Excerpts from Peter B. Rutledge & Christopher R. Drahozal, "Sticky" Arbitration Clauses?: The Use of Arbitration Clauses after *Concepcion* and *AmEx*, 67 VAND. L. REV. ___ (forthcoming 2014)

I. Introduction

The Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*[1] has been described as a "crushing blow to consumers,"[2] a "disaster for consumer protection,"[3] and "one of the most important and favorable cases for businesses in a very long time."[4] In *Concepcion*, the Court held that the Federal Arbitration Act preempts state court decisions invalidating class arbitration waivers as unconscionable.[5] After *Concepcion*, commentators predicted that every business soon would use an arbitration clause, coupled with a class arbitration waiver, in their standard form contracts to avoid the risk of class actions.[6] A "tsunami"[7] of these arbitral class waivers was coming, such that "[a]fter *Concepcion*, it is only a matter of time before nearly every credit card provider, cell phone company, mail-order business or even every potential employer requires anyone who wants to do business with them to first give up their right to file a class action."[8]

Thereafter, in *American Express Co. v. Italian Colors Restaurant*, the Supreme Court ended pretty much any remaining uncertainty over the enforceability of arbitral class waivers.[9]

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[1] 131 S. Ct. 1740 (2011).

[2] Bob Sullivan, *After High Court Ruling, Firms Divide and Conquer in Consumer Cases*, NBC News (Sept. 21, 2011), *available at* http://redtape.nbcnews.com/_news/2011/09/21/7863184-after-high-court-ruling-firms-divide-and-conquer-in-consumer-cases?lite (quoting Ed Mierzwinski, U.S. Public Interest Research Group).

[3] Bruce D. Greenberg, *A Poor Judicial Product and a Disaster for Consumer Protection: A Lengthy Analysis of* AT&T v. Concepcion (May 5, 2011), *available at* http://appellatelaw-nj.com/a-poor-judicial-product-and-a-disaster-for-consumer-protection-a-lengthy-analysis-of-att-v-concepcion/; *see also* Ian Millhiser, The Supreme Court's One Thousandth Cut Against Consumers (Nov 9, 2010), *available at* http://thinkprogress.org/justice/2010/11/09/176967/att-concepcion/ ("if Concepcion turns out badly it will be a disaster for millions of American consumers and a greenlight for corporate America to scam us all a few dollars at a time").

[4] Adam Liptak, *Supreme Court Allows Contracts That Prohibit Class-Action Arbitration* (Apr. 27, 2011), *available at* http://www.nytimes.com/2011/04/28/business/28bizcourt.html (quoting Brian Fitzpatrick, Vanderbilt University Law School) ("'The decision basically lets companies escape class actions, so long as they do so by means of arbitration agreements,' Brian T. Fitzpatrick, a law professor at Vanderbilt University, said. 'This is a game-changer for businesses.'")

[5] 131 S. Ct. at 1753.

[6] *See, e.g.*, Brian T. Fitzpatrick, *Supreme Court Case Could End Class-Action Suits*, S.F. CHRON. (Nov. 7, 2010), *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/11/06/INA41G6I3I.DTL ("Once given the green light, it is hard to imagine any company would not want its shareholders, consumers and employees to agree to such provisions [arbitration agreements with class waivers]."); Nathan Koppel, *Will Federal Consumer Bureau Ride to the Rescue of Class Actions?*, WSJ LAW BLOG (Apr. 29, 2011), *available at* http://blogs.wsj.com/law/2011/04/29/will-federal-consumer-bureau-ride-to-the-rescue-of-class-actions/ ("Class-action bans are already pretty common in certain industries, such as consumer credit and cell phones, and they are about to become much more common, lawyers say.") ….

[7] Myriam E. Gilles & Gary B. Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 629 (2012).

[8] Ian Millhiser, *Supreme Court Nukes Consumers' Rights In Most Pro-Corporate Decision Since Citizens United*, THINKPROGRESS: JUSTICE (Apr. 27, 2011), *available at* http://thinkprogress.org/justice/2011/04/27/176997/scotus-nukes-consumers/).

[9] 2013 U.S. LEXIS 4700 (June 20, 2013).

