CONSUMER CLASS ACTIONS AFTER *AT&T V. CONCEPCION*: WHY THE FEDERAL ARBITRATION ACT SHOULD NOT BE USED TO DENY EFFECTIVE RELIEF TO SMALL-VALUE CLAIMANTS

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The recent Supreme Court decision in AT&T v. Concepcion *put a new restriction on the ability of consumers to pursue small-value claims against corporations with which they sign a contract containing a mandatory arbitration clause. Mandatory arbitration clauses, commonly used by the mobile telephone industry, are inserted into user contracts and require that claimants pursue arbitration rather than lawsuits to resolve disputes. These clauses effectively eliminate the ability of consumers to pursue class-action lawsuits. Because class-action suits are often the only efficient means of pursuing dispute resolution for small value claimants, these clauses serve to deter small-value claimants from seeking any redress. In* Concepcion*, the Supreme Court struck down a line of California cases that liberally voided mandatory arbitration clauses which were deemed to be "unconscionable." The Court reasoned that the state-based evaluation of arbitration clauses was preempted by the federal policy promoting arbitration, as expressed by the Federal Arbitration Act.*

This Note addresses the concern that the strict holding of Concepcion *may result in mandatory arbitration clauses deterring dispute resolution altogether, allowing corporations to go unchallenged. In analyzing the effect of this decision, the Note explores the Federal Arbitration Act and class actions waivers generally, evaluating their economic efficiency and deterrent value. Arguing that mandatory arbitration is actually less efficient than class-action suits while failing to deter illicit corporate behavior, the Note concludes that courts should re-examine how they evaluate these clauses in light of a goal of deterrence. The Note further argues that Congress should amend the Federal Arbitration Act to protect arbitration as an efficient remedy, while also allowing more class-action suits to deter unfair corporate behavior.*

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I. INTRODUCTION

The Federal Arbitration Act (FAA), passed in 1925, represented a marked change in the way courts in the United States were instructed to approach arbitration clauses.[1] A presumption of enforceability arose following the passage of the FAA, and courts have since been generally reticent to alter the terms of an arbitration agreement where the parties to the agreement are found to have contracted fairly.[2] In a 2011 decision, *AT&T Mobility LLC v. Concepcion*, the Supreme Court ruled that, even with regard to contracts of adhesion, a statewide policy of finding arbitration clauses unconscionable when they prevented the plaintiffs from proceeding as a class was preempted by the federal policy in favor of enforcing arbitration clauses.[3]

Over eighty years have passed since the FAA was adopted by Congress, and the U.S. economy has evolved in ways that would no doubt have intrigued its drafters. Consumers enter contracts on a daily basis—for example, with every iTunes purchase[4]—many of which are adhesion contracts with little or no bargaining power on the part of the end user.[5] Though little definitive research has been done, a high percentage of the contracts that consumers enter into on a day-to-day basis appear to contain mandatory arbitration clauses. A sizable portion of those arbitration clauses contain class-action waiver provisions that prevent consumers from joining together to pursue their claims as a class in court or for the

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1. The FAA provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (2006); *see also* S. Rep. No. 68-536, at 2–3 (1924) (statement of Senator Sterling) ("[I]t is very old law that the performance of a written agreement to arbitrate would not be enforced in equity, and that if an action at law were brought . . . such [an] agreement could not be pleaded in bar of the action . . . . [E]stablished precedent has had its large part of course in perpetuating the old rules long after the courts themselves could no longer see that they were founded in reason or justice.").

2. *See* Granite Rock Co. v. Int'l Bhd. of Teamsters, 130 S. Ct. 2847, 2857 (2010). In *Granite Rock*, the Supreme Court restates the position that arbitration clauses are to be given broad authority and a presumption of enforceability. *Id.* Further, the presumption of arbitrability of the dispute even includes disputes over the enforceability of the entire contract. *Id.* Crucially, however, disputes over the enforceability of the arbitration clause itself are matters for a court to decide. *Id.* at 2857–58 (referencing Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445–46 (2006)).

3. 131 S. Ct. 1740, 1753 (2011).

4. *iTunes Store—Terms and Conditions*, APPLE, http://www.apple.com/legal/itunes/us/terms.html (last updated May 23, 2011).

5. Gentry v. Superior Court, 165 P.3d 556, 573 (Cal. 2007) ("Ordinary contracts of adhesion . . . are indispensable facts of modern life."); *see also* Mo Zhang, *Contractual Choice of Law in Contracts of Adhesion and Party Autonomy*, 41 AKRON L. REV. 123, 125–26 (2008) ("A recent development that has caused a considerable amount of controversies is the vast use of contracts of adhesion in the stream of e-commerce conducted on the Internet.").

purposes of arbitration.[6] The obvious rub here for the users of many consumer services is that the average claim amount is usually so low as to make the quest for individual redress economically unprofitable.[7]

The mobile telecommunications industry in the United States is no exception to this trend of modern adhesion contracts. The terms of the service contracts for each of the major four service providers in the United States contain mandatory arbitration agreements coupled with class-action waivers.[8] Customers agree to these terms of service at the time they open an account without any bargaining leverage to alter the agreement.[9] The ubiquity of mobile phones makes the industry a poster-child for the FAA, as the major players are companies with national scope whose business model depends on efficient dealings with a broad customer base.[10] Further, the arbitration clauses of most of the major service providers are quite progressive in that they make concessions to consumers.[11] Part II of this Note examines the general principles underlying the FAA and class actions. Part III goes on to analyze the on-the-ground economic implications of the potential remedies available to small-claim consumer plaintiffs. Part IV discusses recent judicial trends in the interpretation of arbitration agreements in consumer adhesion contracts, including the Supreme Court's recent decision in *Concepcion*, and how these trends could be altered by a more realistic economic analysis. This Note takes the position that the FAA should only protect arbitration clauses that further its underlying core principles, using the mobile telecommunications industry as an example of the way a modern consumer is likely to be confronted with arbitration agreements.

This Note shows, through economic analysis of the realities of small-claim consumer disputes, that arbitration of individual consumers' claims does not result in a more efficient disposition of their complaint. Only by incorporating the deterrent effect of forcing individual consumers to bring separate actions does the arbitration process become more efficient for the defendant corporation than a class action. This Note fo-

6. *See generally* Linda J. Demaine & Deborah R. Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 L. & CONTEMP. PROBS., Winter/Spring 2004, at 55 (sampling a broad array of consumer contracts in an attempt to gauge the "average" consumer's experience with contracts encountered on a regular basis). Demaine & Hensler found that 35.4% of total businesses sampled make use of arbitration clauses. *Id.* at 62. Further, an alarming percentage of those clauses—30.8%—contained no information as to who would be conducting the arbitrations. *Id.* at 67.

7. *See* NAT'L CONSUMER LAW CTR., CONSUMER CLASS ACTIONS 3 (7th ed. 2010) ("[A] class action may be the only economically viable way to provide legal representation for clients with relatively small claims."); Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711, 1714 (2006) ("Class actions are also vital in the consumer arena to address relatively small yet widespread illegal and unfair business practices that would 'go unremedied if each litigant had to fight alone.'").

8. *See infra* Part III.C.

9. *See* Weston, *supra* note 7, at 1715–16.

10. *See infra* Part II.D.

11. *See infra* Part III.C.

cuses finally on the current judicial treatment of these clauses and why incorporating a more realistic economic analysis should alter unconscionability jurisprudence.

II. BACKGROUND

A. *The FAA and Arbitration Clauses*

Prior to the adoption of the FAA in 1925, American courts generally viewed arbitration with the same hostility seen in the English common-law treatment of alternative dispute resolution.[12] A reading of the debates from the House and Senate floors leading up to the passage of the FAA reveals that this English legal ancestry was on the minds of the legislators who helped to craft the measure.[13] The crux of the ultimately successful argument in favor of enforcing arbitration agreements was that the then-current dynamics of the legal system and the benefits to both business and consumers from arbitration clauses presented a far different legal landscape than existed when English courts first decided the issue.[14]

Efficient resolution of disputes in a growing economy was always at the forefront of the debate regarding the FAA. The feeling that litigation is overwrought and needlessly expensive is hardly a modern phenomenon. Seventy years before the passage of the FAA, Charles Dickens wrote *Bleak House*, a novel in which a chancery probate dispute was so bloated and arcane that by the end of the case there was very little estate left to divide amongst the heirs.[15] A House report from 1924 reveals the sentiment that arbitration legislation was "appropriate . . . when there is so much agitation against the costliness and delays of litigation" and that "[t]hese matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable."[16] Though detractors worried that parties could be forced to arbitrate against their wishes, the Senate heard statements regarding the benefits of "voluntary" arbitration agreements, and the final version of the FAA protected the availability of all "grounds as exist at law or in equity for the revocation of any contract."[17]

12. *See, e.g.*, Tobey v. Cnty. of Bristol, 23 F. Cas. 1313 (C.C.D. Mass. 1845) (No. 14,065) (recounting English precedent refusing to order specific performance of an agreement to arbitrate); *see also* Shirley A. Wiegand, *Arbitration Clauses: The Good, the Bad, the Ugly*, 47 OKLA. L. REV. 619, 620 (1994).

13. S. Rep. No. 68-536, at 2–3 (1924); H.R. Rep. No. 68-96, at 1 (1924) ("The need for the law arises from an anachronism of our American law. Some centuries ago, because of jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate . . . .").

14. S. Rep. No. 68-536, at 3; H.R. Rep. No. 68-96, at 2.

15. CHARLES DICKENS, BLEAK HOUSE (Nicola Bradbury ed., Penguin Classics, 2003) (1853).

16. H.R. Rep. No. 68-96, at 2.

17. S. Rep. No. 68-536, at 2–3; *see also* 9 U.S.C. § 2 (2006).

The possibility that a party would be confronted with a "take it or leave it" contract including an arbitration clause was expressly pondered during a joint session of Congress.[18] Worried lawmakers were reassured by the fact that the major consumer industries of the day that would benefit from arbitration clauses—insurance companies and railroads—had governmental bodies that would oversee them and protect consumers from this tactic.[19] Outright deterrence of consumer claims as a valid benefit to business interests was *never* considered in the congressional debate over the FAA—the goal of the measure was solely to make the resolution of disputes more efficient in light of the country's growing economy.[20]

The Act achieved its intended effect in terms of judicial treatment of agreements to arbitrate. Recently, the Supreme Court weighed in on the subject in *Stolt-Nielsen, S.A. v. AnimalFeeds International Corp.*, reiterating that the purpose of the FAA was to create a presumption in favor of enforcement of arbitration clauses according to the terms of the agreement.[21] Courts look to principles of state-specific contract law to assess an arbitration clause's validity, and must not base their decisions on views of arbitration clauses generally, but rather on the facts and terms of the specific agreement they are confronted with in the particular dispute.[22] As mentioned above, this is a sharp contrast to pre-FAA decisions, which failed to offer any method by which a court could give binding, legal authority to an arbitration agreement or the results of arbitration.[23] Now, however, litigation normally centers on which state law to use to interpret the arbitration agreement, which can lead to confusing results for consumers.[24] In instances involving customers of a large corporation where the customers contracted with the corporation in multiple states, at least one court has held that each group of customers must

18. *Arbitration of Interstate Commercial Disputes: Joint Hearing on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 15 (1924) [hereinafter *Joint Hearing*] (statement of Julius Henry Cohen, General Counsel, New York State Chamber of Commerce) (responding to a comment by Sen. Thomas Sterling, Chairman, S. Subcomm. on the Judiciary, raising the "take it or leave it" concern).

19. *Id.*

20. *See* S. Rep. No. 68-536, at 3; H.R. Rep. No. 68-96, at 2; *Joint Hearing*, *supra* note 18, at 34–35.

21. 130 S. Ct. 1758, 1773–75 (2010). The Court has also opined in the past that the purpose of enacting the FAA "was to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991).

