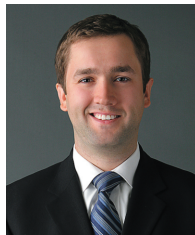


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ARBITRATION**The Changed Landscape of Businesses' Right to Enforce Arbitration Agreements:
A Survey of Class Actions Involving Petitions to Compel Arbitration After *Concepcion***

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In the last few years, the U.S. Supreme Court has removed several roadblocks to business efforts to require individual (as opposed to classwide) dispute resolution. Beginning with *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* in 2010, the Court limited plaintiffs' ability to pursue class arbitrations without a specific agreement to classwide adjudication: "[A] party may not be compelled under the [Federal Arbitra-

tion Act] to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so."¹

Then, one year later, the Court decided *AT&T Mobility LLC v. Concepcion*, a watershed decision that breathed new life into class action waivers by holding that the Federal Arbitration Act preempts state laws that stand as an impediment to enforcing commercial class action waivers, such as a California rule that had deemed such agreements unconscionable and unenforceable.² Along the way, the Court has expressed its displeasure with the flood of class action litigation clogging federal court dockets.³

Even after *Concepcion*, the plaintiffs' bar pressed forward, arguing that "public policy" concerns prevent ar-

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¹ *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684, 2010 BL 92476 (2010).

² *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 179 L. Ed. 2d 742, 2011 BL 110648 (2011) (citing *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005)).

³ For instance, in *Concepcion*, the Court discussed the high stakes involved in class litigation, and the associated risk that defendants could be pressured into settling potentially frivolous claims. *Id.* at 1752. And in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2013 BL 40710 (2013), the Court noted that class actions are the exception to the "usual rule" of proceedings that occur between only the named parties. *Id.* at 2309 (internal quotation marks omitted).

bitration of class claims,⁴ and that class adjudication is essential for the vindication of federal statutory rights.⁵ But earlier this year in *American Express Co. v. Italian Colors Restaurant*, the Supreme Court rejected these attempts to circumvent arbitration agreements.⁶

Other attempts to avoid arbitration have been more successful. *Oxford Health Plans LLC v. Sutter* involved the question whether an arbitrator exceeded its authority to interpret the agreement when it determined that class arbitration was permissible. The Court focused on the very limited standard of review available under the Federal Arbitration Act, and held that as long as the arbitrator was arguably construing the contract, courts were not to second-guess the arbitrator's interpretation.⁷

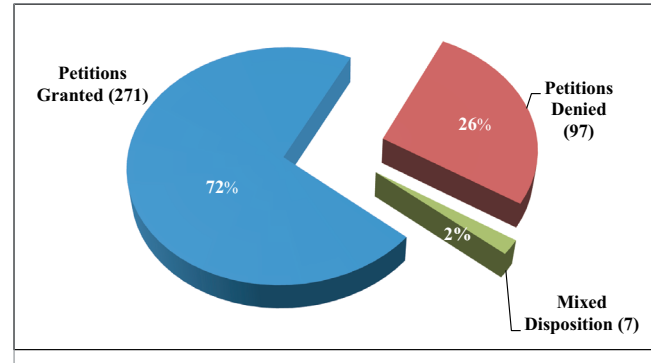
Oxford Health illustrates that the Federal Arbitration Act is a double-edged sword for defendants: Its preemptive power is strong enough to terminate class action litigation where there is a binding arbitration agreement, but on the flipside, the judicial deference it requires makes it very difficult to correct erroneous interpretations of an arbitration clause. Indeed, *Oxford Health* was a unanimous opinion in which both the majority and concurring opinion agreed that the result may have been different had the district court, rather than the arbitrator, construed the arbitration clause in the first instance.⁸

The general consensus among practitioners is that these decisions have caused a seismic shift in trial courts' approaches to petitions to compel arbitration, particularly after *Concepcion*. To test this assumption, and to determine how plaintiffs are responding to the Supreme Court's recent opinions, we reviewed every reported decision that has cited *Concepcion* in ruling on a motion to compel arbitration in a putative class action—a total of approximately 375 opinions. The results confirm that courts have generally taken heed of the Supreme Court's charge to rigorously enforce arbitration agreements.⁹ Of the 375 cases that we reviewed,

courts compelled arbitration approximately **72 percent** of the time. This success rate is particularly notable given that before *Concepcion*, California and other states following California's *Discover Bank* rule almost never compelled arbitration in putative class actions.

