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Response

Bootstraps on the Ground: A Response to Professor Leslie

By Richard Frankel*

I. Introduction

I am starting with a disclosure: I am a pessimist about the benefits of mandatory arbitration clauses in consumer and employment contracts. I tend to believe that the corporate world's expanded imposition of mandatory arbitration provisions in non-negotiable take-it-or-leave-it contracts is designed to immunize corporations from responsibility for illegal conduct and to make it difficult, if not impossible, for aggrieved consumers and employees to vindicate their rights. Consequently, I read Professor Christopher Leslie's insightful and timely article, *The Arbitration Bootstrap*,[1] with great pleasure. Professor Leslie eloquently and persuasively criticizes the landscape of current arbitration law and policy in a number of ways. In particular, the article explains how mandatory arbitration clauses have become "ubiquitous" in consumer and employment contracts and how mandatory arbitration systematically favors big business and fails to adequately protect consumers and employees.[2] Professor Leslie ascribes this trend to a steady stream of Supreme Court decisions over the last thirty years in which the Court has given the Federal Arbitration Act (FAA) an expansive reach based on a distorted view of the Act's legislative history, has shown a strong willingness to enforce arbitration clauses, has precluded states from trying to make the arbitration process fair for

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1. Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEXAS L. REV. 265 (2015).
2. *Id.* at 266.

consumers and employees, and has mandated enforcement of arbitration clauses even when doing so prevents individuals from pursuing their claim in any forum—arbitral or judicial.[3]

According to Professor Leslie, the Court's expansive decisions limiting a state's ability to regulate arbitration clauses—reflected most notably in *AT&T Mobility LLC v. Concepcion*[4] and *American Express Co. v. Italian Colors Restaurant*[5]—have led to a new and potentially troubling practice that Professor Leslie aptly terms "the arbitration bootstrap."[6] As he states, "Arbitration bootstrapping describes situations where firms insert terms unrelated to arbitration into an arbitration clause in the hopes that judges will be more likely to enforce terms embedded in arbitration clauses."[7] Businesses' ability to engage in arbitration bootstrapping stems from the FAA's preemptive effect on state law. Because the FAA preempts certain state efforts to single out arbitration clauses for regulation but has no effect on other contractual provisions, businesses can take contract terms that ordinarily would be unenforceable as unconscionable or against state public policy and make them enforceable by putting them inside an arbitration clause. He identifies many types of ordinarily unenforceable contract provisions—class action bans, shortened statutes of limitations, bans on injunctive relief, bans on punitive damages, loser-pays rules, and non-coordination agreements—that he believes courts might be willing to enforce so long as they appear in an arbitration clause rather than in some other part of the contract.[8]

As Professor Leslie notes, this is strange. "If a contract term would not be enforceable if it were outside of an arbitration clause, it should not be enforceable because it is inserted into an arbitration clause."[9] The problem, according to Leslie, is what he reads as the Supreme Court's pronouncements in *Concepcion* and *Italian Colors*—based on a misreading of congressional intent and the FAA's legislative history—that the Act preempts any attempt to apply state unconscionability principles to arbitration clauses.[10] The remedy, he suggests, is to revisit the Supreme Court's broad preemptive reading of the FAA and its legislative history. Carefully analyzing the FAA's legislative history, Professor Leslie shows that the FAA was intended to apply to commercial contractual disputes between sophisticated merchants, not to statutory claims between businesses and consumers or employees, let alone to arbitration clauses that

3. *Id.* at 268–69.
4. 563 U.S. 333, 339 (2011).
5. 133 S. Ct. 2304 (2013).
6. Leslie, *supra* note 1, at 266–68.
7. *Id.* at 266.
8. *Id.* at 268.
9. *Id.* at 308.
10. *See infra* notes 67–74 and accompanying text.

are imposed on unsophisticated parties in nonnegotiable adhesion contracts.[11] Thus, Professor Leslie concludes that instead of sanctioning the corporate world's attempt to impose unconscionable provisions on consumers through the "arbitration bootstrap," courts should either sever such unconscionable terms from an arbitration provision or alternatively strike down the arbitration provision entirely. Only then will courts have fulfilled Congress's original intent in passing the FAA: "[T]o make arbitration agreements as enforceable as other contracts, but not more so."[12]

To the extent that arbitration bootstrapping is occurring under the radar, Professor Leslie should be applauded for publicizing it and pushing for its abolition. Arbitration clauses should not become a safe harbor for offensive contract provisions.

