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IT TAKES TWO TO TANGO: THE DANCE OF THE UNITED STATES SUPREME COURT JURISPRUDENCE ON ARBITRATION ENFORCEMENT AND OHIO LAW

Ann Marie Tracey* and Kathleen McGarvey Hidy**

I. INTRODUCTION

New limits the U.S. Supreme Court has imposed on collective action, state law arbitration exclusions, and the availability of a judicial forum for resolving statutory claims have dramatically altered the dispute resolution landscape.¹ This jurisprudence stands in stark contrast to previous rulings. Where once the Court staunchly guarded the right to a judicial forum for a statutory claim like a civil rights violation, it now dismisses this right in the presence of an arbitration clause.² Where the Court previously frowned upon a prospective waiver of a right to litigate,³ such a waiver now makes arbitration the exclusive remedy if and when a claim eventually arises.⁴ Where the Court formerly permitted class actions as vehicles to prosecute and effectively vindicate collective claims, it now allows an arbitration clause to trump the right to bring a class action in court.

In step with the Court’s decisions, businesses have modified all types of contracts to include individual arbitration agreements as the parties’ exclusive remedy,⁵ sometimes leaving the consumer without recourse to

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5. These clauses are so ubiquitous that “it has become increasingly difficult to apply for a credit card, use a cellphone, get cable or Internet service, or shop online without agreeing to private arbitration.” Jessica Silver-Greenberg & Robert Gebeloff, Arbitration Everywhere, Stacking the Deck of Justice, N.Y. TIMES (Oct. 31, 2015), http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html. This is also true in the areas of employment or car rental. Id. One hundred percent of cell phone contracts contain an arbitration clause. Ann Marie Tracey & Shelley McGill, Supreme Court – October Term 2010: Seeking a Rational Lawyer for Consumer Claim After the Supreme Court Disconnects Consumers in AT&T Mobility LLC v. Concepcion, 45 LOY. L.A. L. REV. 435, 465 n.179 (2012) [hereinafter Seeking a Rational Lawyer].

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other market players who do not follow suit. The arbitration agreements extend their reach to include statutory claims (such as discrimination claims), requiring the parties to forego relief from a judicial forum. These contractual provisions dictate that arbitration will resolve all matters arising from the relationship that formed the basis for the contract with finality, and can even extend to claims of wrongful death and rape. Aggrieved parties are stripped of their ability to pursue claims through a class action in arbitration agreements banning collective action. Further, arbitration agreements contain confidentiality clauses in both consumer and business contracts, thus prohibiting similarly situated claimants from sharing information, experts, or costs. Some clauses contain stipulations likely to influence the outcome, such as requiring the arbitrators to be Christian, or even requiring that a dispute involving a former Scientology member be heard by a panel of Scientologists. Others require that the Bible, not law, guide the arbitration.

These developments in contracts have skewed dispute resolution soundly in favor of business. As Justice Ruth Bader Ginsburg noted in her dissent in DIRECTV, Inc. v. Imburgia, "this Court has again expanded the scope of the [Federal Arbitration Act], further degrading the rights of consumers and further insulating already powerful economic entities from liability for unlawful acts." As one federal judge observed, the proliferation of arbitration agreements "is among the most profound shifts in our legal history," with business ominously having "a good chance of opting out of the legal system altogether and misbehaving without reproach." Especially for small claims, it is not worth it for consumers to pursue individual arbitration, and few do.

6. For a discussion of the disparate bargaining power between consumers and business, see Seeking a Rational Lawyer, supra note 5, at 461-62.
7. Silver-Greenberg & Gebeloff, supra note 5.
8. Id. According to these authors, "[b]y banning class actions, companies have essentially disabled consumer challenges to practices like predatory lending, wage theft and discrimination." Id.
9. See generally Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) (upholding a class action waiver even though the contract at issue prohibited such sharing, making individual action effectively cost prohibitive). For the impact of such contract restrictions with respect to the ability to obtain an effective remedy, see Shelley McGill & Ann Marie Tracey, The Next Chapter: Revisiting the Policy in Favor of Arbitration in the Context of Effective Vindication of Statutory Claims, 31 ARIZ. J. INT'L & COMP. L. 547, 561 (2014) [hereinafter The Next Chapter].
11. Id.
13. Silver-Greenberg & Gebeloff, supra note 5.
14. A New York Times study "found that from 2010 to 2014, only 505 consumers went to arbitration over a dispute of $2,500 or less." Adam Liptak, Supreme Court Upholds Arbitration in
Likewise, lawyers are not willing to pursue small claims absent a critical mass of plaintiffs.  

Recent Supreme Court decisions and the corresponding explosion of arbitration agreements have ushered in new questions and uncertainties about the application of the laws of Ohio and other states in arbitration disputes. Because of these developments, whether and to what extent state law contract defenses grounded in law and equity, and provided for under both the Federal Arbitration Act (FAA) and the Ohio Arbitration Act, remain available avenues to defeat arbitration agreements is a question that must now be addressed by the courts. Another important question is whether the FAA’s supremacy falters where public policy considerations and state law, such as the Ohio Consumer Sales Practices Act (CSPA), potentially temper arbitration enforcement.

The answers to these questions lie in the FAA, which is discussed at length in Part II, and three Supreme Court decisions, 14 Penn Plaza, LLC v. Pyett, AT&T Mobility, LLC v. Concepcion, and American Express Company v. Italian Colors Restaurant. Each of these cases is addressed individually in Part III. Part IV of this Article examines how the Supreme Court’s jurisprudence has an impact on Ohio jurisprudence. Finally, Part V of this Article explores whether the Court’s newest decision enforcing arbitration agreements, DIRECTV, Inc. v. Imburgia, may displace Ohio contract and statutory laws that safeguard the rights of contracting parties.

II. THE FAA: CONGRESS BOWS TO THE COMMON LAW OF CONTRACTS

A judicial hostility for enforcing arbitration agreements prompted Congress to enact the FAA in 1925. The FAA is backed by a strong federal policy to encourage arbitration. It mandates that courts enforce


15. In AT&T Mobility LLC v. Concepcion, the Supreme Court upheld a class action waiver in an arbitration agreement. See 563 U.S. 333 (2011). As Justice Stephen Breyer noted in his dissent, “[w]hat rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?” Id. at 365 (Breyer, J., dissenting.)

17. OHIO REV. CODE ANN. ch. 2711.
18. OHIO REV. CODE ANN. §§ 1345.01-.13 (West 2012).
23. Concepcion, 563 U.S. at 339.
24. This is expressed in the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2012). For a discussion of this policy in the context of statutory and public interest claims brought by merchants in American
the agreements of parties to arbitrate disputes, and provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." As federal substantive law regarding arbitration extends to both federal and state courts, state courts similarly must enforce arbitration agreements when appropriate. Pursuant to the FAA, federal and state courts examine threshold issues that include the authority of an arbitrator, and whether an arbitration agreement is enforceable with respect to a particular kind of dispute.

Both the policy behind the passage of the FAA and the language Congress embedded in the statute dictate that state contract law be enforced consistently with the contract’s terms and the intent of the parties. Enforceability and revocation of arbitration agreements revolve around "defenses at law or equity" that state common law governs. Such common law contract defenses traditionally have provoked questions on how courts should view disparity of power, unconscionability, and the inability to effectively vindicate claims. This understanding of rooting judicial interpretation of arbitration agreements in the common law of contracts may be undercut by the Supreme Court’s recent jurisprudence on enforceability of arbitration agreements in varying contexts.

When defenses at law or equity come into play, the enforceability of an arbitration contract can become a convoluted and challenging task. This is especially true when the presumption in favor of enforcing an arbitration clause butts up against rights secured by common law. State statutory law providing a right to sue in a judicial forum or to proceed by way of a class further complicates a more traditional analysis. It

Express v. Italian Colors Restaurant, see The Next Chapter, supra note 9. For a discussion of this policy in the consumer context, see Seeking a Rational Lawyer, supra note 5, at 463-68. For how the policy is applied in the labor context, see Shelley McGill & Ann Marie Tracey, Building A New Bridge Over Troubled Waters: Lessons Learned from Canadian and U.S. Arbitration of Human Rights and Discrimination Employment Claims, 20 CARDOZO J. INT'L & COMP. L. 1 (2011) [hereinafter Building a New Bridge].

25. 9 U.S.C.S. § 2 (West 2015). This applies to "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal . . . ." Id.