Table 1: Defendants' Post-*Concepcion* Success Rate on Petitions to Compel Arbitration

Moreover, for the 80 cases decided since the Supreme Court rejected the "effective vindication" defense in *Italian Colors*, defendants' success rate is an even more impressive **84 percent**.



For the 97 decisions that have denied petitions, the most successful ground for opposing arbitration has been contract formation, followed by waiver, unconscionability, public policy, and vindication of statutory rights:

Table 2: Most Successful Grounds for Denying Post-*Concepcion* Petitions to Compel Arbitration

ARGUMENT TO REJECT ARBITRATION	FREQUENCY	SUCCESS RATE
Contract Formation (i.e., challenges to the existence of a binding arbitration agreement between the parties)	34%	31%
Waiver	22%	30%
Unconscionability	55%	24%
Public Policy	16%	18%
Vindication of Statutory Rights	18%	13%

Given the sea change in the law on enforcement of arbitration agreements, businesses should carefully consider the inclusion of arbitration provisions in their contracts. And those with existing agreements should analyze the agreements closely to ensure that the arbitration provision will prove enforceable in court.

Indeed, even in industries that typically have not used arbitration agreements, businesses should consider adopting them, particularly as the plaintiffs' bar continues to assert contract and warranty-based theories in consumer class actions. In the food industry, for example, the plaintiffs' bar has in several cases claimed that food labeling and advertising constitute an express warranty such that any misrepresentation on a food la-

⁴ *Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250, 2011 BL 173423 (W. Va. 2011), *rev'd sub nom. Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 2012 BL 50142 (2012) (per curiam).

⁵ *In re Am. Express Merchants' Litig.*, 667 F.3d 204, 2012 BL 27969 (2d Cir. 2012), *rev'd sub nom. Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2013 BL 163177 (2013).

⁶ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2013 BL 163177 (2013); see also *Marmet Health*, 132 S. Ct. 1201, 2012 BL 50142 (2012).

⁷ *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2013 BL 151235 (2013).

⁸ *Id.* at 2068 n.2 ("We would face a different issue if Oxford had argued below that the availability of class arbitration is a so-called 'question of arbitrability.'"); see also *id.* at 2071 ("If we were reviewing the arbitrator's interpretation of the contract *de novo*, we would have little trouble concluding that he improperly inferred '[a]n implicit agreement to authorize class-action arbitration . . . from the fact of the parties' agreement to arbitrate.'" (quoting *Stolt-Nielsen*, 559 U.S. at 685)) (Alito, J., concurring).

⁹ This is significant because most defendants never sought arbitration out of a fear that it would require *classwide* arbitration, with all of its attendant risks and limited appellate review. See, e.g., *Concepcion*, 131 S. Ct. at 1751 (discussing how "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment").

bel would subject the advertiser or manufacturer to liability.¹⁰

In light of these contract-based claims, it is no longer far-fetched to at least consider placing arbitration agreements and class waivers on food and beverage labels. Companies in other industries with regulatory restrictions on arbitration clauses should explore opportunities to use *Concepcion* and the powerful preemptive effect of the Federal Arbitration Act to implement arbitration agreements.¹¹

An important part of drafting, or reexamining, a business's arbitration agreement is determining the most likely impediments to enforcing the provision in a motion to compel arbitration. As a result, what follows is an analysis of the most common and successful defenses to arbitration, and what businesses might do to ensure they are able to compel arbitration of claims subject to arbitration agreements.

Contract Formation

Notwithstanding the “presumption of arbitrability,” and the command to resolve “doubts . . . in favor of coverage,”¹² the most successful defenses against arbitration relate to contract formation, which plaintiffs have raised in approximately 34 percent of the cases, and the courts accepted this defense 31 percent of the time. Stated simply, plaintiffs raising this defense attempt to dispute that there was any binding agreement to arbitrate in the first place.¹³ Plaintiffs often argue that an arbitration clause cannot be enforced because one party is a non-signatory to the contract,¹⁴ or that they received no notice—or insufficient notice—of the arbitration clause.¹⁵ This argument arises often in the context of online commerce, where a customer must assent to the online terms of service (which may include an arbi-

tration clause) before downloading an application or gaining access to a website or software.¹⁶