In *AmEx*, the Court rejected the argument that an arbitral class waiver was unenforceable because it precluded the plaintiffs from vindicating their federal statutory rights, even though the lack of class relief made it uneconomical for plaintiffs to prove their federal antitrust claim.[10] Commentators quickly decried *AmEx* as an "unmitigated disaster" and the "worst Supreme Court arbitration decision ever,"[11] and predicted "a new rash of companies issuing arbitration clauses that preclude class actions."[12]

Such empirical predictions are based on two, seemingly self-evident, assumptions. First, after *Concepcion* and *AmEx* every business will benefit from using an arbitral class waiver to avoid class actions. Businesses want to avoid class actions, and, on this view, there is no downside to using an arbitral class waiver to accomplish that end….[13] Second, unlike negotiated contracts between sophisticated parties, which may be "sticky" and resistant to change, consumer contracts can be unilaterally — and easily — changed by the business. Gilles makes this assumption explicit as well, stating that "most companies can quickly amend their clauses in response to or anticipation of litigation outcomes, revealing a nimble and adaptive corporate feedback loop."[14]

It has now been more than two years since the decision in *Concepcion*, long enough to evaluate at least preliminarily how contracting practices have changed in response to the decision. In this paper, we present the results of the first empirical study of the extent to which businesses have switched to arbitration after *Concepcion*. As the basis for our study, we examine two samples of franchise agreements: one sample in which we track changes in arbitration clauses since 1999, and a broader sample focusing on changes since 2011, immediately before *Concepcion* was decided. Commentators have strongly urged franchisors, like consumer businesses and employers, to switch to arbitration clauses after *Concepcion.*[15] Indeed, franchise agreements were among the very first types of contracts as to which lawyers first publicized the use of an arbitration clause as a "class action shield" back in the 1990s.[16] Moreover, franchise agreements are a rare example of a type of standard form contract that is

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[10] *Id.* at *18.

[11] Paul Bland, *Worst Supreme Court Arbitration Decision Ever* (June 20, 2013), http://publicjustice.net/blog/worst-supreme-court-arbitration-decision-ever; Jean Sternlight, *American Express Co. v. Italian Colors Restaurant Guts Enforcement of Federal Laws*, ADR Prof Blog (June 20, 2013), http://www.indisputably.org/?p=4750 (same).

[12] Sternlight, *supra* note __.

[13] Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 377 (2005); *see also* Myriam Gilles, *Gutting the Vindication-of-Rights Challenge to Arbitration Agreements*, 81 GEO. WASH. U.L. REV. __ (forthcoming 2013) (ms. at 1) (predicting that "one day soon, some unfortunate transactional lawyer will be the first to be held liable for failing to insert an arbitration clause banning all aggregate claiming in a standard form agreement"); Gilles & Friedman, *supra* note __, at 629 (same).

[14] Myriam Gilles, *Killing Them with Kindness: Examining "Consumer-Friendly" Arbitration Clauses* After AT&T Mobility v. Concepcion, 88 NOTRE DAME L. REV. 825, 846 (2012); *see also* Jean R. Sternlight, *Tsunami:* AT&T Mobility v. Concepcion *Impedes Access to Justice*, 90 ORE. L. REV. 703, 718 (2012) ("For companies that fear being sued in class actions it will be quite easy to insert class action waivers into small-print documents or online provisions that they send or make available to their customers or employees.").

[15] Anthony J. Calamunci, *Concepcion v. AT&T: Its Impact on Franchise Law* (June 15, 2001), http://www.lexology.com/library/detail.aspx?g=bc0de932-81a5-4356-a25d-41d69083f3eb ("*Concepcion*, when applied to franchise agreements, grants franchisors the authority to draft much stronger language even when the agreement is offered as a "take-it or leave-it" …. Franchisors should contact counsel and sharpen their pencils. If there was ever a time to test the boundaries of the fine print, the time is now!") ….

[16] Edward Wood Dunham, *The Arbitration Clause as Class Action Shield*, 16 FRANCHISE L.J. 141, 141 (1997).

publicly available in a systematic way and for which a reasonably lengthy history of contracting practices is available. While our results necessarily are limited to franchise agreements and may not be generalizable to consumer and employment contracts, they nonetheless provide valuable evidence on how businesses are responding to *Concepcion*.[17]

Our central finding is consistent across both samples of franchise agreements: that the predicted tsunami of arbitral class waivers has not occurred. The use of arbitration clauses in franchise agreements has increased since *Concepcion*, but not dramatically, and most franchisors have not switched to arbitration. The reason is not that all franchisors were already using arbitration before *Concepcion*.[18] Indeed, less than half of franchisors used arbitration clauses in their standard form contracts immediately prior to *Concepcion*.[19] There was plenty of room for franchisors to switch to arbitration, but they have not done so in any substantial way.