26. Preston v. Ferrer, 552 U.S. 346, 349 (2008). But see Imburgia, 136 S. Ct. at 471 (Thomas, J. dissenting) ("Thus, the FAA does not require state courts to order arbitration.").


28. For instance, in both Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) and Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009), the issue before the Court was whether the waiver of a judicial forum in the arbitration agreement was enforceable with respect to a discrimination claim.

29. Discover Bank v. Superior Court, 113 P.3d 1100, 1103 (Cal. 2005) (holding that arbitration
may even call into question whether contracts are evaluated in light of state law. Such is the nature of the issues that the Supreme Court considered in \textit{DIRECTV, Inc. v. Imburgia}.\textsuperscript{30}

\textbf{III. THE SUPREME COURT: MARCHING TO THE BEAT OF A DIFFERENT DRUM}

Historically, arbitration agreements encompassed disputes arising under the terms and conditions of a contract. These clauses typically required arbitration before litigation, or even binding arbitration without allowing judicial recourse.\textsuperscript{31} For instance, in the unionized environment, arbitrations resolved claims arising from the terms and conditions of the collective bargaining agreement such as wage, hour and seniority disputes. They did not, however, limit the accessibility of a judicial forum for statutory claims.\textsuperscript{32} When arbitration provisions expanded to block the ability to litigate even statutory claims, the Court nevertheless preserved access to statutory remedies. Similarly, the Court looked favorably on defenses at law and in equity that the FAA specifically recognized.\textsuperscript{33}

The Court has looked at these issues through a new, pro-business lens. In so doing it may have placed into question the role of state common and statutory law in interpreting contracts and recognizing contractual defenses in law and equity. The cases the Court has examined have run the gamut from consumer to merchant, collective to individual, and contractual to statutory claims. The most notable of cases reflecting the Court’s approach to arbitration pertain to the availability of a judicial forum to bring statutory claims and the opportunity to proceed by way of a collective action.

\textit{A. Arbitration Agreements and the Availability of a Judicial Forum}

As businesses became bolder, arbitration agreements expanded to include a waiver of the right to litigate even statutory claims like discrimination claims under Title VII of the Civil Rights Act\textsuperscript{34} or the

\textsuperscript{31} See Alexander v. Gardner-Denver Co., 415 U.S. 36, 38 (1974) (deciding “under what circumstances, if any, an employee’s statutory right to a trial \textit{de novo} under Title VII may be foreclosed by prior submission of his claim to final arbitration under the nondiscrimination clause of a collective bargaining agreement.”).
\textsuperscript{32} See id. at 59-60.
\textsuperscript{33} See The Next Chapter, supra note 9, at 553.
Age Discrimination in Employment Act.\textsuperscript{35} Nevertheless, the Court preserved the right to litigate these non-contractual issues post-arbitration. As the Court stated in \textit{Alexander v. Gardner-Denver Company},

Title VII’s strictures are absolute and represent a Congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount Congressional purpose behind Title VII. In these circumstances, an employee’s rights under Title VII are not susceptible of prospective waiver.\textsuperscript{36}

One key to the Court’s decision in this case was that the Title VII claim had not yet arisen when the contract containing the arbitration clause (with its waiver of a judicial forum) was executed.\textsuperscript{37} Consequently, an individual signing an employment contract with a mandatory arbitration clause could still litigate statutory claims, like discrimination, in a judicial forum after completing arbitration.

In \textit{Wright v. Universal Maritime Service Corp.},\textsuperscript{38} the Court again distinguished between contractual and statutory claims. Noting that the plaintiff’s “statutory claim [is] not subject to a presumption of arbitrability[,]”\textsuperscript{39} it upheld the right to proceed in a judicial forum on claims under the Americans with Disability Act of 1990.\textsuperscript{40} However, it left open the door to the enforceability of a “clear and unmistakable waiver” of this forum.\textsuperscript{41}

The Court walked through this door in \textit{14 Penn Plaza LLC v. Pyett}.\textsuperscript{42} There, plaintiffs’ union, as the exclusive bargaining agent, had signed a collective bargaining agreement that denied plaintiffs the availability of a judicial forum for their statutory age discrimination claim; instead it required such a dispute be resolved by binding arbitration.\textsuperscript{43} As such, it fit the mold of a classic “prospective waiver” which the \textit{Alexander} Court

\begin{footnotes}
\item[36.] \textit{Alexander}, 415 U.S. at 51-52.
\item[37.] \textit{Id.} at 59-60.
\item[38.] 525 U.S. 70 (1998).
\item[39.] \textit{Id.} at 79.
\item[41.] \textit{Wright}, 525 U.S. at 82 (1974).
\item[42.] 556 U.S. 247 (2009). In \textit{Pyett}, the waiver issue basically was not raised on appeal. \textit{See id.} at 273.
\item[43.] \textit{Id.}
\end{footnotes}
had denounced. Finally, the union of which they were members had refused to bring the claims to arbitration. These circumstances left plaintiffs without an ability to effectively vindicate their claim, a classic reason to permit them to proceed in court. The Court held that members of the collective bargaining unit were bound by the arbitration clause to which the bargaining unit had agreed, even though it left them with no recourse. In the wake of Pyett, arbitration can be the exclusive remedy for seeking vindication of even discrimination claims.

B. Arbitration Agreements, Class Actions, and Unconscionability

Language banning class actions in both commercial and employment consumer contracts is now frequently part of the boilerplate provisions of arbitration agreements. While it seems logical that the Court would enforce such contractual provisions, the case context in which the Court has done so has given rise to vigorous dissents. In its rejection of state law with respect to unconscionability of class waivers in arbitration agreements, the Court began undermining defenses and state contract law.

The FAA prevents enforcement of an arbitration clause where a "ground[] exist[s] at law or in equity." Unconscionability is one such ground that courts have longed recognized as a defense against contract enforcement. Unconscionability is defined on a state-by-state basis, with most states examining a "combination of procedural and substantive unconscionability." This defense raised its head in California and was the focus of Supreme Court scrutiny in AT&T Mobility LLC v. Concepcion. California statutes provided that a court "may so limit the application of an unconscionable clause as to avoid any unconscionable result." Pursuant to this enabling legislation, in Discover Bank v. Superior

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44. Alexander, 415 U.S at 51-52,
45. Pyett, 556 U.S. at 253,
46. Id. at 256-57.
47. For a discussion of Pyett, see Building a New Bridge, supra note 24, at 25-31.
48. Silver-Greenberg & Gebeloff, supra note 5.
52. Seeking a Rational Lawyer, supra note 5, at 443.
54. CAL. CIV. CODE ANN. § 16720.5(a) (West 2015).
Court, the California Supreme Court declared unconscionable certain arbitration agreements that contained a waiver of the right to proceed in arbitration by way of a class action. This determination became known as the "Discover Bank" rule. This rule had rendered such class action waivers unenforceable in a broad range of consumer contracts. Subsequently, "California courts . . . frequently applied this rule to find arbitration agreements unconscionable."

The U.S. Supreme Court examined and eviscerated the Discover Bank rule in 2011 in Concepcion. In this case, plaintiffs had asserted that a sales tax imposed on the purchase of a phone ran counter to AT&T's offer of a "free" phone and filed suit, which was then consolidated as a class action. The cell phone contract at issue mandated individual arbitration and required that consumers waive both class action rights and a judicial forum other than small claims court. In Concepcion, a 5-4 decision, the Court upheld the contract language that mandated individual arbitrations of plaintiffs' claims. It characterized the Discover Bank rule as standing "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," and was "pre-empted by the FAA." In reinforcing the FAA policy enforcing arbitration agreements, the Court rejected California courts' ability to set a blanket standard for unconscionability in consumer contracts. It would do so again at the close of 2015 in Imburgia, rejecting lower courts' applications of pre-Concepcion law to an arbitration agreement executed before Concepcion that evoked "the law of your state."

The Concepcion decision curtails efforts by individual states to address essential features of arbitrations, such as cost, efficiency,
procedures, and the opportunity for judicial review. It also raises the question whether state statutes, such as Ohio’s Consumer Sales Practices Act, can continue to provide consumers the opportunity to “proceed as a private attorney general” and seek a claim for “declaratory judgment, injunction or class action.”

