Barras v. BB&T: Charting a Clear Path to Apply Concepcion Through a Quagmire of Divergent Approaches

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Barras v. BB&T: Charting a Clear Path to Apply Concepcion Through a Quagmire of Divergent Approaches

I. INTRODUCTION

A recent series of Supreme Court opinions, climaxing in the landmark case AT&T Mobility LLC v. Concepcion, has undermined the validity of applying unconscionability to arbitration agreements and generated divergent opinions in lower courts. The saving clause of the Federal Arbitration Act of 1927, 9 U.S.C. § 2 (FAA saving clause), states that "an agreement in writing to submit to arbitration ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist ... for the revocation of any contract." Until Concepcion, unconscionability was

4. Id.
5. Unconscionability is an affirmative defense to a contract claim requiring the claimant to prove there is such a degree of both substantive and procedural unfairness that a reasonable person would neither make nor accept the bargain. See Coneff v. AT&T Corp.,
an established ground for revoking arbitration agreements under the FAA saving clause. In Barras v. BB&T, the United States Court of Appeals for the Eleventh Circuit limited Concepcion for the first time in the Eleventh Circuit. This Note will explain the facts of Barras, Supreme Court precedent, the approach other circuits have taken in dealing with cases like Barras, and the important differences between these approaches and the Eleventh Circuit’s approach. Because Barras’s implications appear when its reasoning is contrasted with other circuits, this Note will conclude by using the differences and similarities in the courts’ reasoning to build a framework to interpret Concepcion more consistently.

II. FACTUAL BACKGROUND & PROCEDURAL POSTURE

In Barras, the Eleventh Circuit severed a cost-and-fee-shifting provision from an arbitration agreement, holding that the state standard rendering it unconscionable was not preempted by AT&T Mobility LLC v. Concepcion’s interpretation of the FAA. The plaintiff, Lacy Barras, alleged that BB&T (1) charged her overdraft fees even when she had sufficient funds; (2) supplied her inaccurate and misleading information; and (3) failed to provide her proper notice before making substantive changes to her account—all to wrongfully increase its revenue. Barras litigated under state contract and fair dealing theories, in particular, unconscionability. She litigated these claims in the United States District Court for the Southern District of Florida as a representative of a putative class of similarly situated plaintiffs. BB&T moved to compel arbitration according to her customer agreement, binding under the FAA. The district court denied the motion, holding the arbitration agreement unenforceable.

673 F.3d 1155, 1161-62 (9th Cir. 2012) (noting that most states evaluate both substantive and procedural aspects in determining unconscionability); 8 WILLISTON ON CONTRACTS § 18:10 (4th ed.).

6. An arbitration agreement is a contractual provision where the parties agree to settle, in a binding manner, their legal disputes out of court according to the applicable substantive law governed by a neutral agreed-upon set of procedural rules, with the final substantive and procedural decisions being made by an agreed upon person or groups of persons. BLACK’S LAW DICTIONARY 119 (9th ed. 2009).

7. Stipanowich, supra note 2, at 323, 337, 364-65, 375-76.

8. In re Checking Account Overdraft Litig. MDL No. 2036 (Barras v. BB&T), 685 F.3d 1269, 1274 (11th Cir. 2012). Barras is one of many opinions rendered in consolidated multidistrict litigation regarding bank overdrafts consolidated under the title: In re Checking Account Overdraft Litig. MDL No. 2036.

9. 685 F.3d 1269, 1275-76, 1279, 1282-83.


11. Id. at 1275-76, 1279, 1282-83.
agreement unconscionable and unenforceable under the FAA saving clause, and BB&T appealed. While the appeal was pending, the Supreme Court decided Concepcion. In light of Concepcion, the Eleventh Circuit remanded Barras to the district court. The district court reaffirmed its earlier ruling, holding that South Carolina's unconscionability standard was unpreempted by the FAA. BB&T again appealed.

On appeal, the Eleventh Circuit affirmed that the FAA did not preempt South Carolina's unconscionability standard because shifting all costs and fees arising from any dispute to one party (the customer) would interfere with the neutrality of bilateral arbitration. While the cost-and-fee-shifting provision was not in the arbitration agreement, the court of appeals held the provision applied to any costs or attorney fees incurred in arbitration. The court reversed the lower court's severance decision and held that the cost-and-fee-shifting provision alone, rather than the entire arbitration agreement, should be severed. This left the arbitration agreement—including the class arbitration waiver—intact. While this result gutted the value of Barras's victory, whose apparent goal was to litigate as a class representative, the holding remains important to understanding the riddle left by Concepcion.

III. LEGAL BACKGROUND

A. The Legal Canvas: Supreme Court Precedent

"The 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.' Before

12. Id. at 1273-74.
14. Id.
15. Barras, 685 F.3d at 1273-74.
16. Id. at 1282 ("Moreover, the cost-and-fee shifting provision distorts the fairness and reliability of the arbitration proceeding by forcing Barras to fund any loss, cost, or expense incurred by BB&T in arbitration . . . . These provisions of the unconditional cost-and-fee-shifting provision are not 'geared towards achieving an unbiased decision by a neutral decision-maker.'" (quoting Simpson v. MSA of Myrtle Beach, Inc., 644 S.E.2d 663, 668 (2007)) (emphasis added).
17. Id. at 1276.
18. Id. at 1283-84.
19. Id.
20. Id. at 1273.
the passage of the FAA, state courts were notoriously anti-arbitration, because it seemingly acted as an exculpatory provision that stripped plaintiffs of any meaningful remedy for their substantive rights. In response to this judicial hostility, Congress passed the FAA. Because the FAA made arbitration agreements binding, it injected a tension between state judiciaries and the federal legislature, leaving the federal judiciary stuck in the middle. This tension resulted in three trilogies of Supreme Court opinions punctuated at twenty-five year intervals. The first trilogy established a federal policy that favored arbitration over competing federal policies implied in federal statutes. The second trilogy established that the FAA's federal policy favoring arbitration would override competing policies established by the state courts or legislatures. The third trilogy, decided in the last three years,