Given our finding that only a handful of franchisors have switched to arbitration clauses since *Concepcion*, the next question is "why not"? We examine the assumptions underlying the predictions of a tsunami of arbitration clauses — that there is no reason for a business not to use an arbitral class waiver and that businesses readily and costlessly can and will modify their form contracts — and find reason to question both. By using an arbitration clause, businesses do more than simply contract out of class actions: they contract for a bundle of dispute resolution services, including, for example, a very limited right to appeal. For businesses that perceive themselves as unlikely to be sued in a class action (and hence to receive little benefit from an arbitral class waiver), the other services bundled with the waiver of class actions may discourage them from using an arbitration clause. In addition, even standard form contracts might be sticky — i.e., resistant to change even if change might be in the business's best interest. We find empirical support for both possible explanations for why many businesses have not begun using arbitration clauses after *Concepcion*.[20]

We then consider the potential implications of *AmEx* for the future use of arbitration clauses. Of course, if all businesses switched to arbitration because of *Concepcion*, *AmEx* likely would have little additional effect. But given our finding that such a switch has not occurred, the question then is how *AmEx* is likely to affect contracting behavior. To the extent businesses have not switched to arbitration clauses because of any residual uncertainty over the enforceability of arbitral class waivers, *AmEx* removes that uncertainty. The expected result would be an increased use of arbitration clauses. But *AmEx* does not make arbitration more attractive to businesses that do not use arbitral class waivers because of other characteristics of

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[17] Anecdotal evidence suggests that in some industries there has been a stronger shift toward arbitration since *Concepcion*. Thus, Microsoft, Sony, and other software and online companies have announced since *Concepcion* that they were adopting arbitration clauses in their end user license agreements. We seek to reconcile these anecdotal reports with our empirical findings later in the paper. *See infra* text accompanying notes __-__.

[18] By comparison, the limited empirical evidence on the use of arbitration clauses by mobile wireless services providers suggests that almost all facilities-based operators already use arbitration clauses, in which case of course one would not expect a major move toward arbitration by such businesses. *See* Erin O'Hara O'Connor & Christopher R. Drahozal, *Carve-Outs and Contractual Procedure* (June 14, 2013) (ms. at 35).

[19] *See supra* text accompanying notes __-__; *see also* Christopher R. Drahozal, *"Unfair" Arbitration Clauses,* 2001 U. ILL. L. REV. 695, 727; Christopher R. Drahozal & Quentin R. Wittrock, *Is There a Flight from Arbitration?*, 37 HOFSTRA L. REV. 71, 95 (2008).

[20] For other possible reasons, see *infra* text accompanying notes __-__.

arbitration (such as the limited right to appeal). To the extent such bundling costs deter the use of arbitral class waivers, we still would not expect all or most businesses to switch to arbitration. Likewise, to the extent contract stickiness explains the limited switch to arbitration, *AmEx* likewise still will have limited effect.

That said, *AmEx* might actually make an alternative to arbitral class waivers — what we call non-arbitral class waivers — more attractive than before. By non-arbitral class waivers, we mean waivers of class actions that are not part of an arbitration clause. The parties remain in court but by contract seek to waive class actions directly. Although such clauses are not nearly as common as arbitral class waivers, they do exist.[21] Although on its facts *AmEx* addresses the enforceability of arbitral class waivers, much of the Court's reasoning applies as well to non-arbitral class waivers. Indeed, in our view *AmEx* is better understood not as a case about arbitration clauses, but as a case about class actions, and if read broadly, could be construed as making class actions waiveable even without the use of an arbitration clause. The advantage of non-arbitral class waivers for businesses is that they avoid the bundling costs of an arbitral class waiver: the business can avoid class actions but otherwise have disputes resolved in court (maintaining full appeal rights, for example). Of course, even after *AmEx* much legal uncertainty remains about the enforceability of non-arbitral class waivers, and we certainly do not predict a "tsunami" of non-arbitral class waivers. But on this broad interpretation, *AmEx* on the margin increases the attractiveness of non-arbitral class waivers and might result in some increase in their use.

The implications of this paper are several fold. First, and most obviously, it calls into question some of the empirical predictions following *Concepcion* and *AmEx*. So far, at least, it is not the case that all or even most businesses are switching to arbitration clauses after *Concepcion*….