More recently, in *American Express Co. v. Italian Colors Restaurant*, the Supreme Court examined an issue similar to that addressed in the *Concepcion* consumer case, this time in the context of merchants who filed statutory anti-trust claims against American Express. Merchants alleged the American Express requirement that merchants accept all types of its cards, not just its premier one, constituted a “tie in sale.” The various merchant contracts required individual arbitration and that the parties waive a judicial forum. Further, according to the dissent, “the agreement as applied in this case cuts off not just class arbitration, but any avenue for sharing, shifting, or shrinking necessary costs.”

The lower courts found that the cost of separately employing economic experts would preclude the plaintiffs from litigating claims; this inability to effectively vindicate statutory claims fell into the FAA enforcement exception of legal or equitable grounds. The Supreme Court disagreed. It determined that its precedent rendering arbitration agreements unenforceable on the basis of ineffective vindication of statutory claims may apply to administrative expenses and court costs, but not litigation expenses. The Court upheld the contractual requirement of individual and mandatory arbitrations, leaving the merchants only with an arbitral forum in which to seek relief.

In addition to precluding the availability of a judicial forum for statutory claims such as discrimination claims, in the 2010 maritime anti-trust case, *Stolt-Nielsen S.A. v. AnimalFeeds International Corporation*, the Court again blocked plaintiffs’ recourse to class arbitration. The parties had agreed to let the arbitration panel determine

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68. 133 S. Ct. 2304 (2013).
69. *Id.* at 2308.
70. *Id.* The agreement required a dispute to be resolved by arbitration.
71. *Id.* 2310 (Kagan, Breyer, and Ginsburg, JJ., dissenting).
72. *Id.* at 2308.
73. *Id.*
74. *Id.* at 2310-11.
75. *See id.* at 2310. The Court did leave open the possibility that under some circumstances such costs could be prohibitive. *See id.* at 2310-11. For a discussion of *Italian Colors*, unconscionability, and class actions, see *The Next Chapter*, *supra* note 9.
76. 559 U.S. 662 (2010).
if the arbitration agreement permitted class arbitration; they also agreed the contract was silent on this point.77 The panel determined that class arbitration was permissible.78 However, the Court held that, absent explicit agreement to class arbitration in the contract, the arbitrators had exceeded their authority in finding class arbitration permissible.79 In so doing, the Court once again took a stance in favor of individual over collective action, limiting for plaintiffs the benefits of joining resources to pursue claims as a class in an arbitration forum.80

IV. OHIO LAW, ARBITRATION AGREEMENTS, AND THE SUPREME COURT: SHALL WE DANCE?

The Ohio Arbitration Act, like the FAA, prescribes the closing of courthouse doors to arbitration disputes.81 Also like the FAA, the Ohio Arbitration Act directs courts to address equitable and legal grounds for revoking an arbitration agreement. These courts, both before and since the recent Supreme Court decisions announced in Pyett, Concepcion, and American Express, recognize that they are statutorily empowered to rule that arbitration clauses analyzed under Ohio law lack invincibility. Enforcement or invalidation turns on Ohio law’s interpretation of multiple legal and equitable challenges including unconscionability, public policy considerations, remedial statutory provisions, waiver, duress, and fraud. In this way, state law defenses have remained very much in force in Ohio.

A. The Ohio Arbitration Act, the FAA, and the Revocation Clause

The Ohio Arbitration Act82 provides a state law vehicle for arbitration enforcement. Its key statutory language is substantially similar to the FAA.83 Like the FAA, it provides that a contractual provision to submit

77. Id. at 662.
78. Id. at 663.
79. See id. at 685.
80. But see Oxford Health Plans LLC v. Sutter 133 S. Ct. 2064 (2013). There, the arbitrator had determined that class action cases could occur according to Oxford’s contract. Id. at 2067. Oxford argued that this decision went against the company’s intent and that the arbitrator overstepped his authority. Id. The Supreme Court decided that the arbitrator did not overstep his authority and that his decision stood because he “arguably construed” the contract, unlike in Stolt-Nielsen, where the contract was silent. Id. at 2070-71.
a "controversy" to arbitration "shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract." The revocation clauses under the Ohio Arbitration Act and under the FAA empower courts to examine common law contract principles and, where relevant, to render an arbitration provision invalid and unenforceable.

Under the Ohio Arbitration Act, there are two ways for a party to seek enforcement of an arbitration agreement. The party may seek "indirect enforcement" of an arbitration clause by moving to stay any pending civil action in a trial court "until arbitration of the issue has been had in accordance with the agreement." Whether to hold a hearing on the motion to stay is within the court’s discretion. Ohio law directs courts to grant a stay of litigation in favor of arbitration, provided a valid and enforceable agreement is in place. Alternatively, the party may seek "direct enforcement" through a court order directing that the arbitration proceed in the manner provided for in the written agreement. This requires the court to hold an evidentiary hearing to rule on a request for such an order. The court conducts a de novo review to determine whether to grant the order, with the trial court’s factual findings being "accorded appropriate deference" by a reviewing court.

An initial question confronting Ohio courts is whether a claim falls within the scope of the arbitration agreement. There is a presumption of arbitrability, and ambiguities are "resolved in favor of arbitration" even when an arbitration clause is limited in scope. "Doubts should

84. OHIO REV. CODE ANN. § 2711.01(A). See the limited exceptions in OHIO REV. CODE ANN. § 2711.01(B)(1)(a-e); 9 U.S.C. § 2 (2015).
87. See OHIO REV. CODE ANN. § 2711.02(B). This is referred to as "indirect enforcement." See Maestle, 800 N.E.2d at 10-11.
88. Maestle, 800 N.E.2d at 10.
89. OHIO REV. CODE ANN. § 2711.03(A); see also Shearer, 2011 Ohio App. LEXIS 4281, at *8.
90. See Maestle, 800 N.E.2d at 10-11; see also Shearer, 2011 Ohio App. LEXIS 4281, at **8-9.
92. Taylor Bldg., 884 N.E.2d at 15.
94. Shy v. Navistar Int’l Corp., 781 F.3d 820, 826 (6th Cir. 2015) (quoting Bratt Enters. v. Noble Int’l Ltd., 338 F.3d 609, 613 (6th Cir. 2003). In Shy the arbitration clause at issue was contained in a settlement agreement and consent decree in a class action lawsuit. It provided that "disputes over 'information or calculation' were subject to arbitration." Id. at 824-25. The court found that as the
be resolved in favor of coverage" unless "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."

In assessing whether a claim falls within the scope of an arbitration agreement, Ohio courts can use the federal standard articulated in *Fazio v. Lehman Bros., Inc.* This case asks whether "an action could be maintained without reference to the contract or relationship at issue." For example, language requiring arbitration of "any claim or controversy arising out of or relating to the agreement" generally will meet this requirement. This language may be construed to include a tort claim if the claim touches upon matters covered the agreement. This test "allows courts to make determinations of arbitrability based upon the factual allegations in the complaint" apart from "the legal theories presented." However, the existence of an arbitration agreement between the parties "does not mean that every dispute between the parties is arbitrable."

Claim addressed a disputed report concerning financial calculations, it was subject to arbitration. *Id.* at 827.


97. 340 F.3d 386 (6th Cir. 2003).


99. *Acad. of Med.*, 842 N.E.2d at 492-93 (quoting Collins & Aikman Prods. Co. v. Bldg. Sys. Inc., 58 F.3d 16, 20) (2d Cir. 1995)); *see also Varga*, 2014 Ohio App. LEXIS 631, at *6 (quoting *Acad. of Med.*, 842 N.E.2d at 492-93). The court in *Varga* referred to this language as the "paradigm" of what constitutes a broad arbitration clause. *Id.* (quoting *Acad. of Med.*, 842 N.E.2d at 492-93). *See also Hicks*, 2014 Ohio App. LEXIS 837 at *13 (finding that the counterclaims filed by debt collection companies and a separate defendant were not governed by the arbitration provision in the note).

100. For example, in *Alexander*, the Ohio Supreme Court held that an arbitration clause in a mortgage agreement applied even though the loan had been paid in full. *Alexander*, 911 N.E.2d at 289. Plaintiffs in consolidated cases had sued Wells Fargo in a class action claiming that Wells Fargo failed to timely file satisfaction of mortgage. The mandatory arbitration clause in the mortgage agreement covered any claim "arising out of . . . or relating to" the mortgage; one mortgage agreement specifically provided that the mandatory arbitration provision applied even if the loan had been paid in full. *Id.* at 289. *See also Acad. of Med.*, 842 N.E.2d at 492 ("However, that standard must be consistent with Ohio law and must reflect a correct statement of the applicable federal jurisprudence.").