24. Id. at 2038.
26. Stipanowich, supra note 2, at 324-25.
28. The second trilogy of cases, in 1984 and 1985, worked out the implications of the Court's earlier decision to extend the definition of "commerce" in the FAA to the extent of Congressional power under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3. Horton supra note 25, at 399 (noting that the FAA was passed under the more limited commerce power jurisprudence of the 1920s); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 401 (1967); Hirshman, supra note 25, at 1305. The Court bypassed three limits on arbitration. First, in Moses H. Cone Memorial Hospital v. Mercury Construction Corp., the Court held that when the question of the arbitrability of a dispute is subject to parallel actions in both federal and state court, the federal court could not defer to the state forum,
brought the underlying tension between unconscionability and arbitration to a climax.

The third trilogy consists of Stolt-Nielsen S.A. v. AnimalFeeds International Corp.; Rent-A-Center, West, Inc. v. Jackson, and AT&T Mobility LLC v. Concepcion. In Stolt-Neilson, the Court held that the FAA preempted the use of public policy when constructing parties' intent from a contract that is silent on the issue of class arbitration. This indirectly "laid the siege lines" on "the breastworks of unconscionability" by displacing public policy considerations in contract interpretation with a FAA policy of strictly enforcing arbitration agreements.

The Court's opinion in Rent-a-Center was more direct. In Rent-a-Center, the Court ruled that when contractual parties agree to arbitrate all disputes, the court must limit the scope of an unconscionability analysis to only the provisions in the agreement to arbitrate (gateway provisions). Thus, when a gateway provision provides all disputes are subject to arbitration, the court may not determine unconscionability by looking at any other unfairness in the contract. Limiting the courts' consideration to gateway provisions left very little room to examine the fairness of the corpus of the deal—in other words—substantive unconscionability.

absent exceptional circumstances, because "Congress's clear intent, in the [FAA], is to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." 460 U.S. 1, 22 (1983). Second, in Southland Corp. v. Keating, the Court held that the FAA preempted a California state statute that mandated a judicial (non-arbitral) forum because "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." 465 U.S. 1, 16 (1984). Third, in Dean Witter Reynolds, Inc. v. Byrd, the Court held that no court, whether federal or state, could allow a plaintiff to litigate arbitrable claims on the ground that the claims "intertwined" with arbitrable claims to a degree that separating the claims would be inefficient. 470 U.S. at 216-17. The Court supported its holding on the ground that FAA policy "requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation." Id. at 221. The common thread of these cases was a broad, simple rule favoring arbitration to the detriment of state policies. Hirshman, supra note 25, at 1378. See also Friedman, Arbitration Provisions, supra note 23, at 2044; Stephen E. Friedman, A Pro-Congress Approach to Arbitration and Unconscionability, 106 Nw. U. L. Rev. Colloquy 53, 57 (2011) [hereinafter Friedman, A Pro-Congress Approach].
The Court's decision in Concepcion "dramatically diminished" the use of unconscionability as a meaningful method of avoiding arbitration.37

In Concepcion, the plaintiffs attempted to file a class-action lawsuit against AT&T alleging that AT&T engaged in false and deceptive advertising that cost the plaintiffs (and others similarly situated) about $30. The district court refused AT&T's motion to enforce arbitration because it found that the arbitration agreement was unconscionable under California's "Discover Bank" rule. The Discover Bank rule held class arbitration waivers unconscionable if (1) the contract was one of adhesion, (2) damages from disputes would normally be small, and (3) the more powerful party intended to cheat individual customers through many small wrongs.38 The rule rested on the premise that enforcing a class arbitration waiver in such a contract would practically exculpate the wrongdoer from obtaining legal redress.39 The United States Court of Appeals for the Ninth Circuit affirmed.40 The Supreme Court reversed, ruling that the FAA preempted the Discover Bank unconscionability rule.41

Justice Scalia delivered the opinion for the Court.42 The Court held that California's Discover Bank rule did not provide grounds for revocation of the arbitration agreement according to the FAA saving clause.43 Justice Scalia supported this ruling by stating that the effect, if not purpose, of the Discover Bank rule is the impedance of bilateral arbitration.44 He further reasoned that the FAA's purpose is to give contracting parties freedom to decide disputes in an efficient and streamlined manner.45 Therefore, if the parties decide that the most efficient method to decide their disputes is bilateral arbitration, the Court should enforce this method even if it requires the preemption of all state policies.46

The factual basis of Concepcion's holding involved AT&T's uniquely consumer-friendly arbitration agreement.47 The agreement provided that for small claims, defined as $10,000 or less: AT&T could not recover attorney fees; and should the customer be awarded with an