Second, the paper cautions against unquestioning acceptance of the common "parade-of-horribles" arguments marshaled in courtrooms around the nation, including the Supreme Court of the United States…. Parade-of-horribles arguments, in whatever context, ultimately entail predictions about human (or firm) behavior. At the time they are advanced, those predictions should have some empirical foundation. Yet often they do not. Moreover, after the court decides the case, it should be possible to test whether the predictions proved true. Yet often such predictions are never tested. Not only does this state of affairs sully the quality of legal argument, it entails the risk that a court may render a decision on the basis of a flawed empirical premise.

Third, the paper adds to our understanding of the nature of arbitration as a means of resolving disputes. An arbitration clause is an agreement to a bundle of dispute resolution services — a party-appointed judge, less discovery, a limited right to appeal, and the like. Litigation provides its own bundle of services. While parties can modify the bundles by contract, there are limits. For some parties, all aspects of the arbitral bundle may be preferable to all aspects of the litigation bundle. For others, some characteristics of the arbitral bundle may be advantageous while others are not, but the advantages outweigh the disadvantages. But for still others, the disadvantages may outweigh the advantages of arbitration — even if one of those

[21] *See infra* text accompanying notes __-__.

advantages is avoiding class actions. Stated otherwise, one cannot assume that parties will choose arbitration on the basis of only one characteristic without considering the entire bundle.

Fourth, this paper provides insights into the nature of contract change and innovation. Specifically, it draws on prior scholars' work about why, under certain circumstances, contract terms are "sticky" — that is, parties are reluctant to modify their contracting behavior even when it might be beneficial for them to do so. We examine several explanations for why contracting parties do not necessarily adopt terms that would be to their benefit, and consider how those explanations apply, if at all, when the contracts involve parties occupying unequal bargaining positions. There certainly is reason to expect some degree of stickiness in franchise agreements, and we find some evidence of stickiness in the contracts we studied. But the evidence does not exclude the possibility of other explanations for the lack of a shift to arbitration by franchisors, such as the bundling theory suggested above. This paper also gives reason to question whether a Supreme Court decision upholding a particular contract provision necessarily is a sufficient "shock" to overcome contract stickiness.

Finally, fifth, we offer a first look at how the Supreme Court's recent decision in *AmEx* might affect contracting behavior. Although on its facts *AmEx* involves the enforceability of an arbitral class waiver, the Court's reasoning would extend as well to non-arbitral class waivers. Indeed, the decision could be read as making all waivers of class actions enforceable, at least as to certain federal statutory claims. Unlike arbitral class waivers, non-arbitral class waivers likely are still subject to state unconscionability challenges (since *Concepcion* is based on preemption of such challenges by the Federal Arbitration Act and therefore is limited to arbitral class waivers). But for businesses that want to avoid the bundling costs of arbitration (e.g., retain the right to appeal in court), non-arbitral class waivers would become more attractive after *AmEx*.

Part II of the paper provides background on the use of arbitration clauses as class action waivers and on the *Concepcion* and *AmEx* decisions. Part III discusses the economics of arbitration and standard form contracts, considering both arbitration as a bundle of dispute resolution services and the "stickiness" of contract terms. Part IV describes our data and methodology and presents our empirical analysis. Part V examines possible implications of *AmEx* for the use of arbitral and non-arbitral class waivers. Finally, Part VI summarizes our conclusions and sets out the implications of our empirical findings.

II. Background: *Concepcion*, *AmEx*, and the Use of Arbitration Clauses

We begin with terminology and some history. Although many of the cases and much of the commentary speak generically of "class action waivers," here we use more precise labels. Technically, provisions addressing class relief in arbitration clauses are class *arbitration* waivers, not class action waivers.[22] The arbitration clause itself has the effect of avoiding class relief in

[22] Although sometimes an arbitration agreement will include non-arbitral class waiver in the event the arbitration clause is invalidated. David A. Hoffman, *Whither Bespoke Procedure?*, 2014 U. ILL. L. REV. ___ (manuscript at 29-30).

court because the parties have agreed to arbitrate any dispute instead.[23] The additional waiver language precludes the arbitration from proceeding on a class basis, hence the "class arbitration waiver" label.

In this paper, we refer to the combined effect of an arbitration clause and a class arbitration waiver as an "arbitral class waiver."[24] By comparison, we use the term "non-arbitral class waiver" to refer to contract provisions that seek to waive the availability of a class action in court without using an arbitration clause. Such provisions are much less common but do exist, particularly in the franchise setting.[25] Finally, we refer to both types of provisions collectively as class action waivers.[26]

Because the history of arbitral class waivers has been detailed at length elsewhere,[27] we provide only a brief overview here. We … discuss *Concepcion* itself in sub-part B. Finally, in sub-part C we consider the *AmEx* case and its importance for the enforceability of class action waivers.