102. *Id.*
B. The Ohio Jurisprudence Arbitration Landscape

Prior to the Supreme Court’s recent rulings enforcing arbitration agreements, Ohio courts scrutinized arbitration clauses for defects that might render them invalid. Arbitration clause enforcement in Ohio focused on whether and how arbitration provisions conflicted with common law contract defenses such as unconscionability, or with state statutes like the Ohio Consumer Sales Practices Act (CSPA). 103

Unconscionability was and remains a chief challenge to arbitration enforcement. Under Ohio law, unconscionability renders an arbitration agreement unenforceable 104 based on the revocation clauses of the FAA and the Ohio Arbitration Act. This defense “includes both an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.” 105 For an arbitration agreement to be rendered unconscionable under Ohio law, it must be adjudged to be both substantively and procedurally unconscionable. 106 Substantive unconscionability analyzes the factors concerning the contract terms themselves, where procedural unconscionability analyzes factors relating to the bargaining positions of the parties, such as “age, education, intelligence, [and] business acumen.” 107 When mandatory arbitration clauses appear in contracts between consumers and retailers, the Ohio Supreme Court has recognized that these provisions “are subject to considerable skepticism upon review, due to the disparity in the bargaining positions of the parties.” 108

Conceptually distant from the U.S. Supreme Court’s approach in Concepcion, Ohio courts found procedural unconscionability where businesses drafted arbitration clauses into adhesion contracts with consumers. 109 This occurred where there was disparity in bargaining power between the parties due to economic and educational imbalances between the parties, 110 a lack of sophistication and experience in commercial transactions, and a lack of legal representation. 111 Substantive unconscionability existed in arbitration provisions with

103. OHIO REV. CODE ANN. §§ 1345.01-13 (West 2012).
107. Id. at 1171.
108. Id. at 1179 (citing Williams v. Aetna Fin. Co., 700 N.E.2d 859, 866 (Ohio 1998)).
109. See Eagle, 809 N.E.2d at 1179.
111. See id.; see also Eagle, 809 N.E.2d at 1177-80.
loser pay provisions, mandated secrecy, and excessive fees and costs associated with the arbitration process.\textsuperscript{112}

Thwarting public policy can be an additional basis for a court to invalidate an arbitration agreement. It is distinguished from an unconscionability ground in that the focus is not “on the relationship between the parties and the effect of the agreement upon them” but rather on a “public policy analysis [which] requires the court to consider the impact of such arrangements upon society as a whole. A contract injurious to the interests of the state will not be enforced.”\textsuperscript{113}

Ohio’s CSPA promotes public policy and, according to Ohio courts, can sometimes trump an arbitration agreement.\textsuperscript{114} Similar to the consumer statute at issue in Concepcion, with respect to providing relief for deceptive or unconscionable consumer contracts, the CSPA provides for a private right of action and rescission of the contract or a suit for damages.\textsuperscript{115} It allows the consumer to seek injunctive relief and to proceed in a class action.\textsuperscript{116} It also permits the prevailing party to recover “reasonable attorney’s fee[s].”\textsuperscript{117} Where both an arbitration agreement and a CSPA claim are at issue, the courts evaluate both in determining whether a plaintiff can proceed as a class and in a judicial forum.\textsuperscript{118}

In\textit{ Eagle v. Fred Martin Motor Company}, an arbitration clause in a car purchase agreement precluded the parties from proceeding as a class action or as a private attorney general.\textsuperscript{119} It also invoked arbitration rules imposing confidentiality requirements that restricted the public sharing of information.\textsuperscript{120} These aspects of the arbitration clause impeded the “remedial function” and “consumer protection” purposes of the CSPA.\textsuperscript{121} On the other hand, excessive costs and insufficient notice of arbitration details rendered the arbitration clause both procedurally and substantively unconscionable.\textsuperscript{122} The likely arbitration costs of an approximate range of $750 on a $75,000 claim constituted substantive unconscionability.\textsuperscript{123}

\textsuperscript{112} \textit{See Eagle}, 809 N.E.2d at 1170-80.
\textsuperscript{113} \textit{Id.} at 1180 (citing\textit{ King v. King}, 59 N.E. 111, 112 (Ohio 1900)).
\textsuperscript{114} \textit{See Eagle}, 809 N.E. 2d at 1183.
\textsuperscript{115} \textsc{Ohio Rev. Code Ann.} § 1345.09(A).
\textsuperscript{116} \textit{Id.} § 1345.09(D)-(E).
\textsuperscript{117} \textit{Id.} § 1345.09(F).
\textsuperscript{119} 809 N.E.2d 1161 (Ohio Ct. App. 2004).
\textsuperscript{120} \textit{Id.} at 1183.
\textsuperscript{121} \textit{Id.}
\textsuperscript{122} \textit{Id.} at 1177-80.
\textsuperscript{123} \textit{Id.} at 1173, 1177. Projected estimates for the entire arbitration-related fees ranged between
The CSPA was also pivotal in *Schwartz v. Alltel Corporation*.124 There, the court used both an unconscionability analysis as well as a public policy lens in finding the arbitration requirement in that case unenforceable.125 Because the arbitration clause limited a "right to proceed [as] a class action" and to recover attorney fees, the court ruled that the "clause invades the policy considerations of the CSPA."126 This limit on consumer rights established the necessary "quantum of substantive unconscionability."127 The court also found procedural unconscionability with respect to the disparity of bargaining positions between the parties.128

In other cases where arbitration agreements were challenged on unconscionability or public policy grounds, courts have resisted the invitation to invalidate the agreements. In *Taylor Building Corporation of America v. Benfield*,129 the Ohio Supreme Court addressed the issue of unconscionability in a home construction contract. While noting that consumer contracts with standardized and mandated terms demand heightened judicial scrutiny, the court cautioned that a pre-printed or mandatory arbitration clause did not per se render the arbitration provisions unconscionable; nor did the unequal bargaining power of the parties.130 In *Hawkins v. O'Brien*,131 the court rejected challenges to a payday loan arbitration agreement on public policy and unconscionability grounds. The arbitration clause at issue prevented the plaintiff from proceeding as a private attorney general and through a class action vehicle.132 Hawkins argued that the arbitration agreement was not called to his attention. Because he had signed an acknowledgement that he had read the contract, the court rejected this argument.133 The court also noted that the arbitration agreement did "not contain a confidentiality clause," nor did it deny the plaintiff the substantive rights conferred by the CSPA and Federal Fair Debt Collection Practices Act.134

After the U.S. Supreme Court issued its decision in *Pyett* upholding $4,200 and $6,000. *Id.* at 1177.

125. *Id.* at *16.
126. *Id.* at **13-14.
127. *Id.* at *14.
128. *Id.*
129. 884 N.E.2d 12 (Ohio 2008).
130. *Id.* at 24.
132. *Id.* at *16.
133. *Id.* at *11.
134. *Id.* at **16-17.
mandatory arbitration and a class action waiver in a collective bargaining agreement, but before it had considered the class action waiver in *Concepcion*, an Ohio appellate court saw no inherent unconscionability in the waiver of a class action vehicle. In *Alexander v. Wells Fargo Financial Ohio 1, Inc.*, the court found that a waiver of the right to file a class action lawsuit was neither unconscionable nor did it violate public policy. The Eighth District Court of Appeals distinguished the case from *Eagle* and *Schwartz* on the basis that the dispute did not arise under the CSPA, no confidentiality provision was present in the arbitration clause, and class action prohibition was not unconscionable.

**C. Post Concepcion: Business As Usual**

The Supreme Court in *Concepcion* offered no quarter for California state law’s disdain of class action waivers in arbitration agreements. *Concepcion*’s firm stance has not dissuaded Ohio courts from providing a wide berth for state law application to arbitration challenges. These courts consistently interpret *Concepcion* narrowly, with substantial deference accorded to Ohio jurisprudence and public policy in assessing the validity and enforceability of arbitration agreements. They also resoundingly continue to rely on Ohio state law challenges, both equitable and legal, in evaluating the enforceability of arbitration provisions.