37. See Stipanowich, supra note 2, at 380.
38. 131 S. Ct. at 1745-46.
39. Id. at 1746.
40. Id. at 1745.
41. Id. at 1750-51, 1753.
42. Id. at 1744.
43. Id. at 1748.
44. Id. at 1747.
45. Id. at 1751.
46. Id.
47. Id. at 1745.
amount greater than AT&T's last settlement offer, AT&T must pay a minimum of $7,500 and twice the amount of the plaintiff’s attorney fees.\(^{48}\) These facts made it easier to dismiss the plaintiff’s policy argument that class arbitration waivers would exculpate guilty parties by removing any feasible method of the customer to vindicate their substantive rights.\(^{49}\) However, foreseeing this factual distinction, Justice Scalia emphasized that the purpose of the FAA is to enforce arbitration agreements as written—despite all state public policy.\(^{50}\)

Justice Thomas concurred, employing a plain language argument of FAA interpretation. Justice Thomas pointed out that the FAA states arbitration provisions shall be “valid, irrevocable, and enforceable” unless there are grounds for “revocation.”\(^{51}\) Justice Thomas interpreted this to mean that state rules holding a contract invalid or unenforceable are different from state rules holding the contract revocable.\(^{52}\) Justice Thomas applied this theory by distinguishing between traditional formation defenses, such as duress, fraud, and failure of consideration, which prevent the existence of mutual assent or otherwise strike at the existence of a contract—and unconscionability, which does not deny the existence of a contract but rather refuses to enforce it as a matter of policy.\(^{53}\)

Justice Breyer, joined by Justice Ginsburg, Justice Sotomayor, and Justice Kagan, dissented.\(^{54}\) Justice Breyer focused on the fact that California's unconscionability rule would have applied to class action waivers outside of the arbitration context with equal force.\(^{55}\) Because the Discover Bank rule did not facially disfavor arbitration, it should fall within the FAA saving clause's requirement that grounds for revocation apply equally to any contract.\(^{56}\) Justice Breyer then explained how class arbitration furthered the efficient resolution of claims.\(^{57}\)

\(^{48}\) Id. at 1744.
\(^{49}\) Id. at 1753 (noting that “the Concepcions were better off under their arbitration agreement with AT&T than they would have been as participants in a class action”).
\(^{50}\) Id. at 1749.
\(^{51}\) Id. at 1754 (Thomas, J., concurring) (“Significantly, the statute does not parallel the words ‘valid, irrevocable, and enforceable’ by referencing the grounds as exist for the ‘invalidation, revocation, or nonenforcement’ of any contract.”).
\(^{52}\) Id.
\(^{53}\) Friedman, Arbitration Provisions, supra note 23, at 2062.
\(^{54}\) 8 WILLISTON ON CONTRACTS § 18:10.
\(^{55}\) Concepcion, 131 S. Ct. at 1756 (Breyer, Ginsburg, Sotomayor, Kagan, JJ., dissenting).
\(^{56}\) Id. at 1757.
\(^{57}\) Id.
\(^{58}\) Id. at 1761-62.
Because Concepcion distinctly stated that the federal policy favoring arbitration would necessarily preempt any state policy argument that would limit bilateral arbitration, some thought that the result might be different if the limiting policy stemmed from federal law. The Court expressly declined to give credence to this argument in Compu-Credit Corp. v. Greenwood. In CompuCredit, the Court rejected the plaintiff's argument that the federal policies undergirding the Credit Repair Organization Act provided a countervailing policy sufficient to avoid the arbitration agreement's class-action waiver, requiring an express Congressional statement before overriding the FAA.

B. Other Circuit Courts Post-Concepcion

Concepcion's narrow factual holding created a broad spectrum of interpretations. The following four general approaches have obtained credence in the lower courts: (1) Concepcion represents a narrow exception that preempts state standards based on the policy that plaintiffs ought to have incentives to litigate; (2) arbitration provisions can never be grounds for substantive unconscionability unless the provision would inhibit bilateral arbitration; (3) arbitration provisions are never substantively unconscionable, requiring extreme procedural unconscionability; and (4) all unconscionability of arbitration is preempted.

1. Courts that Treat Concepcion as a Narrow Exception. The United States Court of Appeals for the Second Circuit adopted the
first approach in In re American Express Merchant's Litigation (Amex III), creating two limits on Concepcion. Amex III held that a class arbitration waiver was not binding on a group of small supermarkets that had contracted with American Express because the waiver was unconscionable under a state standard not preempted by the FAA. The concurring and dissenting opinions rendered in the court's denial of the supermarkets' request for en banc review display the competing arguments. Judge Pooler, who authored the majority opinion in Amex III, rendered the only opinion supporting the denial of rehearing, while Chief Judge Jacobs dissented. Judge Pooler rested her argument on the reasons she had given in Amex III.