One question not yet resolved by the Supreme Court is who—the court or the arbitrator—should decide “arbitrability” questions (e.g., whether the parties have a binding agreement to arbitrate) in cases involving non-signatories where the agreement delegates such questions to the arbitrator. As noted above, in *Oxford Health* the arbitrator decided this question because the defendant stipulated to having the arbitrator decide “arbitrability.”¹⁷ But the federal courts of appeals have reached different conclusions on what parties must do to delegate arbitrability issues to an arbitrator.¹⁸ This question is significant, because arbitrators may decide arbitrability questions differently from courts—which have long resisted arbitration¹⁹—and because an arbitrator's decision is entitled to significant judicial deference pursuant to the Federal Arbitration Act.²⁰

Businesses can take several steps to minimize the risk that plaintiffs will be able to avoid arbitration as a result of contract formation problems. For instance, where it is feasible, businesses should ensure that customers receive notice of the arbitration provision, and maintain evidence that the business presented the provision to the customer. Although incorporation by reference by a website link or direction to a separate document is valid, businesses should nonetheless make that reference clear and unequivocal and call it to the attention of the customer.²¹ Further, businesses should ensure that all relevant parties who may eventually bring suit under a given contract are bound by an arbitration clause by mentioning all such parties in the contract, and including them as signatories.²²

Oxford Health also teaches that businesses should be careful about relying on silence instead of explicit class waivers. If businesses do not state their intent on the face of the agreement, then they are potentially inviting an arbitrator to construe the terms for them—a perilous

¹⁰ See, e.g., *Veal v. Citrus World, Inc.*, No. 2:12-CV-801-IPJ, 2013 BL 4177 (N.D. Ala. Jan. 8, 2013) (claiming that a label describing orange juice as “fresh-squeezed” and “100% orange juice” constituted an express warranty); *Colucci v. ZonePerfect Nutrition Co.*, No. 12-2907-SC, 2012 BL 342930 (N.D. Cal. Dec. 28, 2012) (claiming that a label describing a product as “all natural” constituted an express warranty).

¹¹ See, e.g., *Marmet Health*, 132 S. Ct. at 1203-04 (finding that the Federal Arbitration Act preempts state public policy against pre-dispute arbitration agreements that apply to claims against nursing homes).

¹² *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986).

¹³ See *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (“[A]rbitration is . . . a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.”).

¹⁴ See, e.g., *Haskins v. First Am. Title Ins., Co.*, 866 F. Supp. 2d 343, 344 (D.N.J. 2012) (denying petition to compel arbitration because court found that plaintiff homeowners were not signatories to the policies containing arbitration agreements).

¹⁵ See, e.g., *Chavarria v. Ralphs Grocery Co.*, No. 11-56673, slip op. at 11-12, 2013 BL 300607 (9th Cir. Oct. 28, 2013) (finding that arbitration clause was procedurally unconscionable because “the terms of the policy were not provided to [plaintiff] until three weeks after she had agreed to be bound by it”); *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 112, 2012 BL 230422 (2d Cir. 2012) (arbitration provision was unenforceable because email sent to the plaintiffs after their enrollment was insufficient to provide sufficient notice for plaintiffs to assent to the agreement's terms).

¹⁶ Compare, e.g., *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 31 (2d Cir. 2002) (finding a link to a new or updated terms of service on the bottom of a website visited by the user as insufficient to establish assent to terms of service), with *Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904, 911-12, 2011 BL 202575 (N.D. Cal. 2011) (approving “clickwrap” arbitration agreement, because “plaintiff was provided notice and an opportunity to review terms of service prior to acceptance,” notwithstanding lack of evidence that plaintiff actually reviewed the terms and conditions).

¹⁷ See *Oxford Health*, 133 S. Ct. at 2068 n.2; *id.* at 2071 (Alito, J., concurring).

¹⁸ Compare *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1127-28, 2013 BL 25762 (9th Cir. 2013) (holding that non-signatories are categorically barred from enforcing delegation provisions in agreements contracts), with *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 209-11 (2d Cir. 2005) (requiring arbitration of arbitrability questions involving non-signatory defendant pursuant to contractual delegation provision).

¹⁹ See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006).

²⁰ See *Oxford Health*, 133 S. Ct. at 2068-70.