The import of Ohio state contract law in assessing arbitration agreements was evident just six weeks after the *Concepcion* decision was issued when an Ohio appellate court considered its scope and applicability. In *Wallace v. Ganley Auto Group*, purchasers of pre-owned vehicles filed a putative class action against vehicle dealerships, claiming violations of Ohio’s CSPA as well as common law fraud. The dealerships sought to stay the litigation and enforce the arbitration agreements in the motor vehicle purchase contracts.

The vehicle purchasers mounted a three-pronged attack on arbitration of this dispute, all grounded in Ohio law. First, they claimed that the arbitration provisions were void as a matter of public policy because they banned class arbitration. Second, the purchasers asserted that the


136. See id. at **8-9**.


138. Id. at *7*.
arbitration provisions were substantively and procedurally unconscionable. 139 Finally, the plaintiffs claimed that the arbitration provisions should not be interpreted under Ohio contract law principles to govern the dispute, because "their claims originated before the contract was signed and thus are not covered by the agreement to arbitrate." 140

While the Ohio appellate court rejected all three state law challenges, it limited the application of the Supreme Court’s ruling in Concepcion. 141 Constraining Concepcion’s holding to the unique facts of that case began with the Eighth District Court of Appeal’s recognition that California’s judicial rule prohibiting class-action waivers in arbitration agreements in consumer contracts was inconsistent and preempted state law incursion into the province of the FAA. 142 Unlike state law contract defenses, the California rule was a frontal assault on the FAA and directly contradicted the FAA’s ‘‘overarching purpose’’ [which] is ‘‘to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.’’ 143

The Wallace court next admonished that state contract law is at the heart of arbitration agreements and their enforceability. It impliedly rebuked the use of Concepcion to override any state law contract defense to arbitration enforcement. 144 The Supreme Court specifically had reminded courts in Concepcion that “arbitration is a matter of contract, and thus parties may agree to limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit with whom a party will arbitrate disputes.” 145 Pointing out that Concepcion made clear that “courts may not apply judicial rules in a way that frustrates the purpose of the FAA,” the Eighth District Court of Appeals declined to rule that, with respect to Ohio’s CSPA, class action bans in arbitration agreements are per se unenforceable. 146 It cautioned that

139. Id. at **11-17.
140. Id. at **18.
141. This is demonstrated by the Ohio Court of Appeals’ ruling that class action bans in arbitration agreements involving Ohio Consumer Sales Practices Act claims are not per se unenforceable and by its explanation that the judicial rule invalidated in Concepcion differed materially from state contract law defenses in Ohio law used to invalidate arbitration agreements. See id. at **9-10.
142. See Id. at *9 (construing 9 U.S.C. §§ 1-307 (2012)).
144. Id. at *10.
145. Id. at *8 (citing Concepcion, 563 U.S at 344).
146. Id. at **9-10. The Ohio Court of Appeals did not reach the issue of whether the Ohio Consumer Sales Practices Act “contains a policy favoring class actions;” it did note that Concepcion mandates that courts cannot “apply judicial rules in a way that frustrates the purpose of the FAA.” Id. at *10.
Concepcion warns that "enforcement of arbitration clauses cannot be conditioned upon the availability of class wide arbitration" and that the FAA "favors the enforcement of arbitration agreements according to their terms."\textsuperscript{147}

The Ohio appellate court went on to consider the state law contract defense of unconscionability which, under Ohio law, may be used to render an arbitration agreement unenforceable.\textsuperscript{148} This question of unconscionability, a state law analysis, was unchanged by Concepcion.\textsuperscript{149} Also unchanged was the use of Ohio law precedent to determine whether an arbitration provision governs a dispute.\textsuperscript{150} State law becomes the gate-keeper of how courts interpret the agreement and what, if any, evidence is needed to demonstrate that a claim should be excluded from the agreement to arbitrate.\textsuperscript{151}

A second decision in 2011 by an Ohio appellate court confirmed that Concepcion did not render arbitration provisions "invincible."\textsuperscript{152} There, the plaintiff claimed that the costs of arbitrating a dispute arising from the sale of a veterinary practice—in the $24,000 range—rendered the agreement unconscionable and therefore unenforceable. Citing Concepcion, in Shearer v. VCA Antech, Inc., the Tenth District Court of Appeals for Ohio noted that the language in the both the FAA and the Ohio Arbitration Act "permits courts to invalidate arbitration provisions upon the demonstration of a generally applicable state-law contract defense, such as fraud, duress, or unconscionability."\textsuperscript{153} Examining the issue of unconscionability through the lens of Ohio law, the court upheld the arbitration provision.\textsuperscript{154}

While acknowledging the holding of Concepcion, Ohio courts have continued to emphasize the role of state law in determining the enforceability of arbitration agreements, using a case-by-case analysis. In Reyna Capital Corporation v. McKinney Romeo Motors, Incorporated,\textsuperscript{155} a leasing company sued an automobile dealership seeking to have an arbitration agreement in a master lease agreement

\textsuperscript{147} Id. at ***9-10.
\textsuperscript{148} Id. at ***10-17.
\textsuperscript{149} See id. at *10.
\textsuperscript{150} See Wallace, 2011 Ohio App. LEXIS 2474, at **18-20.
\textsuperscript{151} See id.
\textsuperscript{153} Id. at **10-11 (citing AT&T Mobility LLC v. Concepcion, 333 U.S. at 339; Hayes v. Oakridge Home, 908 N.E.2d 408, 412 (Ohio 2009)).
\textsuperscript{154} Id. at **10-16.
declared void as a violation of Ohio’s Civil Rules and Constitution. \[156\]

The Second District Court of Appeals held that none of these provisions provided “grounds as exist in law or in equity for the revocation of the contract,” which the Ohio court noted was the statutory escape hatch *Concepcion* deemed the FAA’s “‘primary substantive provision’” \[157\] and which the Ohio Arbitration Act reflected. \[158\] The issue of whether there had been a waiver of the requirement to arbitrate was examined under both federal and state law precedent. \[159\] Finally, using Ohio law precedent to reject an argument that because a subsidiary had filed suit, the arbitration agreement was invalid under the law of estoppel, \[160\] the appellate court enforced the arbitration agreement. \[161\]

Two years later, another Ohio appellate court applied “Ohio’s longstanding rules of waiver” to examine the enforceability of arbitration clauses. \[162\] The Seventh District Court of Appeals, in *The Finish Line, Inc. v. Patrone*, addressed whether the act of filing a lawsuit

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156. Implicated were Ohio Civil Rules 1, 14, 19 and Article IV, Section 5(B) of the Ohio Constitution. *Id.* at **19-23.

OHIO CONST. art. IV, § 5(B) states in relevant part:

The Supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right . . . . All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

OHIO CIV. R. 1(B) states:

These rules shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice.

OHIO CIV. R. 14(A) states in relevant part:

[A] defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiffs [stet] claim against him.

OHIO CIV. R. 19(A) states in relevant part:

A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (a) as a practical matter impair or impede his ability to protect that interest or (b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest, or (3) he has an interest relating to the subject of the action as an assignor, assignee, subrogor, or subrogee.


157. *Id.* at *19.

158. *Id.* at *19.

159. *Id.* at *26.

160. *Id.* at *28.

161. *Id.*

waived the arbitration clause. The court distinguished the state law contract defense of waiver from the rule announced in Concepcion. "There is a long line of precedent in Ohio holding that a party waives an arbitration clause in a contract by filing a complaint that fails to raise the arbitration clause." Similarly, "[w]hen the other contracting party files an answer and does not demand arbitration, it, in effect, agrees to the waiver and a referral to arbitration under R.C. 2711.02 is inappropriate." Under these circumstances, "[t]he FAA does not serve to displace this existing Ohio law." The court then refused to enforce the arbitration agreement.

In Gustavus, LLC v. Eagle Investments, an Ohio appellate court reviewed a complicated challenge to an arbitration provision in a real estate purchase and sale contract. The Second District Court of Appeals examined whether the arbitration provision was void and unenforceable on grounds of public policy, vagueness and inconsistency. The public policy challenge arose from plaintiff’s assertion that the arbitration provision hindered its claim brought under the Ohio Corrupt Activities Act by depriving it of statutory remedies under this law. The Second District Court of Appeals rejected this argument, citing the ability under Ohio law for the judge to confirm, modify, or correct the arbitrator’s award pursuant to Ohio Revised Code 2711.12. Similarly, it dismissed the void for vagueness and inconsistency arguments. The court relied on Ohio law’s mandate that an “arbitration clause in a contract should not be denied effect by a court unless it may be said with positive assurance that the clause is not susceptible to an interpretation that covers the asserted dispute, and doubts should be resolved in favor of coverage.”