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B. *AT&T Mobility LLC v. Concepcion* and FAA Preemption

The Concepcions were cell phone customers of AT&T Mobility (AT&T), who were charged sales tax on what AT&T advertised as a "free" phone.[28] The AT&T cell phone agreement included an arbitration clause with a class arbitration waiver, but also provided that AT&T was to pay all the customer's arbitration costs for non-frivolous claims; AT&T could not seek to recover its attorney's fees from the customer; and if the customer recovered more in arbitration than AT&T's final written settlement offer, the customer would receive a minimum of $7500 (a so-called "bonus payment") plus double attorneys' fees.[29]

When the Concepcions filed a class action on behalf of all similarly situated cell phone customers, AT&T filed a petition to compel arbitration. The trial court and Ninth Circuit held that, under California law, the class arbitration waiver was unconscionable and not severable

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[23] *See, e.g.,* Ex Parte Green Tree Fin'l Corp., 723 So. 2d 6, 10 & n.3 (Ala. 1998); Zawikowski v. Beneficial Nat'l Bank, 1999 U.S. Dist. LEXIS 514 (N.D. Ill. Jan. 7, 1999); Collins v. International Dairy Queen, Inc., 169 F.R.D. 690, 694 (M.D. Ga. 1997); Hunt v. Up North Plastics, 980 F. Supp. 1046, 1048 (D. Minn. 1997).

[24] For prior uses of the phrase, see, *e.g.*, Maureen A. Weston, *The Death of Class Arbitration After Concepcion?*, 60 KAN. L. REV. 767, 786 (2012); *see also* Sternlight, *supra* note __ ("arbitral class action waiver").

[25] *See infra* text accompanying notes __-__.

[26] Gilles uses the term "collective action waiver" to the same effect. Gilles, *supra* note __, at 375-76; *see also* Christopher R. Drahozal & Quentin R. Wittrock, *Franchising, Arbitration, and the Future of the Class Action*, 3 ENTREPRENEURIAL BUSINESS L.J. 276, 270-80 (2009)

[27] *See, e.g.*, Drahozal & Wittrock, *supra* note __, at 284-87; Jill I. Gross, AT&T Mobility *and the Future of Small Claims Arbitration*, 42 SW. L. REV. 47, 51-56 (2012); Sternlight, *supra* note __, at 705-07; Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000).

[28] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1744 (2011).

[29] *Id.*

from the rest of the arbitration clause.[30] The lower courts also concluded that the FAA did not preempt the California unconscionability doctrine.[31]

The Supreme Court reversed, holding that the application of state unconscionability doctrine to invalidate an arbitral class waiver was preempted. The Court began by explaining that while the savings clause of FAA Section 2 permitted the use of general state contract defenses to invalidate arbitration clauses, such use was not unlimited. Citing dicta from two prior decisions, the Court reiterated that "a court may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what ... the state legislature cannot.'"[32] The Court continued:

> An obvious illustration of this point would be a case finding unconscionable or unenforceable as against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery….
>
> Other examples are easy to imagine. The same argument might apply to a rule classifying as unconscionable arbitration agreements that fail to abide by the Federal Rules of Evidence, or that disallow an ultimate disposition by a jury (perhaps termed "a panel of twelve lay arbitrators" to help avoid preemption). [33]

Application of state unconscionability doctrine effectively to require class arbitration, the Court concluded, likewise "[i]nterfered with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[34]

Not surprisingly, the decision in *Concepcion* has been extremely controversial and widely criticized.[35] Although a handful of courts have sought to limit the decision to its facts — i.e., to arbitration clauses with a "bonus provision" and other sorts of pro-consumer provisions that the AT&T clause had[36] — most have not done so.[37] On the first anniversary of the *Concepcion*