²¹ See, e.g., *Koffler Elec. Mech. Apparatus Repair, Inc. v. Wartsila N. Am., Inc.*, No. C-11-0052 EMC, 2011 BL 77576 (N.D. Cal. Mar. 24, 2011) (enforcing arbitration clause found in terms and conditions that were not attached to the agreement, and never provided to the consumer because the consumer could have acquired the terms and conditions upon request and thus were “easily available”).

²² See *Haskins*, 866 F. Supp. 2d at 344.

undertaking if it means classwide arbitration with limited judicial review. For example, in *Concepcion*, the Court noted that as of September 2009, the American Arbitration Association had opened 283 class arbitrations, none of which had resulted in a final award on the merits, and 162 of which had been settled, withdrawn, or dismissed after an average of almost two years.²³

Waiver

The second most successful argument against arbitration has been waiver of the right to arbitration, which plaintiffs asserted in approximately 22 percent of cases that we analyzed and on which they succeeded approximately 30 percent of the time. This defense was particularly common in the immediate aftermath of *Concepcion*, when defendants attempted to use the new precedent to compel arbitration even in class actions that had been litigated for several months or even years.²⁴

But even in cases decided more than one year after *Concepcion*, both the frequency and success rate of the waiver argument remained constant. Most likely, the waiver defense will be a historical anomaly limited to the immediate aftermath of *Concepcion* and *American Express*, as more defendants pay attention to arbitrability issues, and timely assert their right to arbitrate with more comfort that their arbitration clauses will be enforced as drafted.²⁵

Businesses seeking to enforce an arbitration clause during the course of litigation should keep waiver in mind when fashioning a litigation strategy. To avoid a waiver defense, defendants should move to compel arbitration as early on as possible in a case. Waiting until discovery has begun, and the parties having litigated the merits of a customer's claims place a business at risk of waiving its right to compel arbitration.²⁶

Unconscionability

By far the most frequently raised defense against enforcement of arbitration agreements in class actions is the doctrine of unconscionability. This doctrine invalidates contractual provisions (including arbitration clauses) where the circumstances surrounding the ex-

ecution of the agreement, and/or the contract's substantive terms are deemed oppressive or excessively one-sided. Plaintiffs raised this defense in approximately 55 percent of cases, though the defense proved successful only 24 percent of the time.

Unconscionability is a matter of state law, and the Supreme Court of California recently confirmed that this defense remains alive and well in California.²⁷ However, the grounds upon which courts have relied in invalidating arbitration agreements have varied significantly. For example, courts in several jurisdictions have held arbitration provisions unconscionable where they depart from the traditional fee and cost structure in a way that could negatively impact plaintiffs.²⁸ Several state supreme courts have held that an arbitration agreement is unconscionable where arbitration would likely be too costly to effectively vindicate a plaintiff's rights.²⁹ And courts have been more inclined to hold

²⁷ *Sonic-Calabasas A., Inc. v. Moreno*, No. S174475, 2013 BL 287605 (Cal. Oct. 17, 2013), assessed the impact of *Concepcion* and *Italian Colors* on state decisions that had categorically invalidated arbitration agreements that required employees to waive their rights to pursue administrative hearings to recover past-due wages (so-called "Berman hearings"). The Supreme Court of California concluded that the FAA, as interpreted by *Concepcion*, "preempts our state-law rule categorically prohibiting waiver of a Berman hearing in a predispute arbitration agreement imposed on an employee as a condition of employment," although these waivers may be considered as part of the overall unconscionability analysis. *Id.* As the majority explained, "[state-law unconscionability] rules must not facially discriminate against arbitration and must be enforced evenhandedly." *Id.* "Importantly," the majority noted, "state-law rules that do not 'interfere[] with fundamental attributes of arbitration' do not implicate *Concepcion*'s limits on state unconscionability rules," and "a facially neutral state-law rule is not preempted simply because its evenhanded application 'would have a disproportionate impact on arbitration agreements.'" *Id.* (quoting *Concepcion*, 131 S. Ct. at 1748, 1751).

Only a few days later, the Ninth Circuit also agreed that California's general rules of unconscionability are not preempted by the FAA. See *Chavarria v. Ralphs Grocery Co.*, No. 11-56673, slip op. at 10, 20-22, 2013 BL 300607 (9th Cir. Oct. 28, 2013) ("The Supreme Court's holding that the FAA preempts state laws having a 'disproportionate impact' on arbitration cannot be read to immunize all arbitration agreements from invalidation no matter how unconscionable they may be, so long as they invoke the shield of arbitration. . . . California law regarding unconscionable contracts, as applied in this case, is not unfavorable towards arbitration, but instead reflects a generally applicable policy against abuses of bargaining power.").