22. *See, e.g.*, *Stolt-Nielsen*, 130 S. Ct. at 1773; Fensterstock v. Educ. Fin. Partners, 611 F.3d 124, 132 (2d Cir. 2010); Mathias v. Rent-A-Center, Inc., No. S-10-1476 LKK/KJM, 2010 WL 3715059, at *3–4 (E.D. Cal. Sept. 15, 2010).

23. *See* Wiegand, *supra* note 12, at 620.

24. *See, e.g.*, *In re* DirecTV Early Cancellation Litig., 738 F. Supp. 2d 1062, 1080–86 (C.D. Cal. 2010) (wrestling with which law to apply in multi-district litigation of nationwide consumer claims).

have its claims addressed separately based on its home state's contract law.[25]

When the arbitration clause in a contract is found to be enforceable, the question of how to proceed with arbitration is ordinarily governed by the contractual clause itself, which usually contains reference to a certain set of rules.[26] The American Arbitration Association (AAA) publishes and updates a comprehensive rule set, the use of which is provided for in the arbitration clauses of many large corporations.[27] The AAA provides a specific set of rules to govern class arbitration proceedings, and the class rules take into account many of the important characteristics of judicial class actions, including notice of class certification to unnamed plaintiffs using all "reasonable" means.[28]

B. The Supreme Court Gives the Green Light to Class Arbitrations

The Supreme Court first ruled on the class-action arbitration issue in *Green Tree Financial Corp. v. Bazzle*.[29] The *Bazzle* decision, which carried no majority opinion, allowed for the arbitrators named in the consumer arbitration clause in question to decide whether or not the contract provided for class arbitration.[30] Even though the agreement did not make any explicit mention of class arbitration, the *Bazzle* Court found that the FAA did not prevent class arbitration in any way and approved of the arbitrators' decision.[31]

The Court, however, took a step away from general endorsement of class-action arbitration in *Stolt-Nielsen*.[32] *Stolt-Nielsen* involved an arbitration agreement between worldwide shipping carriers and an international supplier of raw animal feed ingredients, where the Court acknowledged that its prior decision in *Bazzle* had produced some confusion.[33] In

25. *Id.* at 1077. The *DirecTV* court went through an analysis for each set of plaintiffs, and found the same clause enforceable for some groups of plaintiffs, while unenforceable on unconscionability grounds for others. *Id.* at 1080–86.

26. *See, e.g.*, *Arbitration Agreement—Wireless Customer Agreement* ¶ 2.2, AT&T, http://www.att.com/shop/legalterms.html?toskey=wirelessCustomerAgreement& (last visited June 22, 2012) ("The arbitration will be governed by the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes (collectively, 'AAA Rules') of the American Arbitration Association ('AAA') . . . .").

27. *See* Demaine & Hensler, *supra* note 6, at 67 (finding that nineteen of the thirty-six arbitration clauses specifying a particular governing arbitral body specified AAA).

28. *Supplementary Rules for Class Arbitrations*, AM. ARBITRATION ASS'N, http://tinyurl.com/AAASupp (last visited June 22, 2012).

29. 539 U.S. 444 (2003) (citation omitted).

30. *Id.* at 452–53 ("[The] question does not concern a state statute or judicial procedures. It concerns contract interpretation and arbitration procedures. Arbitrators are well situated to answer that question.") (citation omitted).

31. *See id.* at 450–51; *see also id.* at 454–55 (Stevens, J. concurring) (finding that "[t]here is nothing in the Federal Arbitration Act that precludes" the determination by the South Carolina Supreme Court that class action was appropriate).

32. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1775 (2010).

33. *Id.* at 1764, 1772.

clarifying its stance on arbitration clause interpretation, the Supreme Court held that there must be "a contractual basis for concluding that the party *agreed*" to class arbitration and hinted that a showing of disparity in sophistication or common trade practice would be probative to this issue.[34] The Court went on to discuss the economic differences between class arbitration and ordinary bilateral arbitration as justification for its holding, based on the over-arching premise that parties choose arbitration for the purposes of "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators."[35]

The fact that *class-action* arbitration is necessarily more costly than *single-party* arbitration is, however, not a revelation. Nor should it even be a relevant part of the analysis. The FAA was enacted to promote arbitration as a more efficient dispute resolution scheme than litigation.[36] The crux of the argument should, therefore, be whether class *arbitration* is preferable to class *litigation* in the interests of lower costs, greater efficiency, and speed. That the class organizational structure might yield a greater total damage award than an action brought by a single plaintiff is likewise a foregone conclusion and inherent in the purposes of class actions in general.[37] Again, reduction in the amount of the damage award was never considered as one of the purposes of arbitration, either by the drafters of the FAA or the Court in *Stolt-Nielsen*.[38]

The Supreme Court has continued its trend away from judicial invalidation of class-action waivers. In its much-reported decision in *AT&T v. Concepcion*, the Court struck down a line of California cases holding class-action waivers in consumer arbitration contracts to be unconscionable.[39] These cases, known as the *Discover Bank* rule, established that where the damages were predictably small and the agreements were adhesion contracts, plaintiffs were being denied effective relief by not being permitted to arbitrate as a class.[40] *Concepcion*, however, held that such a rule created a "scheme inconsistent with the FAA," which was preempted by the presumption of enforceability of arbitration clauses, notwithstanding the FAA's preservation of state-law contract defenses.[41] Economic analysis of the necessity and propriety of allowing class litigation for small-claim consumer plaintiffs follows in

34. *Id.* at 1775 (finding error in the court of appeals' reasoning that "[e]ven though the parties are sophisticated business entities, [and] even though there is no tradition of class arbitration under maritime law . . . the agreement's silence on the question of class arbitration [is] dispositive").

35. *Id.* Specifically the Court found that "the relative benefits of class-action arbitration are much less assured" and that the large economic scale, lack of privacy, and potential binding effect on absent parties weighed against a default allowance of class-action arbitration. *Id.* at 1775–76.

36. H.R. Rep. No. 68-96, at 2 (1924).

37. *See infra* Part II.C.

38. S. Rep. No. 68-536, at 3 (1924); H.R. Rep. No. 68-96, at 2; *Joint Hearing*, *supra* note 18, at 34–35.

39. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1746, 1753 (2011).

40. *Id.* at 1750 (citing Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (Cal. 2005)).

41. *Id.* at 1748, 1753.

Part III, with a discussion of how this economic analysis could play into a traditional unconscionability framework in Part IV.

C. Overview of Class-Action Principles and Legislative History

1. Core Principles of Class-Action Theory

In congressional debates concerning the passage of the Class Action Fairness Act of 2005 (CAFA), the underlying purpose of class litigation was reiterated by Congressman James Sensenbrenner: "Class actions were originally created to efficiently address a large number of similar claims by people suffering small harms."[42] The core of this judicial vehicle is thus based in economic concern for the plaintiff with a small claim. If that plaintiff were required to proceed individually, quite often she would find it economically unwise to litigate because the costs of litigation would outweigh the potential recovery.[43] This has led at least one scholar to opine that "[f]orestalling class litigation in many instances is tantamount to eliminating disputes altogether."[44] In a now famous turn of phrase, Judge Posner addressed this fundamental principle of class actions: "The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."[45]

Concerns outside of purely monetary economics are also at play in the class-action arena. Legal historians have traditionally pointed to English precedent dating to the seventeenth century that afforded the right for a representative plaintiff to come forward on behalf of a group of persons so large that requiring them all to be present as a group or individually would be impractical.[46] In today's economy, the class-action

42. 151 CONG. REC. H726 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner); *see also* Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997) ("[S]mall recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997))).

43. Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT'L L. 179, 198 (2001) [hereinafter Hensler, *Monster*] (finding that, in consumer class actions, "[i]t is highly unlikely that any individual claiming such losses would find legal representation without incurring significant personal expense"). Professor Hensler studied a representative selection of consumer class disputes and found that most claims valued less than $1000, with claim averages in one case as low as $3.83 per plaintiff. *Id.*

44. Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 184–85 (2003) [hereinafter Hensler, *Our Courts*].

45. Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004). Posner's statement came in a portion of the opinion that seems tailor-made for a law review note against class action waiver: "The more claimants there are, the more likely a class action is to yield substantial economies in litigation. It would hardly be an improvement to have in lieu of this single class action 17 million suits each seeking damages of $15 to $30." *Id.*; *see also infra* Part III.D.

46. DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 10 (RAND 2000). Hensler mentions the viewpoint that, in addition to receiving the benefit of more economically-expedient litigation, consumers *confer* a benefit on society by acting as a

vehicle seems a perfect fit for disagreements in settings where a multitude of consumers are likely affected by the same practice, and where requiring hundreds of thousands, or even millions, of individual trials is impractical.

Further, courts have recognized that a very important benefit of the class-action mechanism is found in the notice requirement. For class-action cases brought under Federal Rules of Civil Procedure 23(b)(1) and (2), the class must receive only "appropriate" notice, but for Rule 23(b)(3) actions, which encompass the majority of large-scale commercial and tort cases, the court must "direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[47] Many potential plaintiffs with low-value claims will likely not have realized that they have been wronged at all.[48] The class-action device has, therefore, been lauded for serving the societal good of alerting consumers of potential injury.[49] Few would argue that simply because a corporation only injures their consumers in a small, rarely-detected amount, they should escape liability. The availability of auto pay options and automatic account debits to pay consumer bills makes it all the more unlikely that a consumer would notice a $1 increase in a monthly bill.[50] For companies with millions of customers, such a slight unjust enrichment per customer would result in a sizable windfall. Thus, the ability to alert consumers to their injuries serves a societal goal of addressing this corporate wrong.

An example of an arena in which consumers are especially unlikely to know they have been harmed is seen in *Muhammad v. County Bank of Rehoboth Beach*, where the plaintiff brought a putative class-action suit against County Bank for conspiring to charge illegal usury rates of interest on a small personal loan.[51] Especially in situations involving viola-

sort of private regulatory agency, providing a supplementary enforcement role when government agencies can take no more official action. *Id.* at 69–72.

47. FED. R. CIV. P. 23(c)(2). The creation of this heightened notice requirement likely relates to the idea that Rule 23(b)(3) requires plaintiffs to "opt out" in order to not be bound by the result of the proceeding. HENSLER ET AL., *supra* note 46, at 448. The informational benefit to consumers is, however, an important ancillary benefit.

48. Gentry v. Superior Court, 165 P.3d 556, 566–67 (Cal. 2007); Muhammad v. Cnty. Bank of Rehoboth Beach, 912 A.2d 88, 100 (N.J. 2006).

49. *See Gentry*, 165 P.3d at 566–67; *Muhammad*, 912 A.2d at 100.

50. *See, e.g.*, *My AT&T Online Account Management*, AT&T, https://www.att.com/olam/loginAction.olamexecute?pId=W_AutoPay_PassThru&source=EAoaAH0nm0000000L (last visited June 22, 2012) ("[T]he easiest way to pay your bill: AutoPay"); *Signing Up and Managing EasyPay*, T-MOBILE, http://support.t-mobile.com/docs/DOC-1073 (last modified June 11, 2012) ("EasyPay is a free service that allows you to pay your T-Mobile bill automatically. . . ."); *Auto Pay with Checking Account*, VERIZON, https://videos.verizonwireless.com/Auto-Pay-with-Checking-Account/v/G3EPOTMI (last visited June 22, 2012).