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[30] Laster v. T-Mobile USA, Inc., 2008 U.S. Dist. LEXIS 103712 (S.D. Cal. Aug. 11, 2008), *aff'd sub. nom.*, Laster v. AT&T Mobility LLC, 584 F.3d 849, 2009 U.S. App. LEXIS 23599 (9th Cir. Cal., 2009), *rev'd sub nom.*, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).
[31] *E.g.*, *Laster*, 584 F.3d at 857-59.
[32] 131 S. Ct. at 1746 (citing Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 687 (1996); Perry v. Thomas, 482 U.S. 483, 492-493, n. 9 (1987)).
[33] *Id.* at 1747.
[34] *Id.* at 1748. According to the Court, class arbitration is "inconsistent with the FAA" because (1) "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"; (2) "class arbitration requires procedural formality"; and (3) "class arbitration greatly increases risks to defendants." *Id.* at 1751-53.
[35] *See supra* text accompanying notes __-__.
[36] *See, e.g.,* Bellows v. Midland Credit Mgmt., Inc., 2011 U.S. Dist. LEXIS 48237, at *11 (S.D. Cal. May 4, 2011); Day v. Persels & Assocs., LLC, 2011 U.S. Dist. LEXIS 49231, at *15-*16 (M.D. Fla. May 9, 2011); Zarandi v. Alliance Data Sys. Corp., 2011 U.S. Dist. LEXIS 54602, at *4-*5 (C.D. Cal. May 9, 2011).
[37] *See*, *e.g.*, Feeney v. Dell, Inc., 2011 Mass. Super. LEXIS 202, at *26-*30 (Mass. Super. Ct. 2011) (distinguishing *Concepcion* on ground that unlike the AT&T Mobility clause in *Concepcion*, "[t]he Dell Arbitration Clause provides no incentives and simply requires arbitration of all disputes, even those that could not possibly justify the expense in light of the amount in controversy"), *aff'd*, 2013 Mass. LEXIS 462 (Mass. June 12, 2013).

decision, in April 2012, Public Citizen "reported that 76 court decisions had applied *Concepcion* to stay or dismiss a putative class action."[38] Courts have applied *Concepcion* to uphold arbitral class waivers in a variety of contracting contexts, including franchise agreements.[39]

After *Concepcion*, plaintiffs continued to challenge the enforceability of arbitral class waivers on the ground that the lack of class relief precluded the plaintiffs from vindicating their rights under a particular federal statute (so-called "vindication of statutory rights" challenges). Building on dicta in a number of Supreme Court arbitration cases, plaintiffs challenged arbitration agreements on the ground that the arbitration clause amounted to an impermissible prospective waiver of a statutory right and hence was unenforceable.[40] In simple terms, the argument is that if parties cannot waive a statutory right directly,[41] they should not be able to do so indirectly — by using an unfair arbitration clause. A common basis for a vindication of statutory rights challenge is that that the upfront costs of arbitration are too high.[42] But the challenge was made against other provisions of arbitration clauses as well, and after *Concepcion* it became the primary basis for challenging arbitral class waivers.

C. *American Express Co. v. Italian Colors Restaurant* and the Vindication of Federal Statutory Rights

The vindication of statutory rights theory — as applied to class waivers — reached the Supreme Court in *American Express Co. v. Italian Colors Restaurant*.[43] The plaintiffs in *AmEx* were merchants that accepted American Express charge cards. They brought a class action alleging that the sales and pricing practices of American Express violated the federal antitrust laws. The agreement between American Express and the merchants included an arbitration clause with a class arbitration waiver, and American Express sought to compel individual arbitration of the plaintiffs' claims. The merchants opposed individual arbitration on the ground that proof of their antitrust claim was so expensive that the claim could only be brought economically as a class action. Enforcing the arbitral class waiver would prevent them from effectively vindicating their statutory rights under the antitrust laws.

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[38] Public Citizen & National Association of Consumer Advocates, Justice Denied One Year Later: The Harms to Consumers from the Supreme Court's Concepcion Decision Are Plainly Evident 4 (April 2012) ("identify[ing] 76 potential class action cases where judges cited Concepcion and held that class action bans within arbitration clauses were enforceable").

[39] *See, e.g.*, Muriithi v. Shuttle Express, 712 F.3d 173 (4th Cir. 2013); Green v. SuperShuttle Int'l, Inc., 653 F.3d 766 (8th Cir. 2011); Villano et al v. TD Bank, 2012 U.S. Dist. LEXIS 123013, at *8 (D.N.J. Aug. 29, 2012); Kairy v. SuperShuttle Int'l, Inc., 2012 U.S. Dist. LEXIS 134945 (Sept. 20, 2012).

[40] *E.g.*, Green Tree Financial Corp.-Ala. v. Randolph, 531 U. S. 79, 90 (2000) ("It may well be that the existence of large arbitration costs could preclude a litigant ... from effectively vindicating her federal statutory rights"); *see also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 637 (1985) ("And so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.").