²⁸ See, e.g., *Newton v. Am. Debt Servs., Inc.*, 854 F. Supp. 2d 712, 725, 733 (N.D. Cal. 2012) (two entire arbitration agreements held unconscionable; among other things, one allowed the defendant to recover attorneys' fees even if plaintiff brought the suit in good faith, and the other forfeited the plaintiff's statutory right to attorneys' fees); *Wolf v. Nissan Motor Acceptance Corp.*, No. 10-cv-3338 (NLH) (KMW), 2011 BL 164101 (D.N.J. June 22, 2011) (severing provisions if they were effectuated in a manner that gave arbitrator unfettered discretion to allocate entire cost of arbitration, and of any appeal regardless of the outcome, to consumer); *Gandee v. LDL Freedom Enters., Inc.*, 293 P.3d 1197, 605-06, 2013 BL 33094 (Wash. 2013) (entire arbitration agreement held unconscionable where, among other things, it would award defendant costs and fees if the plaintiff loses when such liability was not provided for under relevant law).

²⁹ See, e.g., *Brewer v. Mo. Title Loans*, 364 S.W.3d 486, 493-94, 2012 BL 69270 (Mo. 2012) (arbitration agreement was unconscionable where, among other things, "it was unlikely that

²³ See *Concepcion*, 131 S. Ct. at 1751.

²⁴ See, e.g., *Ho v. Ernst & Young, LLP*, No. 5:05-cv-04867-JF (consolidated for class certification purposes with case nos. 5:08-cv-04988-JF and 5:08-cv-02853-JF), 2011 BL 240422 (N.D. Cal. Sept. 20, 2011) (finding waiver where defendant moved to compel arbitration after four years of litigation and after winning partial summary judgment against plaintiffs), *rev'd sub nom. Richards v. Ernst & Young, LLP*, 2013 BL 222217 (9th Cir. Aug. 21, 2013); *In re Checking Account Overdraft Litig.*, 829 F. Supp. 2d 1316, 1321-24, 2011 BL 334777 (S.D. Fla. 2011) (finding waiver where defendants waited over two years to seek arbitration, all the while litigating the merits of plaintiffs' claims).

²⁵ See, e.g., *Richards*, slip op. at 3-5, 2013 BL 222217 (9th Cir. Aug. 21, 2013) (noting that "any party arguing waiver of arbitration bears a heavy burden of proof," and reversing trial court's waiver finding even where defendant filed a motion to dismiss and conducted limited discovery before moving to compel arbitration) (quoting *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694 (9th Cir. 1986)).

²⁶ *Hoover v. Am. Income Life Ins. Co.*, 206 Cal. App. 4th 1193, 1204, 2012 BL 121778 (2012) (concluding that "litigation of the issues in dispute justify[ed] a finding of waiver").

that an arbitration agreement is unconscionable where the defendant retains the ability to pursue certain claims for relief in a judicial forum, but plaintiffs are forced to arbitrate all disputes.³⁰ Depending on the pervasiveness and severity of the unconscionable provisions, courts may even invalidate the entire arbitration agreement, rather than merely severing the unconscionable provisions.

Would-be defendants should consider removing any provision that would make plaintiffs responsible for fees and costs out of proportion with their obligations under existing law. The key is to make sure that the agreement is bilateral—in that both parties have equal rights and responsibilities. For example, the agreement at issue in *Concepcion* required AT&T to reimburse plaintiffs for all costs for nonfrivolous claims.³¹ There is no suggestion in the majority's decision that such an extremely generous clause is required, and businesses may be concerned that such a clause would operate in practice as flypaper and attract claims at a micro level.

Nevertheless, to strengthen the clause against particular state-law attacks, companies may consider a provision that shares costs or allocates costs to the company in certain circumstances. And if potential damages are small, companies should consider including a provision that allows a plaintiff to bring qualifying claims in small claims court in lieu of arbitration, as in *Concepcion*. This guards defendants against state law protecting a right to redress in the courts, while also preserving the main objective of efficient dispute resolution over protracted class litigation.³²

In the same vein, businesses may want to avoid reserving judicial remedies for themselves where plaintiffs are required to arbitrate all claims. Finally, it is fairly common and advisable in this uncertain time to include a clause that permits the court to sever any provision that may be found unconscionable. This permits enforcement of the agreement as a whole even if the court finds any individual provision unconscionable.