51. *Muhammad*, 912 A.2d at 93. The plaintiff's original loan amount was $200, and the court found the effective rate of interest on this unsecured loan to be 608.33%. *Id.* at 91. The court touted the ability of a class action notice to alert consumers, as "many consumer-fraud victims may never realize that they may have been wronged." *Id.* at 100. The New Jersey Supreme Court cited to an article by Jean R. Sternlight and Elizabeth J. Jensen for the proposition that "often consumers do not

tions of financial regulations that most consumers are oblivious to, the informative quality of a class action serves a societal good of preventing a business from pulling the wool over the eyes of unsuspecting customers.[52]

2. *Legislative History of Federal Class-Action Rules*

In 1923, the adoption of Rule 23 as part of the Federal Rules of Civil Procedure marked a sea change in U.S. complex litigation. Prior to adoption of Rule 23, U.S. group litigation existed in a fairly confused state, the result of the adoption of fragments of English common law.[53] Crucially, there was no group vehicle that could have a binding effect on absent parties.[54] Part of the effects of Rule 23's adoption was the clear distinction of several different types of cases that would qualify as class actions, as well as different default rules for whether proceedings had any effect on absent parties.[55] The original rule was amended in 1966 to include more absent parties in the class litigation's binding effect, by default, and specifically permitted class actions even when individual remedies would be appropriate, provided that certain conditions were met.[56]

The Supreme Court in *Amchem Products, Inc. v. Windsor* analyzed the policy concerns behind the 1966 class-action amendments, specifically the addition of Rule 23(b)(3), and focused on the Advisory Committee's determination that "the amounts at stake for individuals may be so small that separate suits would be impracticable."[57] The *Amchem* Court focused on this amendment as a prevailing policy in favor of protecting the rights of consumers who would be effectively weakened by the amount of their claims if forced to bring them individually.[58] The practical effect of Rule 23(b)(3) was that it made the class mechanism a viable option for plaintiffs whose cases did not as clearly necessitate class action as did plaintiffs under Rule 23(b)(1) and (2), but for whom class suit "may nevertheless be convenient and desirable."[59] In addition to the four historical factors required for class certification—numerosity, commonal-

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know that a potential defendant's conduct is illegal. When they are being charged an excessive interest rate or a penalty for check bouncing, for example, few know or even sense that their rights are being violated." *Id.* (citing Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 L. & CONTEMP. PROBS., Winter/Spring 2004, at 75, 88).

52. *See* Sternlight & Jensen, *supra* note 51, at 89.

53. STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 218–26 (1987). Yeazell attributes initial negative American viewpoints on class action mechanisms to a confluence of both anachronistic English precedent and "American strains of individualism"—a feeling that Americans generally would have been hostile to the notion that "someone not a party to litigation would be bound by its results." *Id.* at 220.

54. *ID.* at 221.

55. HENSLER ET AL., *supra* note 46, at 11–12.

56. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614–16 (1997).

57. *Id.* (quoting FED. R. CIV. P. 23 advisory committee's note on 1966 Amendment).

58. *Id.* at 617.

59. *Id.* at 615 (quoting FED. R. CIV. P. 23 advisory committee's note on 1966 Amendment).

ity, typicality, and adequacy of representation—Rule 23(b)(3) actions are required to show the additional factors of "predominance" and "superiority." Communal issues have to "predominate over any questions affecting only individual members" and class relief must be "superior to other available methods for the fair and efficient adjudication of the controversy."[60] An addition of two new factors into the class certification test shows the tug and pull of the contravening forces at work in Congress—a desire to afford more persons the beneficial elements of class relief while ensuring that class relief is the most appropriate, economical choice for handling a given dispute.[61]

Rule 23 was amended again in 2003 to address issues confronted by the Supreme Court in *Amchem Products, Inc. v. Windsor*—the perceived abuse of the class-action device as a way to encourage settlements that do not represent the interests of absent plaintiffs.[62] Class-action attorneys, of course, stand to benefit from so-called "settlement class actions" and will benefit regardless of whether the settlement reached actually materially improves the plaintiffs' position.[63] By ensuring that settlements reached in the class-action context are representative of the input of as many class members as possible, the 2003 amendments can be viewed as a form of consumer protection that serves to maintain the integrity of the class-action device.[64]

The most significant recent developments to class-action doctrine are found in the Class Action Fairness Act (CAFA), which sought again to address abuses in the class-action device as perceived by members of Congress.[65] The bulk of the Act had to do with confronting so-called "coupon" settlements, in which the defendant corporation settles the lawsuit by granting all members of the class a coupon for a savings off of

60. FED. R. CIV. P. 23(b)(3).

61. *See* FED. R. CIV. P. 23 advisory committee's note on 1966 Amendment.

62. *See* Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1594 (2008) (citing the 2003 Rule 23 amendments in a line of changes "address[ing] a variety of legal issues but shar[ing] a common theme of mistrust"); *see also Amchem*, 521 U.S. at 618–21 (noting the increase in "settlement only" class actions and stressing the importance of adequately notifying class members, instead of relying on the objective fairness of the settlement).

63. For examples and critique of the usage of coupon settlements, *see* Steven B. Hantler & Robert E. Norton, *Coupon Settlements: The Emperor's Clothes of Class Actions*, 18 GEO. J. LEGAL ETHICS 1343, 1344 (2005).

64. FED. R. CIV. P. 23 advisory committee's note on 1966 Amendment (detailing policy goals behind strengthened notice requirements for settlement class actions).

65. *See, e.g.*, 151 CONG. REC. H735 (daily ed. Feb. 17, 2005) (Statement of Rep. Keller) ("For example, in a suit against Blockbuster over late fees, the attorneys received for themselves $9.25 million, while their clients got a $1-off discount coupon. Similarly, in a lawsuit against the company who makes Cheerios, the lawyers received $2 million for themselves; predictably their clients received a coupon for a box of Cheerios. In a nutshell, these out-of-control class action lawsuits are killing jobs, they are hurting small business people who cannot afford to defend themselves, they are hurting consumers who end up paying higher prices for goods and services."). *But see infra* Part III.B for an explanation of why this "attorney-fee-to-plaintiff-recovery" comparison is a poor indicator of the efficacy of class action litigation.

another of the corporation's products or services.[66] The Act specified the way in which a class counsel can be compensated in "coupon" settlements, requiring that attorneys be paid a contingency fee based on the "value to class members of the coupons that are *redeemed*."[67] As a sizable portion of the coupons distributed as part of a settlement will never be claimed or redeemed, this change in legislation directly combats the perceived "out-of-control" class-action attorney fees being paid out.[68] CAFA also centered on forum shopping and enlarged federal diversity jurisdiction for class actions.[69] The legislative history of the Act shows animus towards certain class-action-friendly counties, and the end result can readily be viewed as an attempt to homogenize treatment of class issues by federalizing the matter.[70]

Some critics of CAFA have referred to it as an "affront to federalism."[71] Undoubtedly, some states' laws are better for certain consumers than others and enabling easier removal to federal court may infringe on the state protections those consumers would have received. The choice of law problems created by CAFA, however, are beyond the scope of this Note. One thing is clear—the changes brought on by CAFA represent an attempt, at least on the surface, to put the legitimate consumer first in class actions and disincentivize the speculative class actions brought by overzealous plaintiffs' attorneys. By reducing attorney's fees in coupon settlements, CAFA shows an attempt at least to make this avenue of class-action litigation more cost-effective. Through CAFA and the 2003 changes to Rule 23, the recent alterations to class-action procedure show a concerted effort by Congress to maintain class actions as a more efficient means of handling large numbers of claims and to ensure that bona fide claimants, both named and unnamed, are fairly represented. Allowing corporations to work around class-action availability through adhesion contracts is contrary to the basic tenor of Congress in its recent modifications to Rule 23.

66. *See* 151 CONG. REC. H735 (daily ed. Feb. 17, 2005) (statement of Rep. Keller).

67. 28 U.S.C. § 1712(a) (2006) (emphasis added).

68. *See* 151 CONG. REC. H735 (daily ed. Feb. 17, 2005) (statement of Rep. Keller).

69. *See* Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1455 (2008) (highlighting the change from traditional "complete diversity" for federal jurisdiction to the new amendment's provision that diversity jurisdiction exists where "*any* member of a class of plaintiffs is a citizen of a State different from any defendant" (emphasis added)).

70. *See* 151 CONG. REC. H735 (daily ed. Feb. 17, 2005) (statement of Rep. Keller).

71. Burbank, *supra* note 69, at 1447. "CAFA deprives states of the ability to regulate matters of intense local interest by enlisting for that purpose the regulatory potential of the class action as the states conceive it . . . ." *Id.*

D. A Brief Overview of the United States Wireless Phone Service Industry

In the past fifteen years, the mobile phone service industry has grown substantially in the United States. The total number of wireless subscriber connections, according to the industry association for wireless telecommunications, has gone from approximately 44,000,000 in December of 1996 to 331,600,000 in December of 2011.[72] Since December 1996, the ratio of mobile phone subscriptions to U.S. population has gone from 16% to 104.6%, with over 31% of U.S. households using mobile phones as their only phones.[73] In 1996 there were no data on the number of wireless-only homes, but the current percentage represents an increase of approximately 200% over the number of wireless-only homes in the United States only five years ago.[74] As wireless service has been in the ascendency, the U.S. has seen a sharp drop-off in the traditional land-line market, and the consumer long-distance industry has experienced an even steeper downward trend.[75]

There are four major players in the U.S. wireless communications industry: Verizon, AT&T, Sprint, and T-Mobile.[76] As of May 2010, Verizon had the largest market share (32.9%), AT&T trailed closely behind (30.8%), then came Sprint (16.9%), and finally T-Mobile (11.9%).[77] Not surprisingly, to sustain the growth that the industry has seen over the past fifteen years and to compete for market share with other national rivals, the major telecommunications providers put great emphasis on ef-

72. *U.S. Wireless Quick Facts*, CTIA–THE WIRELESS ASS'N, http://www.ctia.org/media/industry_info/index.cfm/AID/10323 (last visited June 22, 2012).

73. *Id.*

74. *Id.*

75. *See* Leslie Cauley, *Consumers Ditching Land-Line Phones*, USA TODAY (May 14, 2008, 11:39 AM), http://www.usatoday.com/money/industries/telecom/2008-05-13-landlines_N.htm; Joe Fitz, Chief Economist, California Board of Equalization, Presentation at the FTA Revenue Estimating and Tax Conference (Oct. 11, 2005), http://www.taxadmin.org/Fta/meet/05rev_est/fitz1.pdf (noting a decline in U.S. long-distance subscribership and providers' difficulty in continuing to provide service as a growing concern).

76. *U.S. Wireless Carriers Get Graded, Ranked for Their Q1 2010 Performance*, BGR (May 14, 2010, 4:01 AM), http://www.bgr.com/2010/05/14/u-s-wireless-carriers-get-graded-ranked-for-their-q1-2010-performance [hereinafter BGR, *Q1 2010 Performance*]; *see also* AT&T, AT&T INC. FINANCIAL REVIEW 2001, at 41 (2007), http://www.att.com/Investor/ATT_Annual/downloads/07_ATTar_Complete10K.pdf [hereinafter AT&T, FINANCIAL REVIEW 2007] ("Our competitors are principally three national [companies] (Verizon Wireless, Sprint Nextel Corp. and T-Mobile) . . . .").

77. Figures calculated based on subscriber data in BGR, *Q1 2010 Performance*, *supra* note 76. The industry is still showing signs of further consolidation. As recently as the fall of 2011, AT&T attempted to acquire T-Mobile in a $39 billion takeover that the Department of Justice moved to block because of anti-competitive concerns. Tom Schoenberg et al., *T-Mobile Antitrust Challenge Leaves AT&T with Little Recourse on Takeover*, BLOOMBERG (Sept. 1, 2011, 8:55 AM), http://www.bloomberg.com/news/2011-08-31/u-s-files-antitrust-complaint-to-block-proposed-at-t-t-mobile-merger.html.

ficiency as a key component of their business models.[78] Given emphasis on efficiency, it is also not surprising that each of the major telecommunications players uses mandatory arbitration clauses, including class-action waivers, in their mobile phone service contracts. Efficiency to a corporation would mean, in simplistic terms, producing the most product (or providing services to the most subscribers possible) for the lowest possible cost. If arbitration clauses create net litigation savings to the corporation, they would aid the corporation in achieving its overall efficiency. Efficiency to the corporation, efficiency to consumers, and the efficient administration of justice overall, however, are separate interests that are not all advanced simply by cost savings to a potential litigation defendant. Specifically, if the goals of consumers and the goals of the justice system are not achieved by arbitration, then any efficiency to the defendant corporation created by arbitration is irrelevant.