However, as explained below, I worry that his article might inadvertently encourage the very bootstrapping that it is trying to prevent. First, I believe that bootstrapping may not be as prevalent as Professor Leslie suggests. In my view, many courts have properly interpreted *Concepcion* not to prohibit state law challenges to unfair contract terms other than class action bans. In other words, for many contract provisions, courts have found that if they can be struck down as unenforceable when placed in another part of the contract, they can also be struck down as unenforceable when placed within an arbitration clause. Additionally, companies may currently have incentives not to bootstrap, because they do not want to do anything that would cause them to lose their most cherished provision—the class action ban—based on the insertion of some other unconscionable provision in the arbitration clause.

Second, because judges generally have not condoned arbitration bootstrapping aside from class action bans, his article could increase judicial approval of bootstrapping rather than decrease it. That is because Professor Leslie reads *Concepcion*, in my view, overly broadly to suggest that the decision prohibits all unconscionability challenges to arbitration clauses, and thus requires courts to enforce bootstrapped contract terms. Although he attacks *Concepcion* as wrongly decided, lower courts are bound by it whether or not it is wrong. He does not give lower courts a path for striking down unconscionable terms that are bootstrapped in arbitration clauses. Thus, if (a) courts are not broadly approving attempts to bootstrap unconscionable provisions into arbitration clauses, and if (b) *Concepcion* requires enforcement of any unconscionable provision inserted into an arbitration clause, then lower court judges reading his article may feel compelled by *Concepcion* to permit bootstrapping where they had not previously.

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11. Leslie, *supra* note 1, at 300–07.

12. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967).

II. Arbitration Bootstrapping Might Not be that Common

Although I described myself as an arbitration pessimist, there is one issue where I am more optimistic than Professor Leslie: the prevalence of arbitration bootstrapping. To understand why requires a short discussion of FAA preemption.

Arbitration bootstrapping is an outgrowth of FAA preemption doctrine. Based on the view that the FAA was enacted to overcome the then-existing judicial hostility to arbitration clauses, the Court has determined that the FAA preempts state statutory or common law rules that single out arbitration clauses for disfavor or that are inconsistent with fundamental attributes of arbitration.[13] Thus, states have less flexibility to regulate arbitration clauses than they have to regulate other parts of contracts. This imbalance can give rise to arbitration bootstrapping. If the relevant state law would be preempted when applied to an arbitration clause, then a contract term that state law would declare unenforceable if placed in any other part of a contract can be enforced if placed inside an arbitration provision.[14] And if the state-law rule is preempted, then the court must enforce the contract term embedded in the arbitration clause, no matter how objectionable it might be.

On the flip side, generally applicable rules that apply to all contracts, such as unconscionability, also apply to arbitration clauses because they do not treat arbitration clauses differently from any other contract. In fact, the *Concepcion* Court specifically identified unconscionability as one of the generally applicable contract doctrines that can be grounds for invalidating an arbitration provision.[15]

The only time a generally applicable rule would be preempted is if enforcing it would conflict with fundamental attributes of arbitration. In *Concepcion*, the Court held that a state unconscionability rule precluding enforcement of a class action ban embedded in an arbitration clause was preempted for just that reason,[16] and in *Italian Colors*, the Court applied *Concepcion*'s reasoning to the "effective vindication" doctrine, a federal variant of unconscionability, to hold that courts must enforce class action bans in arbitration provisions, even if the provision gives a defendant functional immunity from its alleged wrongdoing.[17]

Thus, after *Concepcion* and *Italian Colors*, there is little question that class action bans can be bootstrapped.[18] When embedded in an arbitration

13. *Concepcion*, 563 U.S. at 339, 351–52.

14. Leslie, *supra* note 1, at 266.

15. *Concepcion*, 563 U.S. at 341–42.

16. *Id.* at 343–44.

17. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2310–12 (2013).

18. It is unclear whether financial services companies will continue to be able to impose class action bans in their arbitration clauses. The Consumer Financial Protection Bureau recently

clause, those bans are generally enforceable regardless of whether they would be struck down if placed in a contract that did not have an arbitration clause.

But that does not mean that all objectionable contract provisions can be bootstrapped. They can be bootstrapped only if *Concepcion*'s holding and logic apply to them. If *Concepcion* is primarily limited to class action bans, then courts do not have to permit bootstrapping of unconscionable provisions other than class action bans. Professor Leslie gives a broad reading to *Concepcion*,[19] and suggests that in its wake, a number of other provisions—shortened statutes of limitations, bans on injunctive relief, bans on punitive damages, loser-pays rules, and non-coordination agreements—are subject to bootstrapping because the FAA may prohibit state courts from striking down such provisions when they are placed in an arbitration clause.[20]