Public Policy and Effective Vindication

In a show of remarkable resilience even after *Concepcion*, plaintiffs continued to assert public policy arguments in 16 percent of cases that we analyzed, and

a consumer could retain counsel to pursue individual claims" because representation would "require significant expertise and discovery," and "would not be financially viable" because of the small damages involved).

³⁰ See, e.g., *Cisneros v. Am. Gen. Fin. Servs., Inc.*, No. 3:11-cv-02869-CRB (N.D. Cal. July 24, 2012) (arbitration agreement held unconscionable where plaintiff had to arbitrate all disputes against company, but company retained option of filing suit for the only practice remedies it would ever seek, including self-help, replevin, garnishment, repossession, and foreclosure); *Noohi v. Toll Bros., Inc.*, No. RDB-11-00585, 2012 BL 25919 (D. Md. Jan. 30, 2012) (striking down arbitration agreement where only plaintiffs had to submit their disputes against defendants to arbitration, and defendants made no similar promise); *Brewer*, 364 S.W.3d at 494–95 (striking down arbitration agreement where the plaintiff gave up all rights to a judicial forum, but the company could still file suit in some circumstances); *Clay v. N.M. Title Loans, Inc.*, 288 P.3d 888, 902 (N.M. Ct. App. 2012) (severing provision that reserves certain judicial remedies of the lender that were not available to borrowers).

³¹ *Concepcion*, 131 S. Ct. at 1744.

³² See *Feeney*, 465 Mass. at 505 n.26.

courts vindicated these defenses more than 18 percent of the time.

Before *Concepcion*, arbitration clauses were regularly challenged on the grounds that compelling arbitration would frustrate public policy.³³ And over the past two years, courts have split on how *Concepcion* affects the availability of a public policy defense to compelled arbitration. Many courts have held that *Concepcion* effectively foreclosed such a defense,³⁴ while a minority of courts has held that a public policy defense can still invalidate an arbitration clause, depending on the nature of the policy at issue.³⁵

Nowhere is this divide more visible than in California, where courts have taken both sides of the split.³⁶ In particular, a small number of California courts have clung to the public policy defense in the context of labor and employment cases brought under California's Private Attorney General Act (or "PAGA," a unique state law that allows "private attorney general" representative actions on behalf of the public that do not have to meet class certification requirements), and under the federal Fair Labor Standards Act.³⁷ These cases held that *Concepcion* preempted only state laws dealing with arbitration. And because *Concepcion* did "not address a statute such as the PAGA, which is a mechanism by which the state itself can enforce state labor laws,"³⁸ these courts have limited *Concepcion* to its facts, concluding that public policies aside from those discussed in *Concepcion* may still preclude arbitration.

Recognizing the confusion over this issue, the Supreme Court of California has granted review to address this question, among others, in *Iskanian v. CLS Transportation Los Angeles, LLC*, Case No. S204032. The defendants in *Iskanian*, along with a host of amici,

³³ See, e.g., *Gentry v. Superior Court*, 42 Cal. 4th 443, 466, 2007 BL 91713 (2007) (permitting courts to decline to compel arbitration "on public policy grounds," when forced arbitration would frustrate a state or federal policy).

³⁴ See, e.g., *Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505, 515, 2012 BL 69269 (Mo. 2012) (holding that "post-*Concepcion*, courts may not apply state public policy concerns to invalidate an arbitration agreement even if the public policy at issue aims to prevent undesirable results to consumers").

³⁵ See, e.g., *Brown v. Ralphs Grocery Co.*, 197 Cal. App. 4th 489, 503–04, 2011 BL 183179 (2011) (holding that a public policy defense could still be viable after *Concepcion*).

³⁶ Compare *Brown*, 197 Cal. App. 4th at 503 (declining to enforce an arbitration agreement that frustrated California's public policy of empowering representatives to vindicate public rights), with *Lewis v. UBS Fin. Servs., Inc.*, 818 F. Supp. 2d 1161, 1167 (N.D. Cal. 2011) (holding that "*Concepcion* effectively overrules" California case law recognizing a public policy defense); see also *Truly Nolen of Am. v. Superior Court*, 208 Cal. App. 4th 487, 145 Cal. Rptr. 3d 432, 2012 BL 206843 (App. 4th Dist. 2012) (holding that *Concepcion* expressed disapproval of a public policy defense based on any California policy, but noting that a defense remains available under binding California Supreme Court precedent until that precedent is overruled).