First, Judge Pooler distinguished Concepcion on the ground that here the plaintiff's claims were federal, specifically, antitrust violation of the Clayton Act, while Concepcion involved state claims only. Second, Judge Pooler contended that the class-action waiver in question would remove the plaintiff's ability to obtain redress while Concepcion only addressed the concern that a waiver would remove the plaintiff's incentive to obtain redress. Judge Pooler reached this conclusion by reasoning that the cost and fee reimbursement provided to prevailing

66. 667 F.3d 204, 214 (2d Cir. 2012).
67. Id. at 214.
68. Id. at 218-19.
69. Id. at 206.
70. In re Am. Exp. Merchants' Litig., 681 F.3d 139 (2d Cir. 2012) [hereinafter Amex III denial of en banc rehearing].
71. Id. at 142.
72. Amex III, 667 F.3d at 219 ("We rely ... on the need for plaintiffs to have the opportunity to vindicate their statutory rights.").
74. Amex III denial of en banc rehearing, 681 F.3d at 140.
75. Id. at 141 ("The Ninth Circuit expressly recognized the difference between incentive and ability.").
parties under the Clayton Act would not fully reimburse plaintiffs for fees paid to expert antitrust witnesses, which would be required to maintain a successful action.  

Chief Judge Jacobs addressed both contentions by looking at the Clayton Act. He reasoned that because the Clayton Act expressly provided for a limited reimbursement of costs, attorney fees, and expert testimony fees, Congress had already decided what would be necessary for plaintiffs to vindicate their rights. Thus, if Congress clearly limited the proper level of concern for the vindication of plaintiff’s rights to the statute, the court should not infer from a federal statute additional requirements that negate the FAA. If the statute does not provide the source of this policy, then no reason remains to distinguish between federal and state causes of action.

2. Courts that Adopt the Bilateral Arbitration Limitation. The United States Court of Appeals for the Third Circuit has adopted the second approach, that unconscionability of arbitration agreements is preempted unless the provision interferes with bilateral arbitration. In Quilloin v. Tenet HealthSystem Philadelphia, Inc., the Third Circuit held that a state standard rendering class-action waivers substantively

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76. Id. at 141-42.
77. Id. at 144 (Jacobs, J., dissenting) ("Congress deems [the Clayton Act's] incentives sufficient to encourage private suits.").
78. Id.
79. Id.
80. It appears that the Eighth Circuit court adopted a slight variant of this test in Green v. Supershuttle International, Inc., the Eighth Circuit's leading case dealing with Concepcion. 655 F.3d 766 (8th Cir. 2011). The court stated that the plaintiff's state-law-based challenge to a class arbitration waiver in a consumer contract "suffers from the same flaw as the state-law-based challenge as Concepcion—it is preempted by the FAA." Id. at 769. See also Owen v. Bristol Care, Inc., 702 F.3d 1050 (8th Cir. 2013) (relying on "more than two decades of pro-arbitration Supreme Court precedent" in holding that a class-arbitration waiver in an employment contract should be enforced according to its terms unless Congress clearly mandated the contrary).

Additionally, it appears that the Fifth Circuit has adopted this standard. See Reed v. Florida Metro. Univ., Inc., 681 F.3d 630, 646 (5th Cir. 2012) ("[Concepcion requires that] arbitrators should not find implied agreements to submit to class arbitration, and courts should not confirm arbitral awards that order parties into such a proceeding, without a contractual or legal basis for doing so."). It is likely that the First Circuit will adopt it also. See Karp v. CIGNA Healthcare, Inc., 2012 WL 1358652, at *11 (D. Mass. 2012) ("Accordingly, enforcing the arbitration clause and compelling bilateral arbitration of plaintiff's discrimination claims would not prevent her from vindicating her statutory rights under Title VII. Plaintiff will therefore be required to submit her claim to arbitration in accordance with this decision."). Therefore, this approach has garnered support from four circuits.
81. 673 F.3d 221 (3d Cir. 2012).
unconscionable was preempted because it "[sought] to impose class arbitration despite a contractual agreement for individualized arbitration." Thus the arbitral forum must be bilateral, as the court similarly stated in Litman v. Celico Partnership: Concepcion is "broad and clear: a state law that seeks to impose class arbitration despite [a class arbitration waiver is] . . . preempted by[] the FAA, irrespective of whether class arbitration is 'desirable for unrelated reasons.'" The Third Circuit has recognized that some provisions might "prevent[] plaintiffs from vindicating [their] rights" in a bilateral forum. The court indicated in dictum that a cost-and-fee-shifting agreement might prevent plaintiffs from vindicating their rights if the plaintiffs can show with reasonable certainty (1) their costs and (2) their inability to pay.

3. Courts that Preempt Substantive but not Procedural Unconscionability. The Ninth Circuit, which is of unique interest because it was the court Concepcion reversed, has adopted the third approach—emphasizing the need for extreme procedural unconscionability. In Coneff v. AT&T Corp., the Ninth Circuit's broad rule preempting substantive unconscionability tracks the language of the majority opinion in Concepcion. The court stated that "the FAA preempts the [state unconscionability rule] invalidating the class-action waiver," but "gives little guidance [for procedural unconscionability] beyond a recognition of the doctrine's continued vitality." The Ninth Circuit solidified its stance in Kilgore v. KeyBank National Ass'n, expanding Concepcion's preemption of substantive unconscionability outside of the class-action context. In Kilgore, the court held

