

FAA Preemption after Concepcion

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Abstract:

AT&T Mobility LLC v. Concepcion is an important case for its holding that the FAA preempts application of state unconscionability doctrine to invalidate an arbitration clause with a class arbitration waiver. But in a number of respects, the effect of Concepcion has been overstated, including its effect on application of state unconscionability doctrine to arbitration clauses. Concepcion does not preempt all or even most state unconscionability doctrine as applied to arbitration agreements. Properly construed, Concepcion preempts state unconscionability doctrine only when that doctrine conditions enforcement of arbitration agreements on procedures inconsistent with “fundamental attributes of arbitration” of the sort illustrated in Concepcion itself — such as the use of juries, court-monitored discovery, evidentiary rules, and, of course, class arbitration. If, however, the Supreme Court were to construe Concepcion more broadly (or eliminate application of unconscionability to invalidate arbitration clauses altogether), courts would retain some residual authority to police the fairness of arbitration clauses, but only by finding a dispute resolution process not to be arbitration at all.