[41] By a "direct" waiver of a statutory right, we mean a contract provision that says something like "the parties agree to waive any claim under the federal antitrust laws."

[42] *E.g.*, *Green Tree*, 531 U.S. at 90.

[43] 2013 U.S. LEXIS 4700 (June 20, 2013).

The district court granted the motion to compel arbitration, but the Second Circuit reversed, holding that the class arbitration waiver was unenforceable.[44] After reconsidering its decision in light of both *Stolt-Nielsen S.A. v. AnimalFeeds Int'l, Inc.* and *AT&T Mobility LLC v. Concepcion*, the Second Circuit reaffirmed its decision.[45] The Supreme Court granted certiorari and reversed.[46]

The Court's reasoning was twofold. First, the Court recited that the FAA requires enforcement of arbitration clauses, and found "[n]o contrary congressional command [that] requires us to reject the waiver of class arbitration here."[47] Nothing in the antitrust laws (which, the Court pointed out, were enacted before adoption of the Federal Rules of Civil Procedure) precludes the waiver of class actions. "Nor does congressional approval of Rule 23," the Court stated, "establish an entitlement to class proceedings for the vindication of statutory rights."[48]

As for the argument that the arbitral class waiver prevented the plaintiffs from vindicating their federal statutory rights, the Court noted that it had only recognized the argument in dicta. Here, too, even assuming such a challenge was available, the Court found it unavailing:

> [T]he exception finds its origin in the desire to prevent "prospective waiver of a party's right to pursue statutory remedies." That would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable. The class-action waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties' right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938. Or, to put it differently, the individual suit that was considered adequate to assure "effective vindication" of a federal right before adoption of class-action procedures did not suddenly become "ineffective vindication" upon their adoption.[49]

By rejecting the vindication of statutory rights challenge here, *AmEx* resolved most of the remaining legal uncertainty over the enforceability of arbitral class waivers, at least pending future statutory or regulatory developments.[50] We discuss possible implications of the decision for non-arbitral class waivers below.[51]

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[44] In re American Express Merchants' Litigation, 554 F. 3d 300, 315-16 (2d Cir. 2009).
[45] Italian Colors Rest. v. Am. Express Travel Related Servs. Co. (In re Am. Express Merchs. Litig.), 667 F.3d 204 (2d Cir. 2012); In re American Express Merchants' Litigation, 634 F. 3d 187, 200 (CA2 2011).
[46] 2013 U.S. LEXIS 4700 (June 20, 2013).
[47] *Id.* at *9.
[48] *Id.* at *10.
[49] *Id.* at *12-*14.
[50] Congress might enact legislation restricting the enforceability of arbitral class waivers, although the prospects of any statutory change are slight. In addition, the Consumer Financial Protection Bureau has authority to regulate arbitration clauses in consumer financial services contracts under Section 1028(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act. *See* 12 U.S.C. 5518(b).
[51] *See infra* Part IV(A).

V. *AmEx* and Non-Arbitral Class Waivers

Commentators have predicted that *AmEx* will result in a new "rash" of businesses switching to arbitration clauses to avoid class actions.[52] Of course, if all businesses already had adopted arbitration clauses after *Concepcion*, *AmEx* would have no additional effect on contracting behavior. Given our finding that such a switch has not occurred, the likely effect of *AmEx* remains open.

It is too soon to present empirical evidence on the extent to which businesses switched to arbitration after *AmEx*. Instead, we offer some thoughts on the legal implications of the decision and how those implications might affect future contracting behavior.

A. Legal Implications of *AmEx* for Class Waivers

In *AmEx*, the Supreme Court held an arbitral class waiver enforceable even though the lack of class relief made it uneconomical to pursue a federal antitrust claim.[53] By foreclosing what appears to be the last major court challenge to arbitral class waivers after *Concepcion*, the Court in *AmEx* reduced if not eliminated any residual legal uncertainty about their enforceability.