III. ANALYSIS: ECONOMICS OF CONSUMER ARBITRATION CLAUSES

A. *Single-Consumer Analysis When Individual Compensation Matters*

Analyzing the impacts on consumers of class-action waivers in arbitration clauses requires examining both the economics of arbitration agreements and the consumer benefits of class actions. One of the preeminent scholars in the law and economics field, Professor Keith Hylton, has written extensively on the topic of arbitration agreements and has made the case for broad enforcement of arbitration clauses.[79] He has done so based on analyses suggesting that parties enter into these agreements to arbitrate only when litigation is wasteful, meaning that both sides see a net positive result from the choice to resolve disputes in a given forum.[80] For the potential plaintiff, Hylton's analysis is based on a comparison of two figures: 1) the deterrence value the plaintiff forfeits by having his complaint arbitrated; and 2) the potential savings in litigation costs associated with the decision not to take the case to the "default court."[81] Where the loss of deterrence benefit is outweighed by the gain of savings in litigation costs, the parties' decision to arbitrate is rational and, Hylton argues, should be upheld.[82]

In most conceivable single-party situations this analysis would seem to weigh in favor of arbitration. Hylton's analysis assumes a seventy-five percent error rate in favor of the defendant in the arbitration forum, but

78. *See* AT&T, FINANCIAL REVIEW 2007, *supra* note 76, at 39–40 (explaining the important benefit to the company in terms of efficiency of reduced FCC requirements on mobile communications carriers).

79. Keith N. Hylton, *Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis*, 8 SUP. CT. ECON. REV. 209, 259 (2000).

80. *Id.* at 220–23.

81. *Id.* at 223–25.

82. *See id.*

because of the miniscule costs of arbitrating the claim by comparison to litigating, even a twenty-five percent recovery rate for the plaintiff makes it economically beneficial to both parties to arbitrate.[83] Hylton recognizes the "heroic" assumptions made about contracting parties' ability to predict economic consequences of their decisions to give away litigation rights, but argues that the market will eventually take account of the economic realities of these decisions.[84]

This analysis fails to hold true in instances where a potential plaintiff would not always seek redress for his perceived injury. The calculus employed by Hylton assumes that the plaintiffs will pursue their claim in one forum or another,[85] presumably because the amount of injury is significant enough to motivate the injured party. In the example used before, where the potential plaintiff would only recover twenty-five percent of the time in arbitration, he is willing to forego the benefit of deterrence because the dollar amount he would receive through arbitration is meaningful. As explained below, when the plaintiff would not go through the process of arbitration even if guaranteed the full amount of his claim, let alone with a diminished prospect of recovery, Hylton's formulaic approach is less persuasive.

Data from recent consumer class actions is probative on the point of consumer apathy regarding individual small settlement amounts. In a study of a class-action settlement involving a major consumer insurance carrier, less than one percent of past customers who were eligible to receive compensation from the settlement filed claims against the multi-million-dollar settlement fund.[86] This is a case of consumers effectively rejecting "free money" because the time-and-hassle costs of retrieving it outweigh its monetary value.[87] How likely are consumers to spend time and energy seeking similarly small compensation on an individual basis through arbitration when, unlike a class-action settlement fund, there is a real chance the consumer's claim could fail? Hylton's own model (litigation savings minus forfeited deterrence benefit) shows the detriment to consumers: if the average small-claims plaintiff will experience essentially zero litigation cost if made to bring the case individually (because he will not bother to),[88] the savings from arbitration must also be zero—meaning that the model will necessarily return a negative number.

83. *Id.* at 224–25.
84. *Id.* at 226.
85. *See id.* at 223.
86. HENSLER ET AL., *supra* note 46, at 488.
87. *See id.* Among certain insurance claims, the per-claimant settlement was $5.73. *Id.* app. E. at 550 tbl.E.1. Seeing the level of disinterest the average consumer has in pursuing $5 is invaluable, and further research into the "critical point" at which consumers begin to see a settlement amount as being worth their time to pursue would be most welcome.
88. *See* Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004); *see also* Hensler, *Our Courts*, *supra* note 44, at 184–85 (2003).

The most prescient economic analysis of consumer arbitration clauses makes collective deterrence value to consumers, rather than individual monetary recovery, paramount. A consumer who gives up his litigation right could be said to suffer from "rational apathy," that is, a feeling that any deterrence he might be able to cause the defendant through litigation is negligible by comparison to the savings the consumer might expect from having the corporation not be subject to litigation costs.[89] As Hylton notes, however, consumers are expected to behave in a rather solipsistic fashion.[90] Where the potential plaintiff's ability to see a deterrence benefit is only available in a class mechanism, the assumption that a consumer's interior economic analysis at the time of contracting would take into account the true value of deterrence based on a class remedy seems to stretch believability to the point of breaking. A consumer may see her own potential deterrence impact, and hence her value, as slight for a small-value claim. Ultimately though, the collective value when similar small-value claims are aggregated is beyond the individual consumer's appreciation at the time of contracting. This Note centers on this collective value of small consumer claims, and goes on to demonstrate that, assuming honest economic incentives exist for both parties, class litigation of these claims is more efficient for both consumers and corporations.

B. The Economic Benefit of Class Actions: Deterrence is Key

Small class-action consumer claims have long been derided as inefficient and wasteful, both for the consumer and for the corporation.[91] Detractors point to the large attorney fees generated by class-action settlements and decisions, in comparison to small individual recovery for plaintiffs.[92] As mentioned above, CAFA was enacted, in part, to stem the perceived tide of "prospecting" plaintiffs' attorneys that were filing class-action suits first and recruiting actual plaintiffs later.[93] Surely any system that provides astronomical profits for attorneys while procuring

89. Hylton, *supra* note 79, at 252.

90. *Id.* at 246.

91. *See, e.g.*, HENSLER ET AL., *supra* note 46, at 33; Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 3–4 (1991). This Note assumes that the types of claims likely to be brought by subscribers against any one of the major mobile telephone providers will be accurately described as "small." This is based on a history of class litigation attempted by consumers against these providers, almost always with a per-plaintiff injury amount under $100. *See, e.g.*, Laster v. AT&T Mobility LLC, 584 F.3d 849, 852 (9th Cir. 2009) (alleging plaintiff damages of approximately $30 in false advertising claim); Wong v. T-Mobile USA, Inc., No. 05-73922, 2006 WL 2042512, at *1 (E.D. Mich. July 20, 2006) (alleging plaintiff damages of $19.74).

92. HENSLER ET AL., *supra* note 46, at 33.

93. *See supra* Part II.C.2.

often small sums for the successful plaintiffs must be inefficient, goes the argument.[94]

If viewed from the perspective of maximizing plaintiff recovery, this logic appears valid. The history, however, behind the 1966 amendments to Rule 23 reveals that a class action's value to plaintiffs has not always been viewed from this perspective. Rather, deterrence has for some time been argued to be of greater importance to the class-action plaintiff.[95] Recent scholarship has cast doubt on the long-echoed critiques of class-action remedies, and has trended towards putting the emphasis on deterrence as the true goal of consumer actions involving small claim amounts.[96] Class-action devices have been compared to "private attorneys general," enabling the public to police corporations through the specter of huge collective judgments in recompense for widespread, but small, individual injustices.[97] In addition, the notice requirements of Rule 23 enable many consumers, most of whom have likely never read their mobile phone contract and thus may have never known the corporation wronged them, to join as class members.[98] When deterrence is given center stage as the primary purpose of small-value consumer class actions, concerns over compensation for plaintiffs' attorneys are misplaced.[99] If what matters is the incentive to the corporation to begin changing its ways and the resulting benefit to the consumer, the division of the proceeds of the settlement or judgment becomes an afterthought. Viewed with deterrence as the chief economic goal, the class-action mechanism becomes the most efficient means of reaching that end—by mustering and joining consumers that have been unfairly treated by large corporations, albeit in individually small damage amounts. Additionally, the existence of potentially large attorneys' fees does not lessen the efficiency of class actions in reaching the goal of deterrence. If potential class plaintiffs were truly concerned with monetary recovery in their decision to join a class, losing some of their recovery to attorneys' fees might make some plaintiffs less motivated to sue. When the individual dollar amount of the recovery is so low as to effectively prohibit individual legal action, however, the practical reality is that these suits will not be brought in any form other than a class action. Plaintiffs who were not motivated by the nominal amount of their claim in the first place will not

94. *But see* HENSLER ET AL., *supra* note 46, at 4 (noting industry experts' arguments that consumers as a whole benefit from deterrence of harmful corporate behavior); Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 104–05 (2006) (seeing the class action mechanism as efficient at "caus[ing] the defendant-wrongdoer to internalize the social costs of its actions").

95. HENSLER ET AL., *supra* note 46, at 12, 69–72; Gilles & Friedman, *supra* note 94, at 108–11 (citing to scholarship as early as the 1940s arguing against "restricting the availability of class actions lest we 'impair the deterrent effect of the sanctions which underlie much contemporary law'").

96. *See, e.g.*, Gilles & Friedman, *supra* note 94, at 106.

97. *Id.* at 110; Hensler, *Monster*, *supra* note 43, at 182–83.

98. *See supra* Part II.C.1.

99. Gilles & Friedman, *supra* note 92, at 104–05.

be less motivated if some of the judgment is diverted to attorney's fees. And, from the standpoint of deterrence, the class mechanism achieves the same goal with a $100-million recovery against a corporation that includes $30 million in attorneys' fees as it does if the fees were $30,000—the defendant corporation is still left holding the same $100 million bag.

Re-analyzing the economic utility of an arbitration clause under Hylton's method, but using the deterrent benefit of proceeding as a class as the goal, we see a different result. If the deterrent value of the litigation to the class is the only reason the suit is being brought, this value is totally eliminated under Hylton's theory by an arbitration clause that prevents joining like claims as a class. One individual arbitration will not have this deterrent effect, simply because of the dollar amount. Further, the public scolding that a corporation gets from a massive class action is part of the deterrent-producing effect of the litigation. Professor Deborah Hensler, one of the country's leading class-action scholars, recently published a study of the results of a number of small-value consumer class actions. The companies in Professor Hensler's study could afford to pay the judgment and showed signs of positive behavioral responses afterward[100]—what is not known is if the change in behavior found by Hensler's recent study would have been present had these disputes been aired in the closed forum of arbitration.[101] The economic reality facing small-claim consumer plaintiffs is patently different from plaintiffs with meaningful claim amounts. Deterrence is the real consumer goal of small-claim litigation, but as the next Section shows, major telecommunications providers use arbitration clauses to eliminate the value to consumers from pursuit of their small-value claims.

C. Applying These Theories to the Customer Agreements of the Four Major Mobile Telephone Service Providers

This Section describes how each of the four major mobile telephone service providers utilize arbitration clauses with class-action waivers.

1. AT&T and Verizon

AT&T's contract contains a paragraph at the beginning that reads: "THIS AGREEMENT REQUIRES THE USE OF ARBITRATION ON AN INDIVIDUAL BASIS TO RESOLVE DISPUTES, RATHER THAN JURY TRIALS OR CLASS ACTIONS, AND ALSO LIMITS

100. Hensler, *Monster*, *supra* note 43, at 201–02. For a list of companies in the study, see *id.* at 201 tbl.2.

101. *Id.* at 201–02 ("In four of the six cases, the evidence strongly suggests that the litigation, directly or indirectly, produced the changes in practice.").