163. Id.
164. Id. at *9 ("When state law prohibits outright the arbitration of a particular type of claim, the FAA displaces the conflicting rule.") (quoting AT&T Mobility LLC v. Concepcion, 563 U.S 333, 341 (2011)).
165. Id. at *5.
166. Id. (quoting Mills v. Jaguar-Cleveland Motors, Inc., 430 N.E.2d 965, syllabus (Ohio Ct. App. 1980)).
168. Id. at *12.
170. Id. at **6.
171. OHIO REV. CODE ANN. §§ 2923.31-2923.36 (West 2015).
173. Id. at *15.
174. Id. at *19-21.
Ohio law again was prominent with respect to another claim that arose in *Gustavas*. Ohio Revised Code 2711.01(B)(1) bars arbitration "where [a] final determination of claims in an action may entitle a claimant to relief that affects [a] title, such as specific performance of a contract of sale."

The appellate court examined the reach of *Concepcion* with respect to claims concerning disputes over the title to or possession of real estate. It noted that the Supreme Court explicitly stated in *Concepcion* that the FAA's "'savings clause preserves generally applicable contract defenses[,]" but "'nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives.'"

This bar did not apply to the motion to compel arbitration filed in this case, the *Gustavas* court concluded.

In *Helbling v. Lloyd Ward, P.C.*, the Eighth District Court of Appeals also seemed to be cautious in construing *Concepcion* too broadly when there appears to be a conflict between state law and the FAA. Ohio Rule of Professional Conduct 1.8(h) renders unenforceable an attorney-client agreement that requires arbitrating a claim against the lawyer, unless the client is independently represented when making the agreement.

The appellate court acknowledged that this professional conduct rule limits the arbitration provisions in legal services agreements to cases where the client is independently represented at the time the arbitration agreement is executed. Because "Rule 1.8(h) does not 'prohibit outright' the arbitration of claims relating to a legal services agreement," *Concepcion* did not block Rule 1.8(h)'s application. The court therefore refused to enforce the arbitration agreement.

In 2015, in *Arnold v. Burger King*, an Ohio appellate court invalidated an arbitration agreement while acknowledging *Concepcion*'s clear mandate that the FAA displaces any state law prohibiting outright the arbitration of a particular kind of claim. There, a Burger King

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177. *Id.* at **10-12.
178. *Id.* at *11 (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 343 (2011)).
179. *Id.* at **11-12.
181. *Id.* at *6.
182. *Id.* at *7.
183. *Id.* at *7.
184. *Id.* at *6-7.
employee, raped by her supervisor at work, successfully argued that the arbitration agreement executed at her hiring was unconscionable under Ohio law and therefore unenforceable. Citing the Supreme Court’s decision in *Marmet Health Care Center, Inc. v. Brown*, the Ohio court concluded that it was “free to find the arbitration agreement unenforceable for common law reasons, such as invalid formation of the contract or unconscionability.” The Supreme Court in *Marmet* had explicitly stated that even when a plaintiff’s claims clearly fall within the scope of an agreement to arbitrate, a court must “consider whether, absent th[e] general policy, the arbitration clauses in [plaintiff’s cases] are unenforceable under state common law principles that are not specific to arbitration and pre-empted by the FAA.” The *Arnold* court then analyzed the state law challenge to the arbitration agreement under Ohio law on unconscionability. It found the arbitration agreement procedurally unconscionable because of a combination of the disparity in bargaining power and misleading contract language that could lull a party into “a false sense of security.” It was substantively unconscionable in that the agreement “sought to include every possible situation that might arise in an employee’s life,” and “the arbitrator would be resolving disputes unrelated to employment.” The court then invalidated Burger King’s arbitration agreement as unconscionable under Ohio law.

Federal courts also interpret *Concepcion* to provide Ohio courts wide latitude in applying Ohio law principles of unconscionability, collateral estoppel and res judicata, waiver, and the impact of a fee-splitting provision on the enforceability of an arbitration provision. Post-*Concepcion*, the Sixth Circuit examines Ohio law’s impact on arbitration agreements in a similar way: narrowly construing *Concepcion*’s prohibition on state law conflicting rules. Citing

186. 132 S. Ct. 1201.
188. *Id.* (quoting *Marmet*, 132 S.Ct. at 1204) (internal quotations omitted).
189. *Id.* at 694.
190. *Id.* at 695. On reconsideration, the Eighth District Court of Appeals clarified that plaintiff’s claims fell outside the scope of the arbitration clause and that additional grounds existed to render the clause substantively unconscionable. See *Arnold v. Burger King*, 48 N.E.3d 69 (Ohio Ct. App. 2015), appeal denied, 47 N.E.3d 166 (Ohio 2016).
191. *Id.*
195. *Id.* at **24-30.
Concepcion, federal district courts in the Sixth Circuit apply Ohio law to arbitration-related issues when "the Ohio legal rules at issue . . . are nothing more than the generally applicable doctrines of contract formation and unconscionability and do not disfavor arbitration." Ohio law then provides state law defenses to the enforcement of an arbitration provision even while acknowledging the FAA's policy favoring arbitration. "Because arbitration agreements are . . . contracts," questions of contract formation remain the province of the applicable state law.

In the two years since the Supreme Court's opinion in American Express Company v. Italian Colors Restaurant, Ohio courts have not cited this precedent for any arbitration-related issue. This judicial silence on how American Express impacts Ohio law echoes through Sixth Circuit case law, also silent, with the exception of one case which obliquely addresses American Express' impact on Ohio law as it relates to arbitration. In Prasad v. General Electric, a federal district court addressed whether the arbitral forum could "effectively vindicate" the plaintiff's Ohio law "public policy tort claim." Citing American Express and other Supreme Court precedent, it noted that the FAA's "effective vindication" exception only has been applied to federal statutory claims. It acknowledged that arbitration agreements are governed according to "applicable state law contract formation" with contract defenses such as "fraud, forgery, duress, mistake, lack of consideration or mutual obligation, or unconscionability[.]" potentially invalidating arbitration agreements.

199. 133 S. Ct. 2304 (2013).
201. Id.
202. Id. at *5. The plaintiff in Prasad was a senior staff engineer who agreed to arbitrate disputes with his employer, GE Aviation. Id. at *2. The plaintiff was terminated by GE Aviation following his numerous complaints to both his supervisors and the Federal Aviation Administration about engine design and installation. Id. The plaintiff brought suit against his employer alleging his termination violated Ohio public policy, the Ohio Civil Rights Act, OHIO REV. CODE ANN. § 4112.02(L), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3. Id. GE Aviation moved the district court "to compel arbitration on [Prasad's] state law claims, and to stay the proceedings o[n] the Title VII claim." Id. at *3. The federal district court in Prasad noted that the enforceability of arbitration agreements are governed according to "applicable state law contract formation" with contract defenses such as "fraud, forgery, duress, mistake, lack of consideration or mutual obligation, or unconscionability[,]" potentially invalidating arbitration agreements. Id. at *6 (citing Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 666 (6th Cir. 2003) (quoting Cooper v. MRM Inv. Co., 367 F.3d 493, 498 (6th Cir. 2007)).
203. Id. at *7 (noting that in American Express, the Supreme Court upheld class action arbitration waivers under the Sherman and Clayton Acts.)
invalidating arbitration agreements.\textsuperscript{204} The federal district court went on to analyze the sufficiency of the arbitral forum for plaintiff's public policy tort claims, and concluded that the arbitration agreement was enforceable as to those claims.\textsuperscript{205} It compelled arbitration of the Ohio public policy tort claims and the Ohio Civil Rights claim while staying the Title VII claims which were not governed by the arbitration agreement.\textsuperscript{206}

In sum, Ohio courts, and federal courts applying Ohio law, enforce arbitration agreements while upholding state law defenses rooted in the jurisprudence of the Buckeye State. Enforcement or invalidation of these arbitration agreements often turns on state law challenges of public policy or unconscionability. Ohio courts reject any general bar to class action waivers in consumer contracts. Instead, unlike the California approach at issue in\textit{Concepcion}, Ohio law reflects a fact specific, case-by-case analysis. The Supreme Court’s recent decision in\textit{DIRECTV, Inc. v. Imburgia}, while reinforcing the FAA’s presumption of arbitrability, may very well allow Ohio and other state courts to continue their evaluation of arbitration agreements in light of state common law defenses and statutes.