82. 655 F.3d 225 (3d Cir. 2011).
83. Id. at 231 (citations omitted).
84. Antkowiak v. TaxMasters, 455 F. App'x 156, 160 (3d Cir. 2011).
85. Id. at 160-61.
86. The Seventh Circuit appears to follow the Ninth Circuit. See Gore v. Alltel Commc'n's, LLC, 666 F.3d 1027, 1036 (7th Cir. 2012) (holding that it was for the arbitrator to decide whether the arbitration agreement was procedurally unconscionable).
88. 673 F.3d 1155, 1155 (9th Cir. 2012).
89. Id. at 1160 (stating that the majority in Concepcion, in addressing the dissent, specifically foresaw how its narrow facts could be distinguished and accordingly made the Court's desire for a broad interpretation clear).
90. Id. at 1161.
91. Id.
92. 673 F.3d 947 (9th Cir. 2012).
93. Id. at 961 (noting that Concepcion did not address the issue of public injunctions but does stand for the proposition that state policy based on the substance of the arbitration provision is always preempted by the contrary policy of the FAA).
that the FAA preempted California's common-law unconscionability doctrine that refused to enforce arbitration on claims that require public injunctive relief. The court noted that it was "not free to ignore Concepcion's holding that state public policy cannot trump the FAA when that policy prohibits the arbitration of a 'particular type of claim.'" However, the court examined the strength of the plaintiff's claim for procedural unconscionability at length.

4. The Court that Might Eliminate Unconscionability as a Limit to Arbitration. The United States Court of Appeals for the Sixth Circuit has not expressly addressed the specific issue of unconscionability after the Supreme Court's ruling in Concepcion. However, a brief survey of its district court opinions indicates that the Sixth Circuit might adopt Justice Thomas's suggestion and simply remove unconscionability as a ground for revoking arbitration agreements.

94. Id. at 963.
95. Id.
96. Id. at 963-64. However, it appears that Concepcion has affected the definition of procedural unconscionability, as the court noted mere adhesion will be insufficient if unaccompanied by other factors such as finding the parties were unsophisticated, or lacked sufficient time to read the contract, or the language was inconspicuous.
97. See Reed Elsevier, Inc. v. Crockett, 2012 WL 604305, at *13 (S.D. Ohio 2012) ("Similarly, this Court concludes that classwide arbitration, to the extent manufactured by a rule of contract construction that would render arbitration agreements unconscionable contracts of adhesion if interpreted not to permit class arbitration, would be inconsistent with the FAA."); Porter v. MC Equities, LLC, 2012 WL 3778973, at *5 (N.D. Ohio 2012) ("In Concepcion, the Supreme Court ruled that arbitration agreements must be enforced and that an agreement to disallow class procedures in an arbitration agreement was not a defense to enforcement."); SL Tennessee, LLC v. Ochiai Georgia, LLC, 2011 WL 7154486, at *7 (E.D. Tenn. 2011), aff'd, 2012 WL 381338 (E.D. Tenn. 2012) ("[T]he Court finds that all claims before the Court should be subjected to arbitration pursuant to the arbitration clause contained in the parties' contract.").

Plaintiff also argues that the arbitration clauses are unconscionable and should not be enforced because the clauses substantially limit his rights. This argument, however, conflicts with the federal policy favoring arbitration and the decisions of the United States Supreme Court and Tennessee courts applying the FAA. Accordingly, plaintiff's argument that the arbitration clauses are unconscionable and unenforceable is not well-taken.

Id. On the other hand, the district court opinions in the Fourth Circuit evidence no discernible trend. Compare Rose v. New Day Fin., LLC, 816 F. Supp. 2d 245, 259 (D. Md. 2011) ("That an agreement restricts a party's access to a court does not make it unfair; the arbitration is not inferior to the courtroom."), with AT&T Mobility LLC v. Fisher, 2011 WL 5169349, at *6 (D. Md. 2011) ("[Concepcion] held that the FAA preempts a state court rule conditioning the enforceability of an arbitration agreement on the availability of classwide arbitration procedures. It did not squarely hold that such waivers can never violate public policy or, conversely, that they are always valid.").
C. Eleventh Circuit Post-Concepcion Precedent

In Cruz v. Cingular Wireless, LLC, the Eleventh Circuit began the task of applying Concepcion's ruling. Cruz presented a factual scenario almost identical to Concepcion—a cell phone consumer using unconscionability to challenge a class arbitration waiver. However, the plaintiffs raised two distinguishing points: (1) under their contract, if the class arbitration waiver was held unconscionable then the court must strike the entire arbitration agreement (a blow-up clause); and (2) they had admissible evidence that a class-action waiver would make vindication of their rights practical. The court summarily dismissed the plaintiffs' blow-up clause argument, noting that it simply evidenced the other party's desire to litigate rather than arbitrate a class action, reinforcing the Court's reasoning in Concepcion. The second argument, factual substantiation, required a more lengthy analysis. The plaintiffs provided affidavits from several attorneys stating that the small claims would be cost-prohibitive to pursue, substantiating this by showing that "only 0.000007%" of the customers actually filed a complaint. The court rejected this argument, again reasoning that the plaintiffs had merely substantiated arguments specifically rejected in Concepcion. The court further stated that Concepcion would require strict enforcement of a class arbitration waiver even if it precluded the litigant from vindicating a state substantive right. The court concluded by citing Justice Thomas's opinion that unconscionability is no longer a viable method of challenging an arbitration agreement.