THE REMEDIES AVAILABLE TO YOU IN THE EVENT OF A DISPUTE."[102] The main arbitration clause follows in a later section:

> In the unlikely event that AT&T's customer service department is unable to resolve a complaint you may have to your satisfaction (or if AT&T has not been able to resolve a dispute it has with you after attempting to do so informally), we each agree to resolve those disputes through binding arbitration or small claims court instead of in courts of general jurisdiction. . . . Any arbitration under this Agreement will take place on an individual basis; class arbitrations and class actions are not permitted. For any non-frivolous claim that does not exceed $75,000, AT&T will pay all costs of the arbitration. . . .
>
> If, after finding in your favor in any respect on the merits of your claim, the arbitrator issues you an award that is greater than the value of AT&T's last written settlement offer made before an arbitrator was selected, then AT&T will:
>
> pay you the amount of the award or $10,000 ("the alternative payment"), whichever is greater; and
>
> pay your attorney, if any, twice the amount of attorneys' fees, and reimburse any expenses (including expert witness fees and costs) that your attorney reasonably accrues for investigating, preparing, and pursuing your claim in arbitration ("the attorney premium").[103]

Verizon's arbitration clause also explicitly removes class arbitration as an option for the arbitrator and similarly offers to pay the costs of arbitration as well as a default payment of $5,000 if the arbitrator awards an amount that is greater than Verizon's most recent settlement offer.[104]

Because they preclude class litigation, both of these companies' agreements, if enforced, effectively cut off any value of deterrence that might flow to their customers from pursuing a claim. Even accepting the notion that a penalty of $10,000 (or $5,000 in Verizon's case) could effectively deter a multi-billion dollar company such as Verizon or AT&T from engaging in unlawful practices, neither AT&T nor Verizon is at risk of ever having to pay out on their "alternative payment" provision. The Ninth Circuit recently had a chance to analyze this "alternative payment" clause in *Laster v. AT&T Mobility LLC* where the court found that the provision essentially enabled AT&T to "buy off" each individual consumer's claim for face value at any time before the arbitrator handed

102. *Wireless Customer Agreement*, AT&T, http://www.att.com/shop/legalterms.html?toskey=wirelessCustomerAgreement& (last visited June 22, 2012).

103. *Id.* (providing the quoted language in sections 2.1 and 2.2 of the agreement).

104. *Customer Agreement*, VERIZON WIRELESS, http://www.verizonwireless.com/customer-agreement.shtml (last visited June 22, 2012).

down a ruling.[105] There is virtually no chance that a company would risk having to pay out $10,000 on a $30 claim. If the consumer showed any discernible chance of getting a beneficial result in arbitration, the reality is simply that the service provider would begrudgingly offer the face value of the complaint,[106] limiting the deterrence value of the claim to that of a single plaintiff's recovery.

2. *Sprint*

Sprint's agreement also requires all disputes to be handled by arbitration. The agreement provides for assistance in paying the administrative and filing fees, but does not offer any such "alternative payment" amount.[107] Crucially, Sprint's agreement only covers "administrative" fees associated with the arbitration, and does not provide assistance with the fees of the customer's counsel or other costs of arbitration.[108]

This is an example of an agreement that strips the provider of as much risk of deterrence from customer litigation as possible. By requiring the customer to assist with the administrative fees, for example, Sprint ensures that customers with very small claims will find it a net-loss scenario to bring their dispute. Sprint may be forced to pay out on some small claims, but the vast majority will go unremedied.

3. *T-Mobile*

T-Mobile's consumer agreement contains an arbitration clause with class-action waiver by default.[109] Its provisions are the most complex, however, and initially seem to offer more options to the customer. Customers are permitted to bring claims in small-claims court, and may "opt out" of the arbitration clause by providing notice within thirty days of initiating their contract.[110] A class-action waiver, however, applies to the arbitration clause and, although a customer can opt out, other potential class members will also have had to opt out in order to join any class.[111] Assuming that a customer reads the agreement and knows to opt out, she may be faced with a new problem: few, if any, other customers have opted-out and are able to join her complaint. Providing the option of proceeding in small-claims court is, like the "alternate amount" provisions in

105. 584 F.3d 849, 855–56 (9th Cir. 2009). The Ninth Circuit's ruling in the *Laster* case has since been overruled by the Supreme Court in *AT&T v. Concepcion*, which is discussed at length in Part IV.C.

106. *Id.*

107. *PCS Terms & Conditions*, SPRINT PCS, https://manage.sprintpcs.com/output/en_US/manage/MyPhoneandPlan/ChangePlans/popLegalTermsPrivacy.htm (last visited June 22, 2012).

108. *Id.*

109. *T-Mobile Terms and Conditions*, T-MOBILE, http://www.t-mobile.com/Templates/Popup.aspx?PAsset=Ftr_Ftr_TermsAndConditions&print=true (last visited June 22, 2012).

110. *Id.*

111. *Id.*

AT&T and Verizon's contracts, another distinction without a difference. Although potentially a more receptive forum to customer complaints than an arbitrator, a judgment in small-claims court on one customer's complaint would lack the deterrent effect of a judgment of a class action giving compensation to millions of customers similarly situated.

Accepting that the true macro-level goal of small-value consumer claim litigation lies in deterrent effect rather than monetary recovery, the contracts of all four major mobile telephone providers are inefficient—one would have to think purposely—in allowing potential plaintiffs to reach this goal. Even where a plaintiff's arbitration costs are born by the defendant, the simple fact that plaintiffs must proceed alone practically does away with any hope for this deterrent effect. If a plaintiff is made to pay her own way through arbitration, as other writers have noted, the "costs can become prohibitive, especially for the ordinary claimant."[112] The only way that individual arbitrations of low-value claims would ever reach the real goal, deterrent effect, would be if all potential class members actually brought individual arbitrations of their tiny claims. This is a practical impossibility, however—most individual consumers will not be motivated to jump through all the hoops of the arbitration or litigation processes on their own to achieve some sort of nebulous deterrent effect. The ability of an enterprising class counsel and a handful of exceedingly motivated representative plaintiffs to bring a consumer class action—to be the private attorney general—remains the most feasible avenue for consumers at large to hold service providers accountable for nefarious activity and have a realistic prospect of behavioral change in the future.

D. Class Actions Are More Theoretically Efficient for Defendant Corporations Than Similar Arbitration

As we have seen, once the economic emphasis is placed on deterrent value rather than nominal per-customer recovery value, class-action litigation becomes the economically efficient way of achieving this goal for the consumer. Taking the data compiled by Hensler regarding the settlement results of several recent class actions and using it to extrapolate what the costs of similar arbitration to the defendant corporations would be, shows that class litigation often becomes the most efficient way of proceeding in this arena as well.

One of the class-action cases studied by Professor Hensler involved a deceptive trade practices action, among other allegations, filed by customers who invested in a bank's brokerage product.[113] The final settlement amount in that case was $17.2 million, representing $11.2 million

112. Harold Brown, *Alternative Dispute Resolution: Realities and Remedies*, 30 SUFFOLK U. L. REV. 743, 765 (1997).

113. HENSLER ET AL., *supra* note 46, at 175–81.

going to the class members.[114] The defendant corporation, Great Western Bank, reportedly spent $5 million on its own legal defense, for a total out-of-pocket cost of $22.2 million for a class-action dispute involving a 60,000 member class.[115] From the funds apportioned for distribution to class members, a quick bit of division returns an average of $186 per class member.

Based on the figure of $186 per claim, it is clear how inefficient processing these claims individually would have been. The American Arbitration Association posts its fee schedules for arbitration online, and the current "going rate" for small claims arbitration is $250 for "desk" arbitration, and $750 per day for an in-person "hearing."[116] If each one of the 60,000 class members were made to pursue their claim individually with Great Western, the out-of-pocket expenses to Great Western, had it employed an arbitration clause similar to Verizon's or AT&T's and offered to pay for arbitration fees (and assuming the arbitrators found in favor of the claimants) would have been $26.2 million.[117] This figure assumes that each arbitration used only the desk arbitration for one hour—that none of the hypothetical claimants got an actual "day in court." This figure also does not include any costs for the corporation's own legal expenses, and it is already $5 million dollars in excess of the total out-of-pocket costs to the defendants of defending and paying out the class action.

Taking a look at a second example in Professor Hensler's study, *Graham v. Security Pacific Housing Services, Inc.*, yields the same result. In *Graham*, borrowers of many different types of purchase-money loans sued creditors arguing that the collateral protection insurance added to their monthly bills breached the terms of loan agreements.[118] The class size in this dispute was in the same range as the previous study, 60,379; the portion of the settlement available to the class members was a little lower, $7.87 million, with the total settlement sitting at $10.5 million.[119] No data were reported in this case study regarding the defendant banks' own legal costs. For the sake of comparison, we can again use the $5 million figure from the last example, for a total out-of-pocket cost to the defendants of $15.5 million, representing a settlement yield of $130 per class member. Again, following the method above, had the defendant banks and lending institutions required the debtors to proceed by indi-

114. *Id.* at 182–84.

115. *Id.* app. E. at 553 tbl.E.1.

116. AM. ARBITRATION ASS'N, CONSUMER ARBITRATION COSTS, ADMINISTRATIVE FEE WAIVERS, AND PRO BONO ARBITRATORS 1, http://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTG_014025&RevisionSelectionMethod=LatestReleased (last visited June 22, 2012). It should be noted that, were any of my hypothetical arbitrations to require an in-person hearing, the AAA's daily rate becomes $750. *See id.*

117. Each claimant's average claim amount was $186. Multiplied by 60,000 that is $11.2 million in claim amount. Assuming just one hour of "desk" arbitration per claimant returns an arbitration bill of $15 million.

118. HENSLER ET AL., *supra* note 46, at 191–92.

119. *Id.* at 200, app. E. at 549, 551 tbl.E.1.

vidual arbitration on these claims, the total bill (again, assuming that the defendants were paying for the arbitration, or the victorious party would win arbitration costs) would have been $22.9 million, excluding the defendants' own legal costs.

Finally, a third example. In a case that received a lot of press attention in Texas, two well-known plaintiffs' lawyers sued the Texas insurance industry over an alleged scheme to defraud customers $2 at a time.[120] Because of the "double rounding" employed by the insurance companies, one out of every four customers was cheated out of $2 a year.[121] The total settlement amount was $39,698,000, of which $25,235,000 was available to the 4,401,817 class members; the total defense legal bill was reported to be $4,487,000, for a total out-of-pocket cost to the insurance industry of $44,455,000.[122] Using the same method as in the last two case studies, if the insurance companies in this dispute all used arbitration clauses with class-action waivers, the total arbitration bill on the class members' claims brought individually would have been approximately $1.14 billion.

The point here is not contingent upon any scenario actually arising in which all 4 million class members in the insurance double rounding case actually take a dispute to arbitration. In fact, it is precisely the fact that this scenario *will never* arise that makes the point clear. The point is, simply, that individual arbitration of small claims is anything but efficient by comparison to the class-action mechanism. To achieve the same average recovery, more money must be expended. This mathematical and economic reality cannot be lost on Verizon and AT&T when they offer to pay arbitration costs of their complaining customers. Instead, it is the practical reality these companies are banking on: customers simply will not, in any significant numbers, bring their small claims to arbitration. The companies that employ adhesion contract arbitration clauses are relying on the deterrent power of single case arbitration, not its much-lauded "efficiency."

In the next Section, this Note discusses the primary weapon, the unconscionability defense, which consumers have used to combat class-action waivers in arbitration clauses. It will then go on to suggest that by using a more accurate depiction of the economic reality facing consumers, this weapon can be more effective.

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120. *Id.* at 255–59, 267. The premise of the litigation was that the insurers had employed a "double rounding" scheme, wherein the amount of a customer's annual premium was rounded to the nearest whole dollar once a year—$0.49 or lower would go down and $0.50 or more would be rounded up. *Id.* at 256. Then, to determine the monthly premium, the figure would be divided and rounded again. *Id.* at 257. Presumably, one out of every four customers received the short end of the stick both times, meaning the insurers got an average yearly windfall of $2 for every four customers. *Id.* at 258.

121. *Id.*

122. *Id.* app. E. at 549, 551 tbl.E.1.