³⁷ See *Brown*, 197 Cal. App. 4th at 503–04; *Franco v. Arakelian Enters., Inc.*, 211 Cal. App. 4th 314, 149 Cal. Rptr. 3d 530, 2012 BL 309638 (App. 2d Dist. 2012), rev. granted, *Franco v. Arakelian Enters.*, 294 P.3d 74 (2013), pending *Iskanian v. CLS Transp. L.A.*, 206 Cal. App. 4th 949, 142 Cal. Rptr. 3d 372, 2012 BL 138794 (App. 2d Dist. 2012); *Teimouri v. Macys Inc.*, No. 37-00093577 (Cal. Super. Ct. Aug. 18, 2011); *Deneveu v. Ross Stores, Inc.*, No. RG10504571 (Cal. Super. Ct. June 22, 2011).

³⁸ *Brown*, 197 Cal. App. 4th at 503.

have urged the Supreme Court to hold unequivocally that a public policy defense based on any state law is no longer viable after *Concepcion*—a position significantly more persuasive now that the Supreme Court decided *Italian Colors*. To the extent that any ambiguity remains over the reach of *Italian Colors*, the California Supreme Court should provide concrete guidance on this question when it decides *Iskanian*.

The public policy defense also remains a far-reaching and important issue in claims for injunctive relief under California's broad Unfair Competition Law (UCL) and Consumers Legal Remedies Act (CLRA). Here, two cases decided by the California Supreme Court prior to *Concepcion* have led plaintiffs to continue to argue that "public injunctive relief" claims under these statutes are specifically exempted from arbitration.³⁹

Although these arguments did not subside after *Concepcion*,⁴⁰ it is hard to see how these arguments could survive *Italian Colors*. The Ninth Circuit recently agreed, and concluded that "[b]y exempting from arbitration claims for public injunctive relief under the CLRA, UCL, and FAL, the *Broughton-Cruz* rule . . . prohibits outright arbitration of a particular type of claim," and is therefore preempted by the FAA.⁴¹ The Califor-

nia Supreme Court's decision in *Iskanian* may also sound the death knell for these arguments.

Another common defense, raised in 18 percent of cases, is premised on the argument that arbitration on an individual—rather than a classwide—basis would be prohibitively expensive or difficult, thereby frustrating the effective vindication of plaintiffs' rights. In the cases we reviewed that were decided after *Concepcion*, the overall success rate was 13 percent. In a clear sign that courts are getting the message, however, the success rate has fallen to zero since the Supreme Court rejected the effective vindication defense in *Italian Colors*.

Conclusion

The benefits of bilateral arbitration are numerous: "In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."⁴² These benefits, however, can be put in jeopardy if businesses are not attuned to the most common defenses raised by plaintiffs. Businesses should give careful thought to those aspects of their agreements and litigation strategies that are most vulnerable, and revise arbitration agreements where necessary in order to maximize their ability to compel arbitration. It is also a ripe time to consider these clauses in industries that have not used arbitration agreements to govern the resolution of disputes with their customers.

plained that *Concepcion* precludes California from prohibiting arbitration based on perceived "institutional advantages of the judicial forum" (*id.*).

⁴² *Concepcion*, 131 S. Ct. at 1751.

³⁹ See *Broughton v. Cigna Healthplans of Cal.*, 21 Cal. 4th 1066, 90 Cal. Rptr. 2d 334, 988 P.2d 67 (1999); *Cruz v. Pacifi-Care Health Sys., Inc.*, 30 Cal. 4th 303, 133 Cal. Rptr. 2d 58, 66 P.3d 1157 (2003).

⁴⁰ See e.g., *Kilgore v. Keybank, N.A.*, 718 F.3d 1052, 2013 BL 99088 (9th Cir. 2013) (en banc).

⁴¹ *Ferguson v. Corinthian Colls., Inc.*, No. 11-56965, 2013 BL 301939 (9th Cir. Oct. 28, 2013). Relying on *Italian Colors*, the court also refused to apply the "effective vindication" exception, because this exception only applies to federal statutes that "stand on equal footing with FAA" (*id.* at 15), and ex-