In Pendergast v. Sprint Nextel Corp., the court reaffirmed Cruz v. Cingular Wireless, LLC. The court held that the plaintiff's uncontested evidence that the class-arbitration waiver would render him unable to vindicate his substantive rights was irrelevant. The court stated "The Supreme Court . . . expressly rejected the notion that the

99. 648 F.3d 1205 (11th Cir. 2011).
100. Id. at 1208.
101. Id. at 1213.
102. Id.
103. Id. at 1213-14.
104. Id. at 1214.
105. Id.
106. Id. at 1214-15.
107. Id. at 1215.
108. 691 F.3d 1224 (11th Cir. 2012).
109. 648 F.3d 1205 (11th Cir. 2011).
110. Id. at 1235.
state law should not be preempted because the class action waiver would effectively shield the defendant from liability."\textsuperscript{111} This sweeping language diminished the likelihood of successfully distinguishing \textit{Concepcion} on its facts. Thus, the Eleventh Circuit explicitly rejected the United States Court of Appeals for the First Circuit's approach—fact distinction—and implicitly rejected the Ninth Circuit's approach—procedural unconscionability.\textsuperscript{112} It appeared that the court was ready to hold all unconscionability of arbitration preempted by the FAA.

\section*{IV. \textsc{Legal Reasoning}}

In \textit{Barras}, after affirming the lower court's decision that the gateway provision was properly before the court and noting that the cost-and-fee-shifting agreement would apply to arbitration, the court turned to the question of unconscionability.\textsuperscript{113} The opinion began by noting the Supreme Court's reasons for distinguishing class arbitration from bilateral arbitration, emphasizing class arbitration's higher risk and complexity.\textsuperscript{114} The court noted that the Supreme Court in \textit{AT&T Mobility LLC v. Concepcion}\textsuperscript{115} stated that unconscionability could fall within the FAA saving clause—avoiding preemption.\textsuperscript{116} The court then provided a three-factor analysis based on \textit{Concepcion}, inquiring whether: (1) the provision objectively disfavors arbitration, (2) striking the provision would greatly increase the risk to the defendant, and (3) the provision stems from a subjective judicial prejudice against arbitration.\textsuperscript{117}

However, the court defined each factor in terms of bilateral arbitration.\textsuperscript{118} In the first factor, the court defined "[laws] that disfavor[] arbitration" as any law that favors class arbitration over bilateral

\begin{thebibliography}{9}
\bibitem{111} Id.
\bibitem{112} Id.
\bibitem{113} 685 F.3d at 1275-76.
\bibitem{114} Id. at 1276.
\bibitem{115} 131 S. Ct. 1740 (2011).
\bibitem{116} 648 F.3d at 1277.
\end{thebibliography}

\textsuperscript{117} Although \textit{Concepcion} held that the state law at issue was preempted, it made clear that there are instances wherein a state law may invalidate an arbitration agreement without being preempted by the FAA. Indeed, the phrase "\textit{save upon such grounds as exist at law or in equity for the revocation of any contract}" in § 2 must have meaning. \textit{Id.; see also} 9 U.S.C. § 2 (2006).
\textsuperscript{118} \textit{Barras}, 685 F.3d at 1278.
\textsuperscript{119} \textit{Id.} at 1277-79.
arbitration.119 Similarly, the court defined “increas[ing] [the] risk[] to
defendants” as the possibility of high-stakes class arbitration rather than
bilateral arbitration.120 Lastly, the court defined subjective judicial
hostility against arbitration by distinguishing South Carolina’s rule,
which did not require class arbitration, from California’s rule, which
required the availability of class action in most consumer agree-
ments.121 Thus, all of these factors focus on bilateral arbitration as the
FAA policy mandated by Concepcion.

V. IMPLICATIONS

Barras is the Eleventh Circuit’s “bookend” on the possible interpreta-
tions of AT&T Mobility LLC v. Concepcion;122 in other words, Barras
limits rather than extends the implications of Concepcion. It follows that
the plausible implications of Barras were latent in Concepcion. Because
the most plausible of these implications have been addressed in the
foregoing survey of the circuit-level interpretations of Concepcion,123
this implications section will not explore the possible general impli-
cations of Barras, but rather will attempt two specific goals. The first goal
is to determine how Barras limited the implications of Concepcion in the
Eleventh Circuit. The second goal is to determine how Eleventh Circuit
practitioners and judges can use this limitation to frame a circuit-wide
standard in light of state policies, federal policies, and the language of
Concepcion.

A. How Barras Shapes the Eleventh Circuit’s Future Interpretation of
Concepcion

Eleventh Circuit precedent indicates that some form of the bilateral
arbitration approach will be adopted. Because Cruz v. Cingular Wireless,
LLC124 held that a factually supported argument of exculpation could
not distinguish Concepcion, the Eleventh Circuit does not follow the
Second Circuit’s approach—strictly limiting Concepcion to its facts.125
On the other hand, because Barras held that a substantively unconscio-
nable arbitration provision could be removed without violating the FAA,
it seems that the Eleventh Circuit has declined to adopt the Ninth
Circuit’s view—eliminating substantive unconscionability from the FAA

119. Id. at 1277.
120. Id. at 1278.
121. Id. at 1278-79.
122. 131 S. Ct. 1740 (2011).
123. See subsection III.B.
124. 648 F.3d 1205 (11th Cir. 2011).
125. Compare subsection III.B.1. with subsection III.C.
analysis. However, the court did emphasize that Barras's cost-and-fee-shifting agreement was buried in small print in another portion of the contract and, therefore, would not clearly reveal the provision's import to a reasonable reader. Thus, while making no mention of the Ninth Circuit's procedural unconscionability exception, the court left that door open. Lastly, because the Eleventh Circuit held an arbitration provision unconscionable, it has not adopted Justice Thomas's theory that all unconscionability law surrounding arbitration is preempted.