IV. ANALYSIS: APPLYING UNCONSCIONABILITY DOCTRINE TO CLASS-ACTION WAIVERS

The primary courtroom defense to arbitration clauses that invoke class-action waivers has been the doctrine of unconscionability.[123] Plaintiffs have been able to invoke this defense based on the language of section 2 of the FAA, which preserves generally applicable defenses to contract that exist in law or in equity.[124] As contract law is an area of state law governance, arbitration clauses and class-action waivers have largely been fought on a state-by-state basis, with each state's version of unconscionability jurisprudence yielding disparate results.[125] The standard "setup" of the unconscionability test, however, is much the same regardless of jurisdiction, with variations only truly evident in the degree of scrutiny. Unconscionability requires two component elements: procedural unconscionability and substantive unconscionability.[126] One California court described procedural unconscionability as "address[ing] the manner in which agreement to the disputed term was sought or obtained, such as unequal bargaining power between the parties and hidden terms included in contracts of adhesion."[127] Substantive unconscionability relates to the general fairness of the deal itself, including whether a particular clause is so "oppressive that it should not be enforced."[128] Unconscionability is often described as a balance between the two factors: both must be present to some degree but where the contract was extremely procedurally unconscionable, a lesser showing of substantive unconscionability may be allowed (and vice versa).[129] This Part of the Note discusses the current state of unconscionability as a defense to arbitration clauses after *Concepcion*, and argues that a more realistic economic analysis could alter this jurisprudence in favor of small-claim consumer plaintiffs.

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123. *See, e.g.*, Litman v. Cellco P'ship, 381 F. App'x 140, 142–43 (3d Cir. 2010); Gentry v. Superior Court, 165 P.3d 556, 572–73 (Cal. 2007); Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (Cal. 2005).

124. 9 U.S.C. § 2 (2006).

125. Post-CAFA these cases have become much more complex, as companies are able to remove disputes to federal court even with incomplete diversity, enabling the same clause to be judged multiple times in a single dispute based on federal choice-of-law rules for each distinct sub-group of plaintiffs. *See, e.g.*, *In re* DirecTV Early Cancellation Litigation, 738 F. Supp. 2d. 1062, 1077 (C.D. Cal. 2010).

126. JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 338 (6th ed. 2009).

127. Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862, 866 (Cal. Ct. App. 2002).

128. *Id.*

129. "Indeed, some courts have said that both elements *must* ordinarily be present before a finding of unconscionability can be made. Nonetheless, the courts have ruled that gross excessiveness of price is itself unconscionable . . . . Employment contracts containing arbitration clauses binding only on the employee have been found to be unconscionable." PERILLO, *supra* note 126, at 338–39.

A. Many State Courts Have Analyzed Class-Action Waivers in Arbitration Clauses Through the Lens of Unconscionability

In the recent and multi-faceted *In re DirecTV Early Cancellation Litigation* decision, the Central District of California had occasion to discuss the unconscionability laws of several states as they apply to class arbitration waiver clauses in consumer adhesion contracts.[130] In interpreting California and Florida law, for example, the court found that a concontract of adhesion, governed by "boiler plate, 'take-it-or-leave-it'" bargaining terms, met most of the requirements of procedural unconscionability.[131] The court also found that this style of agreement, especially as employed in the instant case based on testimony from DirecTV employees, "results in customers not being aware of material terms of the agreement, including the Arbitration Clause and Class Action Waiver, until after their service has been activated."[132] Because it deprives consumers of a meaningful choice in the terms of the contract, a contract of adhesion is usually procedurally unconscionable under the laws of California, Arizona, Florida, and Pennsylvania, per the Central District of California's opinion.[133]

For the second, "substantive" element of unconscionability, the various states' tests in the *DirecTV* opinion have less in common. California courts, in determining unconscionability for class-action waivers in consumer settings, look to:

> whether the agreement occurs "in a setting in which disputes between the contracting parties predictably involve small amounts of damages"; and . . . whether "it is *alleged* that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money."[134]

Given that the second of these two prongs requires only that it be "alleged" that the party in the stronger position was trying to cheat the weaker party, a substantive showing is largely based on whether the individual claim amount is likely to be small and, therefore, on whether the plaintiff has been denied an effective chance to pursue his claim through the most reasonable means available (class action). The California Supreme Court in *Shroyer v. New Cingular Wireless Services, Inc.*, further explained this common theme, stating that "the [class-action] waiver becomes in practice the exemption of the party from responsibility."[135] Ari-

130. *In re DirecTV*, 738 F. Supp. 2d. at 1080–86.
131. *Id.* at 1080, 1082–83.
132. *Id.* at 1082.
133. *Id.* at 1080–85.
134. *Id.* at 1080 (emphasis added) (citing Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 983 (9th Cir. 2007)).
135. 498 F.3d at 983 (quoting Discover Bank v. Superior Court, 113 P. 3d 1100, 1108 (Cal. 2005)) (internal quotation marks omitted).

zona and Pennsylvania look to whether the terms of the agreement are inherently one-sided—whether one party has advantages in protecting its interests that the other side does not have, or is put in a more disadvantaged position.[136] The DirecTV class-action waiver ostensibly applied to both parties, but the overall effect was clearly one-sided, as the court reasoned that it was "difficult to envision the circumstances under which . . . [DirecTV] might . . . sue their customers in class action lawsuits."[137] The Florida unconscionability precedent is simpler: "[a]n agreement that requires customers to give up legal remedies indicates substantive unconscionability."[138] The basic premise behind the various strands of substantive unconscionability doctrine is the same—agreements that reduce the weaker party to its most defenseless state, effectively removing an economically efficient option of seeking redress, meet the standard for substantive unconscionability.

There is very little middle ground in unconscionability jurisprudence, and several states are in diametrical opposition to the views espoused in this opinion under California, Arizona, Florida, and Pennsylvania law. Louisiana law, also analyzed in the *DirecTV* opinion, requires a showing of "unduly harsh substance" and generally views "the fact that certain litigation devices may not be available in an arbitration" as failing to meet that mark.[139] Finally, New York law was also a subject of discussion in the *DirecTV* litigation, and both the court and the New York plaintiff conceded that the arbitration agreement in question would have been enforced in New York.[140] In an often-cited opinion, the Eleventh Circuit, applying Georgia law, held that a class-action waiver within an arbitration clause in a consumer lending contract did not render the clause unconscionable, explicitly mentioning that "arbitration agreements prohibiting class action relief do not 'necessarily choke off the supply of lawyers willing to pursue claims on behalf of debtors.'"[141] Texas and Utah also routinely enforce class-action waivers in arbitration clauses, falling back on time-honored traditions in both states of allowing parties to "contract as they see fit," and the theory that an adhesion contract does not create "unfair surprise" because the consumer has a chance to read the contract.[142]

136. *In re DirecTV*, 738 F. Supp. 2d at 1081, 1085 (citing Maxwell v. Fidelity Fin. Servs., Inc., 907 P.2d 51, 58 (Ariz. 1995)); Huegel v. Mifflin Constr. Co., 796 A.2d 350, 357 (Pa. Super. Ct. 2002)).

137. *In re DirecTV*, 738 F. Supp. 2d at 1081 (alterations in original) (quoting Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862, 865 (Cal. Ct. App. 2002)).

138. *Id.* at 1083 (citing Powertel, Inc., v. Bexley, 743 So. 2d 570, 576 (Fla. Dist. Ct. App. 1999)).

139. *Id.* at 1083 (citing Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159, 166–68, 174 (5th Cir. 2004)).

140. *Id.* at 1084 (noting New York courts' general approval of both adhesion contracts and class-action waivers as failing to demonstrate either procedural or substantive unconscionability).

141. Jenkins v. First Am. Cash Advance of Ga., LLC, 400 F.3d 868, 878 (11th Cir. 2005) (quoting Johnson v. W. Suburban Bank, 225 F.3d 366, 374 (3d Cir. 2000)).

142. *See, e.g.*, Wynne v. Am. Express Co., No. 2:09-CV-00260-TJW, 2010 WL 3860362, *8 (E.D. Tex. Sept. 30, 2010) (the court applying both Utah and Texas law, because a Utah choice-of-law provi-

The decisions of the California Supreme Court striking down various class-action waivers in arbitration clauses as unconscionable have come to be known collectively as the "*Discover Bank* Rule," after the pivotal California case.[143] In *Discover Bank*, the California Supreme Court set forth a basic paradigm that class-action waivers in arbitration clauses in adhesion consumer contracts would almost always be unconscionable, and allowed the class of plaintiffs to proceed with class arbitration despite the language of the contract prohibiting it.[144] It is this judicial rule that was addressed by the Supreme Court and found to be preempted by the FAA in *AT&T v. Concepcion.*

B. Class-Action Waivers As Exculpatory Clauses

Class-action waivers have been attacked in the unconscionability context under the theory that they essentially serve to exculpate corporations from liability, as individual claims from consumers are impractical and unlikely.[145] Several cases involving America Online (AOL) focus on a forum-selection clause in the subscription contract which stipulated that all disputes would be decided under Virginia law.[146] Virginia, conveniently enough for AOL, does not permit consumer class actions and the plaintiffs in the various cases were suing under the rights protected by their home states' versions of the Unfair Trade Practices Act.[147] These decisions uniformly rely on the presumption that barring class actions will result in a severe reduction in the number of claims brought against AOL for their unlawful business practice, as the amount in controversy in each individual case is not enough to merit most customers bringing suit.[148]

Exculpatory clauses, by their very nature, have been held to satisfy the "substantive unconscionability" prong of the general unconscionability defense.[149] As the California Supreme Court pointed out in *Gentry v.*

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sion in the contract made it necessary to determine whether there existed a superior public policy concern under Texas law).

143. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1746 (2011).

144. Discover Bank v. Superior Court, 113 P.3d 1100, 1109–10 (Cal. 2005).

145. *See, e.g.*, America Online, Inc. v. Pasieka, 870 So. 2d 170, 171–72 (Fla. Dist. Ct. App. 2004); Williams v. America Online, Inc., No. 00-0962, 2001 WL 135825, at *3 (Mass. Super. Ct. Feb. 8, 2001).

146. *Pasieka*, 870 So. 2d at 170–71.

147. *Id.* at 170–71; America Online, Inc. v. Superior Court, 108 Cal. Rptr. 2d 699, 702 (Cal. Ct. App. 2001); *Williams*, 2001 WL 135825, at *1–2.

148. *See, e.g.*, *America Online, Inc.*, 108 Cal. Rptr. 2d at 712 ("Frequently numerous consumers are exposed to the same dubious practice by the same seller so that proof of the prevalence of the practice as to one consumer would provide proof for all. Individual actions by each of the defrauded consumers is often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action; thus an unscrupulous seller retains the benefits of its wrongful conduct." (quoting Vasquez v. Superior Court, 484 P.2d 964, 968 (Cal. 1971)).

149. *See, e.g.*, *In re* Apple & AT & TM Antitrust Litigation, 596 F. Supp. 2d 1288, 1300 (N.D. Cal. 2008) ("[T]he manner in which the Arbitration Agreement operates as an exculpatory clause shows that 'the terms were unreasonably favorable to' ATTM.").

Superior Court, class-action waivers may be properly analyzed as exculpatory clauses to the extent that they "operate effectively" as such by insulating the defendant corporation from liability.[150] The California Supreme Court cited to the prevailing public policy against exculpatory contract clauses, codified in the California Civil Code, and found that the adhesive class arbitration waiver in Mr. Gentry's employment contract was unconscionable.[151]

C. *The Supreme Court's Decision in* AT&T v. Concepcion *that the FAA Preempts the* Discover Bank *Rule*

The argument voiced repeatedly against applying the unconscionability doctrine to class-action waivers in arbitration clauses is essentially couched in the Supremacy Clause.[152] The gist is that because the FAA created a federal policy in favor of arbitration, the Supremacy Clause prevents states from overriding this policy through use of state law to rule that arbitration agreements, as a whole, are unconscionable.[153] Proponents of this argument rely heavily on the fact that courts, notably in California, have consistently found arbitration clauses in adhesion contracts to be unconscionable, regardless of consumer-friendly provisions that some contracts' clauses have contained.[154] Opponents of the unconscionability doctrine approach may argue that consistent results in dealing with seemingly-disparate arbitration clauses effectively expose an underlying state policy that seeks to subvert the overall federal policy in favor of arbitration—essentially, no matter how consumer-friendly businesses make their contracts, certain states will continue to find their arbitration clauses to be unconscionable.[155]

Again, the FAA in section 2 clearly provides that traditional state law defenses to contract are available for use in challenging an arbitration clause.[156] This ability to raise a defense in contract stands in sharp contrast to the prohibition on states constructing their own policies and

150. 165 P.3d 556, 561 (Cal. 2007).