\textbf{V. DIRECTV, INC. V. IMBURGIA}

In light of the common law’s reverence for contracts, and the role of state law in contract interpretation, the Supreme Court faced an intriguing question in\textit{DIRECTV, Inc. v. Imburgia}.\textsuperscript{207} There, the Court addressed whether the California court properly invalidated an arbitration agreement executed pre-\textit{Concepcion} when the agreement allowed such action if state law would not enforce the class action waiver in the agreement.\textsuperscript{208} The case invoked the questions of whether contract law is left to the states and what role the parties’ intent at the time of entering into the contract plays.\textsuperscript{209} In a decisive 6-3 decision, the Court held the FAA trumped now invalid state law, and that consumers could not pursue their claims collectively.\textsuperscript{210}

\textsuperscript{204} Id. at *6 (citing Morrison, 317 F.3d at 666) (quoting Cooper, 367 F.3d at 498)).
\textsuperscript{205} Id. at **8-12.
\textsuperscript{206} Id. at **13-16.
\textsuperscript{207} DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015).
\textsuperscript{208} Id. at 469. Under pre-\textit{Concepcion} California law, the contract clause precluding class arbitration would be unenforceable. Id. at 466.
\textsuperscript{210} Imburgia, 136 S. Ct. at 471.
Amy Imburgia and others sued DIRECTV in a class action lawsuit in state court alleging violations of California state contract law in connection with early termination fees.211 Although the arbitration agreement mandated arbitration and waived a class action option, DIRECTV did not move to compel arbitration; California law would render the agreement unenforceable under the \textit{Discover Bank} rule.212 The trial court certified a class.213 One week later, the U.S. Supreme Court issued its decision in \textit{Concepcion}, holding that California’s ban on class action waivers contravened the FAA and therefore was void.214 “DIRECTV [then] moved to . . . decertify the class, and compel arbitration[,]”215 claiming that given California law it would have been futile to do so earlier.216 Instead, it was an argument viewed as futile, and the court denied its motion.217 DIRECTV filed an appeal.218

The California appellate court conducted a \textit{de novo} review of the arbitration agreement. The contract provided that “any legal or equitable claim relating to this Agreement, . . . if the claim is not resolved informally, . . . will be resolved only by binding arbitration . . . “219 The same section also precluded consolidating claims, proceeding by way of a class, or as a private attorney general.220 Finally, it stipulated that “[i]f, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable.”221

The court noted that both parties argued that “the FAA ‘requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms,’” citing the Supreme Court decision in \textit{Volt Information Sciences Inc. v. Leland Stanford Junior University}.222 This policy “applies even to ‘agreements to arbitrate under different rules than those set forth in the [FAA] itself.”223

\begin{itemize}
\item 211. \textit{Imburgia v. DIRECTV, Inc.}, 170 Cal. Rptr. 3d 190, 192-93 (Cal. Ct. App. 2014).
\item 212. \textit{Imburgia}, 136 S. Ct. at 471-472 (Ginsburg, J., dissenting).
\item 213. \textit{Id.} at 193.
\item 215. \textit{Id.}
\item 217. \textit{DIRECTV}, 170 Cal. Rptr. at 193.
\item 218. \textit{Imburgia}, 136 S. Ct. at 466.
\item 219. \textit{DIRECTV}, 170 Cal. Rptr. at 193.
\item 220. \textit{Id.}
\item 221. \textit{Id.}
\item 223. \textit{DIRECTV}, Cal. Rptr. 3d at 194 (quoting \textit{Volt}, 489 U.S. at 479).
\end{itemize}
Contract terms "to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement[,] is fully consistent with the goals of the FAA, 'even if application of the state rules would yield a different result from application of the FAA.'"\(^{224}\)

The appellate court then turned to contract interpretation. It found "further support in "the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it."\(^{225}\) Given that DIRECTV had authored what the court deemed an ambiguous document with respect to applicable law, the company "[could] not now claim the benefit of the doubt."\(^{226}\) The state appellate court concluded that pre-\textit{Concepcion} California law—in effect when the parties executed the contract—would preclude the class action waiver and, further, that its non-severability clause made the entire arbitration agreement unenforceable.\(^{227}\)

\section*{B. DIRECTV. v. Imburgia in the Supreme Court}

DIRECTV fared better on its petition for certiorari to the U.S. Supreme Court. The Court granted its motion,\(^{228}\) heard arguments October 6, 2015, and expeditiously issued its ruling on Dec. 14, 2015. It held in favor of DIRECTV, finding that the California court's decision conflicted with the FAA, and that the arbitration agreement must be enforced.\(^{229}\)

On certiorari, Petitioner DIRECTV contended that \textit{Concepcion} invalidated California law, albeit subsequently to the parties' entering into the contract. Therefore the mandatory arbitration and class action waivers must be enforced.\(^{230}\) It reminded the justices that the California court "did not even acknowledge the 'emphatic federal policy' in favor of arbitration."\(^{231}\)

Respondents countered that DIRECTV chose the language that "the law of your state" would govern whether the arbitration agreement provisions were enforceable,\(^{232}\) and that this is the language it applied.

\(^{224}\) \textit{Id.} (quoting \textit{Volt}, 489 U.S. at 479).
\(^{225}\) \textit{Id.} at 196 (quoting \textit{Mastrobuono v. Shearson Lehman Hutton, Inc.}, 514 U.S. 52, 62 (1995)).
\(^{226}\) \textit{Id.} (quoting \textit{Mastrobuono}, 514 U.S. at 163).
\(^{227}\) See \textit{id.} at 196, 198.
\(^{229}\) \textit{Imburgia}, 136 S. Ct. at 471.
\(^{231}\) \textit{Id.} (citing \textit{Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.}, 473 U.S. 614, 631 (1985)).
\(^{232}\) Brief of Resp’t in Opp’n to Pet. for Cert. at 16, DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463
nationally in its contract. Respondents further countered that is not for DIRECTV to pick and choose which state laws apply. Therefore, by the language “the law of your state” the parties intended to be governed California law that at the time invalidated waivers of class actions in this type of arbitration. Moreover, the California law at issue was not Discover Bank, but California’s consumer protection laws which “entitle consumers to bring actions for unfair business practices, and to do so as a class, and which invalidate any contractual waiver” of class action. Given that, California law would render unenforceable the DIRECTV arbitration agreement containing a class action.

The parties agreed that it was the intent of the parties to have California state law control the contract, and that California law would not enforce the class action waiver. As with contracts generally, in enforcing and construing an arbitration clause, “courts and arbitrators must ‘give effect to the contractual rights and expectations of the parties’”239 with “the parties’ intentions controlling.”240 However, DIRECTV and Imburgia vigorously disagreed on how and when courts give effect to the parties’ intent.

1. A Preview: Oral Argument

During oral arguments, the justices expressed several shared views and concerns that resurfaced in their final opinions, informed the decision, and may factor into the impact the decision has on state courts. Generally, the justices questioned whether the California

233. Id. at **1-2.
234. Id. at **1-2, 7-8.
235. Id. at *15 (internal citations omitted.)
236. Id. at *2.
237. Brief of Pet’r at 1; Brief of Resp’t at 2.
238. Brief of Pet’r at 7; Brief of Resp’t at 4.
240. Id. at 664 (quoting Mitsubishi Motors Corp., 473 U.S. at 626). For example, in BG Grp. PLC v. Republic of Arg., 134 S. Ct. 1198 (2014), the Court held that contract terms allowed the arbitrator to determine if local litigation were necessary, despite the existence of a treaty between the countries involved.
241. DIRECTV argued that the presumption of arbitrability controls, especially where, as here, the contract invoked the FAA, Brief of Pet’r at 9. Imburgia argued that a dispute that falls within an arbitration agreement arises from a common-sense understanding of what the parties themselves probably intended.” Brief of Resp’t at 21.
242. For an overview of the argument, see generally Adam Liptak, Supreme Court Sees DirecTV Class Action as Too Big and Too Small, N.Y. TIMES (Oct. 6, 2015), http://www.nytimes.com/2015/10/07/business/supreme-court-sees-directv-class-action-as-too-big-and-too-small.html?_r=0; see also Mann, supra note 209.
court’s interpretation of the contract was correct, whether the contract was ambiguous, and whether the court had any business interjecting itself into state law contract interpretation. 243 Even had the California court erred, the justices suggested they found the task of reviewing state court contract interpretation objectionable. 244 They acknowledged that if they engaged in reviewing state court contract interpretations, they would face a flood of such cases, 245 and questioned what standard the justices should use in reviewing them. 246 Moreover, tackling an erroneous lower court contract interpretation prompted one justice to inquire whether overturning state law would result in a “federalization” of contract law. 247

On the other hand, all United States courts must bow to Supreme Court rulings. Chief among the justices’ concerns was whether California courts, in allowing the class to proceed, were attempting to perform an “end run” around the Court’s decision in Concepcion, essentially reflecting a judicial hostility to arbitration that the FAA was intended to counteract. 248

2. The Imburgia Decision

The Court’s repudiation of the California court decision was as resounding as it was expeditious. The 6-3 majority 249 pounced on the

243. Justice Scalia drilled counsel for DIRECTV: “You need some test . . . . Where does it stop? We’re going to reinterpret every State interpretation of—of State law that—that ends up invalidating an arbitration agreement? Certainly not. So what’s the test?” Tr. of Oral Argument, supra note 216, at 12.