In addition, the dissent in *AmEx*, perhaps inadvertently, rejected a variation on the vindication of statutory rights challenge. Some courts, typically state courts, had extended the theory to rights arising out of state statutes, rather than limiting it to federal statutory rights. For example, in *Dell, Inc. v. Feeney*, the Massachusetts Supreme Court refused to limit the vindication of statutory rights doctrine to federal statutory rights, instead holding that it applied to state statutory rights as well.[54] Justice Kagan's dissent in *AmEx*, however, made clear that such analysis is erroneous:

> When a state rule allegedly conflicts with the FAA, we apply standard preemption principles, asking whether the state law frustrates the FAA's purposes and objectives. If the state rule does so — as the Court found in *AT&T Mobility*—the Supremacy Clause requires its invalidation. We have no earthly interest (quite the contrary) in vindicating that law. Our effective-vindication rule comes into play only when the FAA is alleged to conflict with another *federal* law, like the Sherman Act here. In that all-federal context, one law does not automatically bow to the other, and the effective vindication rule serves as a way to reconcile any tension between them.[55]

Given that even the *AmEx* dissenters would have limited the vindication of statutory rights doctrine to federal statutory rights, cases like *Feeney* would seem to be no longer good law.

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[52] *See supra* text accompanying notes __-__.
[53] American Express Co. v. Italian Colors Restaurant, 2013 U.S. LEXIS 4700, at *10 (June 20, 2013).
[54] Feeney v. Dell Inc., 2013 Mass. LEXIS 462, at *45-*46 (Mass. June 12, 2013).
[55] *AmEx*, 2013 U.S. LEXIS at *42-*43 (Kagan, J., dissenting).

Finally, while on its facts *AmEx* deals with an arbitral class waiver, the decision might also increase the likelihood that courts will enforce non-arbitral class waivers.[56] Stated otherwise, although the decision has been criticized as the "worst Supreme Court arbitration decision ever,"[57] arguably it is a class action decision more than an arbitration decision.

Most of the reasoning of the Court in *AmEx* applies to non-arbitral class waivers as well as arbitral class waivers. Thus, as the Court points out, the vindication of statutory rights doctrine essentially is an application of the bar on prospective waivers of statutory rights.[58] If parties cannot directly waive a statutory right, they also cannot do so indirectly by using an unfair arbitration clause.[59] The Court then goes on to hold that an arbitral class waiver does not amount to a prospective waiver of a statutory right because "the class-action waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties' right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938."[60] Nothing in that analysis depends in any way on the fact that the class waiver used an arbitration clause. Rather, central to the Court's analysis seems to be that at the time Congress enacted the antitrust laws class actions under the Federal Rules of Civil Procedure had not yet been adopted, an argument that would apply as well to non-arbitral class waivers.[61]

Clearly any effect of *AmEx* on the enforceability of non-arbitral class waivers would only be dicta because *AmEx* on its facts involved an arbitral class wavier. Moreover, the Court relies on the FAA and its own prior arbitration cases at various points in the opinion. Thus, the Court later explained that the "the FAA does, contrary to the dissent's assertion, favor the absence of litigation when that is the consequence of a class-action waiver, since its 'principal purpose' is the enforcement of arbitration agreements according to their terms."[62] And the framework the Court applies to reconciling the FAA and the antitrust laws is its usual framework for analyzing whether a federal statute makes a particular statutory claim nonarbitrable.[63] That said, there is at least an argument that the decision in *AmEx* enhances the enforceability of both arbitral and non-arbitral class waivers.

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[56] As noted above, courts currently are split on the enforceability of non-arbitral class waivers. *See supra* text accompanying notes __-__.

[57] Paul Bland, *Worst Supreme Court Arbitration Decision Ever* (June 20, 2013), http://publicjustice.net/blog/worst-supreme-court-arbitration-decision-ever; Jean Sternlight, *American Express Co. v. Italian Colors Restaurant Guts Enforcement of Federal Laws*, ADR Prof Blog (June 20, 2013), http://www.indisputably.org/?p=4750 (same).

[58] 2013 U.S. LEXIS at *11.

[59] As the Court explains in *AmEx*: "That would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." *Id.* at *13.

[60] *Id.* at *13. "Or, to put it differently, the individual suit that was considered adequate to assure 'effective vindication' of a federal right before adoption of class-action procedures did not suddenly become 'ineffective vindication' upon their adoption." *Id.* at *14.

[61] On this view, an open question after *AmEx* is how to deal with a statutory right arising out of a federal statute enacted after the creation of class action procedures under the Federal Rules — particularly the adoption of the current version of Federal Rule of Civil Procedure 23 in 1966. For arbitral class waivers, the Court's analysis suggests that it would use its general framework for non-arbitrability. *See id.* at *8-*10. But that framework presumably would not apply, at least not directly, to non-arbitral class waivers.

[62] *Id.* at *17-*18 n.5.

[63] *Id.* at *8-*10.