On the other hand, in Cruz and Pendergast v. Sprint Nextel Corp., the Eleventh Circuit held the FAA preempted any law that would require class arbitration. These holdings, coupled with the emphasis on bilateral arbitration in Barras, strongly indicate that the Eleventh Circuit has adopted some form of the Third Circuit's rule—substantive unconscionability of arbitration provisions is preempted by the FAA unless the provision would inhibit bilateral arbitration. This rule fits well with the facts from Barras, as the agreement shifting all of the arbitration costs to the consumer would certainly inhibit bilateral arbitration. The court points this out when it explains why the provision was unconscionable under state law. The court stated that the cost-and-fee-shifting provision would distort the arbitration proceeding to such a degree that it would interfere with the unbiased, neutral nature presumed in bilateral arbitration. Thus, it appears that the Eleventh Circuit will preempt unconscionability of an arbitration provision unless the provision interferes with bilateral arbitration.

B. A Normative Analysis of How Legal Practitioners and Judges Can Use Barras

1. The Narrow Exception Theory. The Eleventh Circuit should not move toward the narrow exception theory, as that theory fails to

126. Compare section IV with subsection III.B.3.
127. Barras, 685 F.3d at 1280.
128. Id.
129. 691 F.3d 1224 (11th Cir. 2012).
130. Id. at 1236; 648 F.3d at 1215.
131. Barras, 685 F.3d at 1282.
132. Compare subsection III.A. with section IV.
133. This section is a brief normative analysis of each of the four theories. I will limit the treatment of each approach to the cases already addressed in this Note. I do this first, because it is the only feasible manner to address the infinite number of scenarios that could be hypothesized, and second, because I have provided a relatively comprehensive coverage of the most important cases in their respective circuits and these will likely define the legal arguments that will be made in the future.
account for the sweeping nature of Concepcion’s language. For example, the Second Circuit distinguished between the Concepcion plaintiff—who lacked sufficient incentive to vindicate a substantive right—and the plaintiff in In re American Express Merchant’s Litigation (Amex III)134—who lacked ability to vindicate a substantive right.135 However, there is no material difference between its definition of ability and the Supreme Court’s definition of incentive. In Amex III, the Second Circuit defined “inability” as the factual allegation that a plaintiff’s damages would be consumed by requisite expert testimony fees unless spread across multiple plaintiffs.136 In Concepcion, the Supreme Court defined “incentive” as the factual allegation that the plaintiff’s damages would be consumed by requisite attorney fees unless spread across multiple plaintiffs.137 Though Amex III involved a federal statute, the Supreme Court in CompuCredit Corp. v. Greenwood138 foreclosed pitting implied federal policy against FAA policy.139 Thus, the Second Circuit’s attempt to limit Concepcion to its facts has failed to produce a satisfactory explanation of Concepcion’s broad language.

2. The Bilateral Arbitration Limit. The Third Circuit’s approach seems to fit most squarely with Concepcion’s language. The Court clearly did not intend to shut the door on all unconscionability. It mentioned several times, with favor, that unconscionability could be grounds for

134. 667 F.3d 204 (2d Cir. 2012).
135. Id. at 214.
136. Id.
137. Compare Concepcion, 131 S. Ct. at 1761 (Breyer, Ginsburg, Sotomayor & Kagan JJ., dissenting) (“What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?”), with id. at 1753 (“The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system .... But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.”).
139. Id. at 672-73. In Amex III, the court did attempt to distinguish CompuCredit in a footnote. The court made what seems to be a semantic distinction that has no substantive value. The court argued that CompuCredit did not apply because there the plaintiff argued that the federal statute provided a countervailing policy requiring some form of class action, while here the plaintiff argued that the “class arbitration waiver would effectively deprive them of their ability to vindicate their statutory rights.” 667 F.3d at 213 n.5. The Author is unsure exactly what the court understood to be the difference between the two, but this looks like the semantic distinctions dealt with in the text accompanying notes 135-38. It is also interesting that the Amex III judges cited Justice Sotomayor’s concurrence rather than the majority. Justice Sotomayor’s CompuCredit concurrence is especially interesting since Justice Sotomayor had originally been on the Amex III panel before being elevated to the Supreme Court. See Amex III, 667 F.3d at 206 n.2.
revocation under the FAA saving clause. Courts examining these statements almost uniformly agree that less than all unconscionability of arbitration agreements is preempted. When linked with the Court's favorable description of bilateral arbitration and negative portrayal of class arbitration, it seems that bilateral arbitration is what the Court in Concepcion intended to protect.

However, on closer inspection, several challenges to the bilateral arbitration rule undermine its ability to save the doctrine of unconscionability. What is the source of this exception to FAA policy? If it is state law (unconscionability), then it is preempted by the FAA's overarching federal policy to enforce "arbitration agreements . . . according to their terms." If it is the proper interpretation of federal law (FAA policy) then it is not state law, and thus no longer unconscionability, as there is no federal unconscionability law. Thus, the bilateral arbitration rule does not truly save unconscionability. It fails to solve the riddle presented by the Court's parallel claims that unconscionability is still viable under the FAA saving clause and state policy arguments are preempted by the FAA. Thus, bilateral arbitration is facially consistent with both the language and holding of Concepcion, but internally inconsistent.