244. Id. at 24 (“But you know, wrongness is just not what we do here.”). See also Liptak, supra note 242.

245. Tr. of Oral Argument, supra note 216, at 50.

246. Justice Antonin Scalia and Justice Stephen Breyer both asked counsel for DIRECTV what standard the Court should use in deciding what state contract disputes it should review. Id. at 12-13, 19. Justice Scalia drilled counsel for DIRECTV: “You need some test . . . . Where does it stop? We’re going to reinterpret every State interpretation of—of State law that—that ends up invalidating an arbitration agreement? Certainly not. So what’s the test?” Id. at 12.

247. Justice Breyer noted in oral argument, “And suddenly we have Federalized, if not every area, a huge area of State contract law.” Id. at 10, 12. See also Liptak, supra note 242.

248. Justice Breyer wove the two concerns together:

So we have, on the one hand, the risks that we’ll get into too many State law cases, if we take their side. On the other hand, there is the risk that they’ll run around our decisions. Now, when you get to that second thing, even though I dissented [in Concepcion], I think it’s an extremely important thing in a country that has only nine judges here and thousands of judges in other places who must follow our decisions — and think of the desegregation matters, et cetera — that we be pretty firm in saying you can’t run around our decisions, even if they’re decisions that I disagree with.

Transcript of Oral Argument, supra note 216, at 50-51.

249. Justice Breyer delivered the opinion in which Justices Scalia, Anthony Kennedy, Samuel Alito, Elena Kagan and Chief Justice John G. Roberts joined; Justice Clarence Thomas filed a dissenting opinion and Justice Ginsburg filed a dissenting opinion in which Justice Sonia Sotomayor joined.
California courts’ application of now-invalidated California law when the operative language of the arbitration agreement invoked the “law of your state.” For contract interpretation, the Court deferred to state courts: “California courts are the ultimate authority on [California] law.” The majority instead went directly to determining whether the California law, in light of Concepcion, was consistent with the FAA.

The majority soundly rejected the argument that the contract term, “the law of your state” would resurrect the invalidated California law embodying the Discover Bank rule to defeat the FAA. Parties were free to choose any law they wished to govern a dispute, even that of Tibet or pre-revolutionary Russia. They could even choose to include the Discover Bank rule that would render the arbitration agreement unenforceable. However, those choice of law provisions were not included in the contract at issue. Rather, the contract simply invoked “state law.” California law did not support the appellate court’s application of a now defunct blanket ban on class arbitration. “The view that state law retains independent force even after it has been authoritatively invalidated by this Court is one courts are unlikely to accept as a general matter and to apply in other contexts.” As a result, the lower courts’ interpretation of the contract as applying a now invalid law failed to place arbitration contracts “on equal footing with all other contracts.” It did not “give ‘due regard . . . to the federal policy favoring arbitration.”

C. Imburgia’s Impact on State Law

While the Imburgia decision reiterates Concepcion and the preeminence of the FAA, the Court in Imburgia took great pains to carve out the role of state courts in interpreting and applying state law with respect to contracts. Although it analyzed the appellate court’s


250. Id. at 469-70.
251. Id. at 468.
252. Id.
253. Id. at 471.
254. Id.
255. Id.
256. Id.
257. Id. at 470-71. To its point, the Court noted that the lower courts had cited no California precedent that would support the application of an invalid state law to a contract.
258. Id. at 470.
259. Id. at 471 (internal citation omitted).
application of California law which would invalidate a class action waiver, it, like the appellate court, addressed Concepcion’s invalidation of the Discover Bank rule and not the California Consumer Legal Remedies Act. In so doing the Court deferred to state law contract interpretation. Moreover, it focused on the Discover Bank rule’s not placing arbitration agreements on equal footing with other contracts. Sidestepping California statutes, the Court determined that the lower court improperly resurrected Discover Bank to uphold the class action waiver. In this way, Imburgia reinforces the role of state courts in contract interpretation.

No such strong deference to state law appears in Concepcion. There, the Court simply pitted the Discover Bank rule against the FAA: “California’s Discover Bank rule . . . interferes with arbitration. Although the rule does not require class wide arbitration, it allows any party to a consumer contract to demand it ex post.” Further, while Concepcion undercut California state law with respect to its view of unconscionability, the Imburgia Court explicitly looked to how California law interpreted the term “the law of your state” as referring to a now invalid law. In this vein, there was no support that any other California court “would reach the same interpretation of ‘law of your state’ in any context other than arbitration.”

The Imburgia decision also underscores the role of precedent in assessing the validity of a decision to vacate an arbitration agreement. Such a track record is strongly evident in Ohio. Its courts have reached consensus on tackling the enforceability of an arbitration agreement in a contract. Unlike the California courts in Concepcion and Imburgia, Ohio jurisprudence calls for invalidating an arbitration agreement only after a case by case analysis of unconscionability and public policy in the context of a particular factual scenario.

The protections offered to consumers by Ohio’s Consumer Sales Practices Act are likely to remain intact. Under express circumstances, the CSPA provides for consumers to pursue private action, and even class action litigation. As a result, Ohio courts effectively restore a party’s right to resort to a judicial forum, or a class action, even in the face of an arbitration agreement waiving these rights. Judges can do so, in part, because unlike California law, the CSPA does not void an

261. Id. at 468 ("[W]e recognize that California courts are the ultimate authority on California law.").
262. Id. at 471.
263. Id. at 468-471.
265. Imburgia, 136 S. Ct. at 469. To its point, the Court noted that the lower courts had cited no California precedent that would support the application of an invalid state law to a contract. Id. at 469-71.
arbitration agreement in a consumer contract simply because it contains a class action waiver. *Imburgia*’s clear deference to state contract law, combined with Ohio’s careful approach, each suggests that when appropriate, Ohio courts will void arbitration agreements where consumers have defenses at law or in equity as the FAA intends.

VI. CONCLUSION

The Supreme Court’s emerging jurisprudence on arbitration enforcement increasingly challenges state law initiatives to keep the courthouse doors open where arbitration agreements contravene. These new steps by the Supreme Court around state law is a recent judicial redefining of Congress’ clear and long-standing mandate to wed arbitration enforcement to common law contract principles.

Decisions strictly enforcing arbitration agreements have had a profound impact on business-consumer relationships. They also have skewed the power balance between contracting parties in favor of the dominant party. That these contracts routinely are made available online, requiring a party to simply acknowledge having read and understood the contract before hitting “I agree,” reinforces the question of whether there indeed has been a meeting of the minds.

The reshaping of the law surrounding the enforceability of arbitration agreements also may have a profound effect on each state’s common law. The *Imburgia* case presents intriguing questions involving state contract law defenses and the intent of the parties. Will defenses like unconscionability and ineffective remedies be “federalized,” as Justice Breyer warned? The *Imburgia* dicta suggests that the Court will defer to state common law, as long as state courts remain vigilant in preserving the presumption of arbitrability and the force of contracts.

In its own way, Ohio law has developed around the Supreme Court precedent, allowing arbitration enforcement challenges under statutory rights as well as state common law principles. Ohio courts continue to use Ohio common law contract principles to define, demarcate, and defeat arbitration agreements. Their careful approach suggests that, under Ohio law, consumers and other parties to arbitration agreements may be less constrained by mandatory arbitration clauses than recent Supreme Court cases suggest.