151. *Id.* at 568–70.

152. *See, e.g.*, *id.* at 569 ("Nor do we accept Circuit City's argument that a rule invalidating class arbitration waivers discriminates against arbitration clauses in violation of the Federal Arbitration Act . . . .").

153. *Id.* at 578 (Baxter, J., dissenting) (agreeing with Circuit City that the court cannot elevate its "judicial affinity" for class actions "above the policy expressed by both Congress and our own Legislature"); *see also* Brown, *supra* note 112, at 743–44.

154. *See, e.g.*, Monica T. Nelson, Comment, Discover Bank v. Superior Court*: The Unconscionability of Classwide Arbitration Waivers in California*, 30 AM. J. OF TRIAL ADVOC. 649, 662 (2007).

155. *See* Litman v. Cellco P'ship, 381 F. App'x 140, 142–43 (3d Cir. 2010) (explaining that in refusing to compel arbitration, the court in an earlier New Jersey case was not holding that "arbitration itself is unconscionable, but instead . . . [that] 'it was unconscionable for defendants to deprive [plaintiff] of the mechanism of a class-wide action, whether in arbitration or in court litigation.'" (third alteration in original) (quoting Muhammad v. Cnty. Bank of Rehoboth Beach, 912 A.2d 88, 100–01 (N.J. 2006))).

156. *See supra* note 124 and accompanying text.

laws that run counter to expressly announced policy goals of the federal government.[157] As shown in the *DirecTV* litigation, finding that a particular clause is unconscionable usually requires a showing of procedural and substantive unfairness, both determined by state-specific tests.[158] In California, where this issue has been litigated the most, the existence of an adhesion contract has almost always satisfied the procedural prong of the unconscionability test.[159] As for substantive unconscionability, the California courts have developed a test that seeks to determine whether the arbitration clause applies to claims that will predictably be for "small amounts of damages" and whether it is "alleged" that the party with greater bargaining power is attempting to systematically cheat its consumers.[160] Counsel for defendant corporations have pointed to consumer-friendly portions of their contracts, such as offers to pay arbitration costs, in an effort to defeat the substantive unconscionability argument.[161] Such consumer-friendly additions to the arbitration clauses have had no impact on the ultimate outcome in California, and they do not absolve the underlying clauses from the state's unconscionability test because they still require a small-value claimant to spend many hours pursuing what could be a negligible sum of money.[162]

A more fruitful line of argument for defense attorneys has been found, as alluded to above, in the Supremacy Clause. The question of just how far a state-specific test can go in frustrating the federal policy goals was the issue at the crux of the argument in *AT&T v. Concepcion*, as the Supreme Court granted *certiorari* to assess whether the *Discover Bank* rule as applied repeatedly in California was preempted by the stated policy of the FAA.[163] Articulations of the *Discover Bank* rule, as recited in that case and referenced in *Shroyer*, appear careful to be distinct

157. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2 (commonly referred to as the "Supremacy Clause").

158. *See supra* Part IV.A.

159. *See, e.g.*, Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 985–86 (9th Cir. 2007); Discover Bank v. Superior Court, 113 P.3d 1100, 1108 (Cal. 2005).

160. *Discover Bank*, 113 P.3d at 1110.

161. *Shroyer*, 498 F.3d at 986.

162. *See, e.g.*, *id.* at 986–87. California, like other states, puts the most emphasis on the procedural right being taken away from a small-claim plaintiff. *See, e.g.*, Gentry v. Superior Court, 165 P.3d 556, 572–73 (Cal. 2007). Thus, an offer to pay the costs of arbitration is seen as meaningless because it does not address the practical concern of a consumer being generally unwilling to take action by himself on a very small claim. Further, the Ninth Circuit in *Laster*, ultimately reversed by the Supreme Court, illustrated how a corporation will never actually end up paying the minimum recovery amount because "AT&T will simply pay the face value of the claim before the selection of an arbitrator to avoid potentially paying [the increased worst-case amount]." Laster v. AT&T Mobility LLC, 584 F.3d 849, 855–56 (9th Cir. 2009). The existence of a $10,000 minimum recovery is illusory, as there is little to no chance that a national corporation will risk $10,000 to avoid paying out on a $30 claim. *See supra* Part III.C.1.

163. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1744–45 (2011).

from a policy that would be seen as a state policy in conflict with the FAA:

> We do not hold that all class action waivers are necessarily unconscionable. But when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party from responsibility.[164]

The Supreme Court, however, disagreed. In *Concepcion*, the Court began its discussion with a general explanation of section 2 of the FAA, reiterating that it "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses' . . . but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitration is at issue."[165] The Court found that the *Discover Bank* rule, at the very least, disproportionately affected arbitration clauses and could be plausibly seen as a subversive attempt to counteract a preemptive federal policy.[166] The Court did not focus on the Concepcions' argument that this rule reflected a general policy towards allowing effective judicial process, rather than a state aim to subvert the FAA.[167] The basis for the Court's Supremacy Clause-based holding leaves in great doubt whether a state can utilize its common-law contract defenses, as specifically provided for by the FAA. The opinion appears to suggest that because the *Discover Bank* rule invalidated arbitration clauses primarily because they appeared in consumer adhesion contracts, and because almost every consumer contract is an adhesion contract in today's economy, the California legislature had developed an illegitimate policy by pronouncing consumer arbitration clauses to be inherently suspect.[168] The Supreme Court, however, did not allege that California changed the basic two-prong makeup of the classic unconscionability doctrine.[169] Surely it is not the fault of the California legislature that an increasing number of consumer contracts display procedural unconscionability and risk judicial scrutiny on this basis. In essence, the Supreme Court decided California had developed a new policy of declaring arbitration clauses invalid, even though arguably all the California courts were doing was enforcing a common-law contract defense whose elements were met (at

164. *Shroyer*, 498 F.3d at 983 (quoting *Discover Bank*, 113 P.3d at 1110) (internal quotation marks omitted).
165. *Concepcion*, 131 S. Ct. at 1746.
166. *Id.* at 1747–48.
167. *Id.* at 1748.
168. *Id.* at 1746–48.
169. *Id.* at 1746.

least in California law) by certain types of arbitration clauses containing class-action waivers in small-value consumer adhesion contracts.

The Court went on to herald efficiency as being served by single-plaintiff arbitration, and again viewed efficiency in terms of a single-plaintiff recovery versus expected expenditure in achieving that monetary recovery.[170] A look at whether the reasoning in *Concepcion* holds up under the use of corporate deterrence as the recovery sought in small-claim consumer actions, as this Note suggests is proper, follows in the next Section.

D. Incorporating a More Realistic Economic Analysis Could Alter the Landscape of Unconscionability Jurisprudence

The two camps of unconscionability doctrine appear to be deeply entrenched. On one side of the aisle are states that view the individual plaintiff's ability to seek recovery as the fundamental right worth guarding, and see arbitration as a realistic means of providing this right of recovery.[171] And, as this Note has explored, there are other states that look to the deterrent effect of having to bring small-claim consumer cases on an individual basis and seek to prevent corporations from avoiding potential liability by use of arbitration for this deterrent effect.[172] In a transient society, and in a mobile telephone industry made up almost exclusively of multi-state operators, this state-specific approach simply cannot be ideal. Unfortunately for consumers seeking to effect corporate change through class litigation, the Supreme Court's recent decision in *Concepcion* threatens to sound the death knell for judicial avoidance of class-action waivers in arbitration clauses through use of the unconscionability doctrine. The substitution of a different economic "efficiency" analysis, however, shows the logic in *Concepcion*, and the various states' jurisprudence that resist unconscionability as a defense to class action, to be untenable. The *Concepcion* decision spoke highly of "streamlined proceedings and expeditious results" as the main benefits and goals of enforcing arbitration clauses.[173] If only one plaintiff is wronged, and the parties have "design[ed] arbitration processes," it seems only fitting that the dispute should be resolved according to the terms of the agreement as designed.[174] Further, if the defendant offers to pay the plaintiff's arbitration costs, as many of the major-mobile-telecom players do, the plaintiff may be more efficient in pursuing his individual recovery.[175] As the *Concepcion* majority opinion stated, however, "the times in which con-

170. *Id.* at 1753.
171. *See supra* Part IV.A.
172. *See supra* Part IV.A.
173. *Concepcion*, 131 S. Ct. at 1749.
174. *Id.* at 1748–49.
175. *Id.* at 1753; *see supra* Part III.C.

sumer contracts were anything other than adhesive are long past."[176] This statement was made by the majority to convey the notion that the *Discover Bank* rule would have a broad effect in sweeping away most consumer arbitration clauses.[177] The statement, however, also describes the landscape of actual bargaining power available to a modern-day consumer—to suggest that the two parties "design" an arbitration process in today's age borders on the ridiculous. Further, by using corporate deterrence as the goal of plaintiffs' litigation in small-claim consumer actions, as shown in Part III of this Note, individual arbitration is simply unable to achieve the plaintiffs' true benefit at all, let alone in a "streamlined" or "expeditious" way. Finally, even assuming that monetary recovery is the true goal of small-claim consumer lawsuits, this Note has shown that requiring every wronged plaintiff to proceed with arbitration on an individual basis is actually less streamlined and efficient than promoting joinder in a class device.[178]

The arbitration clause at issue in *Concepcion* is certainly more expeditious for AT&T in dealing with its small-value consumer disputes, in one important way: it deters them. This, however, is not the purpose of the FAA.[179] The *Concepcion* majority posited that "[t]he 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.'"[180] This cannot really be true. That statement is akin to saying the main purpose of a red traffic light is to make drivers stop at red traffic lights. In truth, of course, the purpose of a traffic light is to make traffic flow in a more orderly fashion and avoid automobile accidents. In a similar way, the FAA's main purpose is not the enforcement of arbitration clauses for their own sake, but because of the cost savings and efficiency procedures purportedly made available by arbitration clauses.[181] With the focus on an economic analysis that reveals enforcement of class-action waivers not to further expeditious results, but rather to deter plaintiffs from pursuing results altogether, the Supreme Court's view on lines of jurisprudence like the *Discover Bank* rule may come out differently.

Other states' negative views towards the unconscionability doctrine as applied to class-action waivers may also change by incorporating a deterrence-centric economic analysis. In New York, for example, arbitration clauses with class-action waivers are enforced regularly, under the logic that "arbitration provides a relatively uncostly procedure for resolv-

176. *Concepcion*, 131 S. Ct. at 1750 (citing other sources).
177. *See id.*
178. *See supra* Part III.D.
179. *See Joint Hearing*, *supra* note 18, at 34–35 (describing the "evil[s] to be corrected" by the FAA as the costliness and inefficiency of commercial dispute resolution through litigation).
180. *Concepcion*, 131 S. Ct. at 1748 (alteration in original) (quoting Volt. Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989)).
181. *Joint Hearing*, *supra* note 18, at 34–35.

ing [disputes]."[182] Substantive unconscionability is not found where the plaintiff is provided an alternate forum, because the judicial focus is on the cost-effectiveness of arbitration by comparison to the plaintiff's *individual* claim.[183] If the same standard for substantive unconscionability, however, is used with the litigation goal changed to reflect the deterrent benefit of the aggregate claims that would otherwise have been allowed in a class action, there may be a different result. No longer would single-case arbitration provide an alternate, efficient forum for recovery, and the defendant corporation's class-action waiver may be avoided as an exculpatory clause.[184] If individual consumer claims are so low as to make individual prosecution of the claim ridiculous, but these small wrongs are so widespread as to warrant deterrence from consumers as a whole, it is crucial that courts recognize that removing the right of small-claim consumers to pursue class-wide remedies essentially insulates corporations against the only real sting that might arise from their contractual breaches in these situations.