3. Procedural Unconscionability Alone. The "procedural unconscionability alone" approach states that Concepcion preempted substantive unconscionability but left procedural unconscionability intact. This view, as the last, hangs on the Court's mention of unconscionability as grounds for revocation. It removes the state policy arguments that undergird substantive unconscionability, which appeals to supporters of Justice Thomas's theory because a sufficient degree of procedural unconscionability strikes at mutual assent, an element vital to the formation of a contract.

140. E.g., Concepcion, 131 S. Ct. at 1746.
141. See subsections III.B. & III.C.
142. Concepcion, 131 S. Ct. at 1751-52 (noting that class arbitration is slower, more costly, more risky, and more formal than bilateral arbitration).
143. Id. at 1748 (quoting Volt, 489 U.S. at 478).
144. Friedman, A Pro-Congress Approach, supra note 28, at 53-54.
145. Id. at 65.
146. Concepcion, 131 S. Ct. at 1746.
147. Friedman, A Pro-Congress Approach, supra note 28, at 65.
148. Kilgore v. Key Bank, Nat'l Ass'n, 673 F.3d 947, 956 (9th Cir. 2012).
149. The Author notes that, at heart, the rules of contract formation are based on state policy that does not differ from the doctrine of substantive unconscionability. A contract is a promise that the state will enforce. Every state requires offer, acceptance, and consideration (or a consideration substitute). Consideration is a prime example of states
However, this approach ignores that unconscionability has historically required some degree of substantive unconscionability. It is hard, almost impossible, to determine how state courts are going to be able to develop unconscionability around procedural unconscionability alone without consistently disfavoring certain types of provisions based on their substance, especially consumer arbitration agreements. Thus, rather than providing answers, this doctrine might recreate problems with Concepcion’s bar against laws that implicitly disfavor arbitration.

making a policy/value judgment. A state could enforce promises without consideration. See Nicole Kornet, Contracting in China: Comparative Observations on Freedom of Contract, Contract Formation, Battle of Forms and Standard Form Contracts, 14.1 Elec. J. Comp. L. (May 2010), available at http://www.ejcl.org/141/art141-1.pdf. Thus, states have simply made a value judgment that they do not want to enforce promises without consideration (unless the failure of consideration can be amended by a substitute doctrine, such as promissory estoppel, which at root expresses a state policy). Thus, there is no rigid logical reason to distinguish between the procedural and substantive elements of unconscionability. This, however, does not derail the following analysis, since the FAA was drafted and still exists in a context where the distinctions between formation and unenforceability have legal meaning. See 8 WILLISTON ON CONTRACTS § 18:10.

150. 8 WILLISTON ON CONTRACTS § 18:10 (discussing Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965)).


While the usefulness of the two-pronged analysis and the inconsistency in its application have been criticized, courts have seemingly adopted this formulation as a means of examining particular facts. Often the facts involve analysis of unconscionability in the context of one of the specific provisions of the UCC where it is addressed—for example, section 2-309 notice of termination or section 2-719 contractual limitation of remedy—but not always. In some significant cases, the analysis focuses on overall enforceability under section 2-302, and, it must be stressed, the same analysis is often used in non-UCC cases.

One of the most thorough analyses comes in Resource Management Co. v. Weston Ranch & Livestock Co., where the defendants in an action for specific performance unsuccessfully raised unconscionability by arguing that the conveyance of certain oil and gas royalty rights by contract was unenforceable. The court analyzed both substantive and procedural unconscionability and, specifically, whether there must be a linkage between the two. On the one hand the court stated, “gross disparity in terms, absent evidence of procedural unconscionability, can support a finding of unconscionability.” On the other hand, the court suggested that procedural unconscionability, alone, without “substantive imbalance,” would support a finding of unconscionability but “that would be rare.” In fact, the court correctly pointed out that in such cases other doctrines, such as fraud, misrepresentation, duress, and mistake, are superior “tools” for analyzing validity.

Id. (footnotes omitted).
4. Eliminating Unconscionability. The last approach, eliminating unconscionability as grounds for revocation, has the intellectual appeal of being internally consistent. However, this view is not consistent with the language of Concepcion. Additionally, Justice Thomas's desire for consistency might come at a great cost: the destruction of any meaningful limit on contractual freedom. The elimination of unconscionability in arbitration agreements would naturally encourage drafters to loop as many substantively hard provisions as possible into the arbitration agreement, and it is difficult to imagine what procedural provisions could not be integrated into an arbitration agreement. While the federal courts could limit the definition of "arbitration" under the FAA, this would result in a federal body of judicial precedent to determine what agreements are enforceable. This result is akin to a comprehensive standard preempting federal unconscionability.

VI. CONCLUSION

In summary, no approach is able to solve the AT&T Mobility LLC v. Concepcion riddle fully. However, a balance between the bilateral arbitration exception and the procedural unconscionability rule has the greatest merit. Such a combination provides a federal dictate of substantive unconscionability, while leaving states to determine procedural unconscionability. This seems to track the Court's concern to protect bilateral arbitration without destroying state-based unconscionability standards. It also has the benefit of emphasizing procedural unconscionability—a formation defense as required by Justice Thomas's interpretation of the FAA. Barras laid the precedent for the Eleventh Circuit to adopt such an approach; it is now the task of attorneys to argue it successfully.

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152. Friedman, A Pro-Congress Approach, supra note 28, at 53.
153. Id. at 56.
156. 131 S. Ct. 1740 (2011).