Texas state law may also come out differently in deciding the substantive unconscionability of class-action waivers in arbitration clauses if a new economic model is used to underpin class actions.[185] A recent Texas court decision highlights the stance that class-action waiver is merely the removal of a dispute resolution method, but does not make the contract unfair.[186] Texas law also provides, however, that exculpatory clauses will be voided if contrary to public interest.[187] If the benefit of class actions to consumers is viewed as deterrence of bad corporate behavior, as opposed to individual recovery, class-action waivers in arbitration clauses could come under the Texas prohibition on exculpatory clauses because they prevent the only realistic way to achieve this public goal.

States like Louisiana, however, pose a different threat to consumer class actions. Louisiana has a consumer protection statute that does not permit class actions in consumer disputes.[188] Courts view this consumer

182. Harris v. Shearson Hayden Stone, Inc., 441 N.Y.S.2d 70, 76 (N.Y. App. Div. 1981).

183. The court in *Harris* also cited conservation of judicial energy among its reasons for finding that the purposes of arbitration were served by enforcing the class-action waiver. *Id.*

184. *See, e.g.*, Kalisch-Jarcho, Inc. v. City of New York, 448 N.E.2d 413, 416 (N.Y. 1983). New York state law provides for avoidance of exculpatory clauses that insulate corporations from backlash for intentional or reckless wrongdoing. *Id.*

185. A different economic model would have no effect, in all likelihood, on the degree of procedural unconscionability to be found in any agreement. This discrepancy in the level of defect required to be found in the contract is one significant weakness in pursuing uniformity in judicial treatment of arbitration clauses.

186. Wynne v. Am. Express Co., No. 2:09-CV-00260-TJW, 2010 WL 3860362, at *7 (E.D. Tex. Sept. 30, 2010).

187. Crowell v. Hous. Auth., 495 S.W.2d 887, 889 (Tex. 1973). In *Crowell*, the Texas Supreme Court invalidated a contract clause insulating the housing authority from liability for negligent operation of low-income housing. *Id.*

188. "Any person who suffers any ascertainable loss of money or movable property, corporeal or incorporeal, as a result of the use or employment by another person of an unfair or deceptive method,

protection statute as evincing a legislative policy determination that the unavailability of particular "litigation devices" is not enough to make a contract unconscionable in Louisiana.[189] Even though a court may be less likely to view loss of the class mechanism as more than a mere "device" under the economic analysis argued for in this Note, statutory prevention of class actions in consumer disputes presents a barrier, and evinces a misunderstanding of the importance of class actions, that will take more stringent measures to overcome. Some states have begun to take legislative initiative on their own, proposing legislation to unilaterally prohibit class-action waivers in written agreements.[190] An amendment to the FAA would enable a uniform application of federal arbitration policy, impossible under our current state law-governed system, that is all the more valuable in a commercial environment dominated by national corporations with customers across the county. Part V outlines the elements and benefits of such an amendment.

V. RECOMMENDATION

This Note supports the view that consumers are not served or motivated to sue by the possibility of individual recovery in small-value cases. This view is bolstered by the words of Judge Posner,[191] as well as decisions akin to the Ninth Circuit's ruling in *Laster*, where the court found that offers to pay arbitration costs and minimum-payment provisions did nothing to alter the economic realities facing individual consumer litigants.[192] In addition, the negligible percentage of potential class members who filed claims against the settlement fund in several large consumer class-action suits underscores the lack of economic value consumers see from such recoveries.[193] If it is not even a worthwhile proposition to collect from the awarded settlement fund for most plaintiffs, many would argue that the suit should not have taken place.

To prevent this suit would ignore the role of the class action as a "private attorney general"[194] and allow corporations to benefit by operating outside of their contractual bounds. The major mobile telecommunications providers, as but one example of a broad consumer industry, consistently use arbitration clauses that either explicitly or occasionally

act, or practice . . . may bring an action individually but not in a representative capacity to recover actual damages." LA. REV. STAT. ANN. § 51:1409(A) (2012).

189. *See, e.g.*, Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159, 174–75 (5th Cir. 2004); O'Quin v. Verizon Wireless, 256 F. Supp. 2d 512, 519 (M.D. La. 2003).

190. *See, e.g.*, H.D. 729, 2011 Leg., 428th Sess. (Md. 2011). The bill provides that a "written agreement made before a dispute arises may not waive or have the practical effect of waiving the rights of a party to that agreement to resolve the dispute by obtaining relief as a representative or as a member of a class of similarly situated persons." *Id.*

191. *See supra* text accompanying note 45.

192. *See* Laster v. AT&T Mobility LLC, 584 F.3d 849, 855–56 (9th Cir. 2009).

193. *See supra* note 86 and accompanying text.

194. *See supra* note 97 and accompanying text.

implicitly prevent dispute resolution on a class-wide basis.[195] They then, in numerous instances, fall back on the FAA as a shield against judicial inspection, based on a stated federal policy that strongly favors arbitration.[196] By using the FAA in this way, corporations can require individual arbitration that deters consumers from ever seeking recompense for small injuries and that fails to achieve the only realistic hope of a consumer plaintiff in a small-claim setting—deterrence from similar wrongful actions in the future. This is an illegitimate use of the FAA, and should be made to cease.

The Supreme Court's decision in *Concepcion*, however, has appeared to curtail, at least for the time-being, states' individual attempts to ensure that this "private attorney general" function of small-claim consumer class actions remains viable. The holding of *Concepcion* places in great doubt whether or not a state may hold any individual arbitration clause unconscionable for not affording class relief, and prohibits the development of a line of jurisprudence akin to the *Discover Bank* rule. While the analysis allowing the *Concepcion* majority to arrive at its interpretation of the FAA's presumption of enforceability is questionable, the decision is nonetheless a great wrench in the works of unconscionability jurisprudence. The remaining route to preserving the corporate deterrence benefits from consumer class actions, therefore, rests with Congress. The FAA should be amended to ensure that it only creates a presumption of enforceability where the clause it would enforce is in keeping with its underlying premise. The main purpose of the FAA has always been efficient resolution of disputes.[197] Efficiency is defined as "effective operation as measured by a comparison of production with cost (as in energy, time, and money)."[198] "Production" for the purposes of small-claim-value class actions must be the meaningful benefit to consumers—corporate deterrence. If made to arbitrate one claim at a time, the deterrent value simply will not be present. Arbitration, therefore, can never be efficient where deterrence is the only practical benefit.[199]

In many small-claim-value consumer class actions, individual claim arbitration is more costly, and therefore less efficient, for defendant corporations as well, presuming that all class members brought claims.[200] To the extent that corporations in fact do see lower legal costs from imple-

195. *See supra* Part III.C.

196. *See, e.g.*, Scott v. Cingular Wireless, 161 P.3d 1000, 1008 (Wash. 2007). This argument is not limited to the mobile-telephone industry. Hurley v. Deutsche Bank Trust Co. Ams., 610 F.3d 334, 338 (6th Cir. 2010) (applying the same argument to a case involving a financial institution).

197. *See supra* note 16 and accompanying text.

198. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 368 (10th ed. 1993).

199. Of course, where the value of a plaintiff's claim is high enough, the plaintiff would see a "real" benefit through monetary recovery, thus making individual arbitration potentially more efficient than litigation in realizing this benefit. The consumer may in fact value her individual recovery over any collective deterrent effect. This situation, however, is not presented in small-claim-value cases.

200. *See supra* Part III.D.

menting arbitration schemes, this result can be traced to the deterrent effect of being made to "go it alone" and the loss of the notice requirements that accompany class actions which are the first inklings to many plaintiffs that they have been wronged in small-claim-value cases.[201] Because deterrence of claims was never a goal of the FAA, it should not be allowed to be invoked to protect arbitration clauses that have the sole practical effect of deterring claims, rather than achieving a more efficient resolution of claims.

An effective amendment would do two things: (1) ensure that the corporate deterrence value to the public at large is high enough to make a class action worthwhile; and (2) ensure that individual plaintiffs would not already be suitably motivated to bring individual disputes based on the dollar value of their claim. Element (1) is already partially achieved by the numerosity requirement in Rule 23(a).[202] Requiring that the purported class dispute impact a large number of people helps limit the times a court will ignore an arbitration clause to situations that will have the maximum corporate deterrence effect. Also, however, there should be a requirement of a certain corporate gross income amount in any amendment to the FAA. It is possible to believe that individual small-claim arbitrations may have a deterrent effect on small businesses. When the company is of sufficient size, however, such disputes will cease to be a viable avenue for consumers to seek real corporate change. Further, requiring that a company be of a certain size will help ensure that consumer class actions achieve a degree of publicity, which may help to deter other similar corporations from wrongdoing as well.[203]

As to the second element, any amendment should also require that consumers would not already be motivated to conduct individual arbitrations or litigation based on the dollar value of their claim. Where this incentive is present, much of Hylton's economic analysis counsels in favor of enforcing arbitration clauses.[204] Absent this incentive, however, the real benefit to any dispute resolution process, from the consumer's perspective, is likely to be deterrence—in such situations arbitration is a poor means to this end. By setting a "cap" on individual recovery of $100 in small-claim consumer class actions where defendants put a class-action waiver in place, for example, Congress could protect arbitration as a viable choice in situations where it is an efficient pursuit of financial recovery, and restrict the use of arbitration as merely an attempt to avoid

201. *See supra* Part II.C.1.

202. Rule 23 requires that a class be certified only if "the class is so numerous that joinder of all members is impracticable." FED. R. CIV. P.23(a)(1).

203. The high-profile nature of a large corporation, and the media storm likely to be created by a large class-action judgment against it, may more effectively deter that corporation (and other potential offenders) from engaging in practices that will produce this socially and economically unpleasant situation again in the future. *See* Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 751 (1998).

204. *See supra* Part III.A.

class actions where deterrence, and not necessarily financial gain, is the goal.[205] It is the sub-$100 consumer suit that will often be completely deterred by the class-action waiver in an arbitration clause, and even though there may be little personal incentive to an individual to sue for $30, there is potentially much greater societal value in allowing many similarly situated plaintiffs to join their claims. This is not for any prospect of greater economic recovery (as each claimant is unlikely to see more nominal value) but to create an efficient way of reaching the real goal of small-claim consumer litigation: deterrence of future wrongful corporate acts.

VI. CONCLUSION

The economic climate of the country has changed dramatically since the FAA was initially passed, and the time has come for Congress to take stock of whether it is being invoked by courts and parties to achieve the purposes for which it was enacted. In the cases of small-value-claim consumer disputes, by and large, it is not. State courts can, if not restricted by state legislation regarding class actions in consumer litigation, utilize a more realistic economic view of the potential small-value-claim consumer plaintiff's situation for the purposes of invalidating unconscionable class-action waivers. In the wake of *Concepcion*, this, unfortunately, appears to be an avenue that is closing or has already closed. A better solution would be the passage of an amendment to the FAA restricting its presumption of enforcement to arbitration clauses that do not have the effect of deterring small-claim-value plaintiffs from seeking recompense at all. When the value of a potential plaintiff's claim is so low as to remove any financial incentive to either litigate or arbitrate alone, but where the collective corporate deterrent value of many similarly-situated plaintiffs would be quite high, class actions remain the most "efficient" weapon that consumers have in their litigation arsenal. As a federal policy enacted with efficiency as its main goal, the FAA should not be allowed to prevent class actions from serving this purpose.

205. *See* Scott v. Cingular Wireless, 161 P.3d 1000, 1008 (Wash. 2007) ("Class action waivers have very little to do with arbitration. Clauses that eliminate causes of action, eliminate categories of damages, or otherwise strip away a party's right to vindicate a wrong do not change their character merely because they are found within a clause labeled 'Arbitration.'").