Although Professor Leslie makes his argument forcefully, I am not fully convinced that bootstrapping is a major problem. As I and others have argued, *Concepcion*, when properly read, does not require preemption of much beyond class action bans.[21] Accordingly, it does not authorize bootstrapping of provisions other than class action bans. This is because most unconscionable provisions in an arbitration clause do not implicate "fundamental attributes of arbitration" in the way that class action bans were held to do.[22] The *Concepcion* Court identified specific characteristics unique to class proceedings that it concluded made class-wide proceedings inconsistent with arbitration, including difficult questions about an arbitrator's authority to bind absent class members and how the procedural complexities of class certification could hinder the parties' ability to choose how they want to design the arbitration process.[23]

Most of the provisions contained in arbitration clauses that are challenged as unconscionable neither raise these concerns nor implicate other fundamental attributes of arbitration.[24] Additionally, many courts

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proposed a rule that would prohibit class action bans in arbitration clauses contained in financial services contracts. *See* Bureau of Consumer Financial Protection, Notice of Proposed Rulemaking (May 5, 2016), http://files.consumerfinance.gov/f/documents/CFPB_Arbitration_Agreements_Notice_of_Proposed_Rulemaking.pdf [https://perma.cc/766D-KX5S].

19. *See infra* notes 68–75 and accompanying text.

20. *See infra* notes 25–56 and accompanying text.

21. Christopher R. Drahozal, *FAA Preemption After* Concepcion, 35 BERKELEY J. EMP. & LAB. L. 153, 164–68 (2014). *See generally* Richard Frankel, Concepcion *and Mis*-Concepcion*: Why Unconscionability Survives the Supreme Court's Arbitration Jurisprudence*, 17 J. DISP. RESOL. 225 (2014) (arguing that *Concepcion* and *Italian Colors* will have very little impact outside of class action waivers).

22. *Concepcion*, 563 U.S. at 344.

23. *Id.* at 346–50; *see also* Frankel, *supra* note 21, at 235 (describing how *Concepcion*'s reasoning is primarily limited to class actions).

24. *See, e.g.*, Drahozal, *supra* note 21, at 164–69 (giving examples of application of unconscionability doctrine that do not fail the "fundamental attributes" standard); Frankel, *supra*

have read *Concepcion* to permit the application of state law unconscionability rules to invalidate provisions in arbitration clauses other than class action bans, including in many of the cases that Professor Leslie himself cites. As explained below, I do not believe that the cases Professor Leslie cites fully support the assertion that courts are interpreting *Concepcion* to permit widespread arbitration bootstrapping. Most of the cases that Professor Leslie cites to argue that bootstrapping is on the rise either (a) do not apply bootstrapping (that is, they do not hold that a provision that would otherwise be unenforceable becomes enforceable because it is embedded in an arbitration clause), (b) are cases that were decided very soon after *Concepcion* was handed down when the scope and the reach of the decision was still unclear and that have not been followed by subsequent cases, or (c) are outlier decisions that do not reflect the prevailing interpretation of *Concepcion*.

A. Shortened Statutes of Limitations

Professor Leslie first raises concerns that provisions shortening a statute of limitations to something less than the statutorily-prescribed period would become enforceable if placed in arbitration clauses. The main case he cites is *Muriithi v. Shuttle Express, Inc.*,[25] in which he states that the Fourth Circuit reversed a district court's decision that "an arbitration clause's reduced one-year statute of limitations was unconscionable" and held "that *Concepcion* generally preempts unconscionability arguments against arbitration clauses."[26] While the court did hold that *Concepcion* preempted a challenge to a class action ban,[27] as discussed, class action bans are the one type of provision that can be bootstrapped.

By contrast, the court applied traditional state law unconscionability analysis to the other challenged provisions, including a fee-splitting provision that allegedly imposed prohibitive costs on the plaintiff as well as the shortened statute-of-limitations provision. Moreover, it explicitly held that *Concepcion* did not abrogate the pre-existing rule that courts can strike down arbitration provisions that impose prohibitive costs.[28] While the Court found that the plaintiff had failed to meet its burden of demonstrating that costs were prohibitive, it still found that traditional rules for striking down objectionable contract terms should be applied to arbitration clauses.[29] Thus, the case gives no fodder for a party hoping to start bootstrapping objectionable terms into an arbitration clause.

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note 21, at 242–49 (discussing how courts have addressed various unconscionability challenges to arbitration clauses since *Concepcion*).

25. 712 F.3d 173 (4th Cir. 2013).

26. Leslie, *supra* note 1, at 293 (citing *Muriithi*, 712 F.3d at 178, 180).

27. *Muriithi*, 712 F.3d at 180.

28. *Id.* at 181–83.

29. *Id.*

The court's analysis of the shortened statute of limitations also undermines the bootstrapping argument. In *Murithii*, no bootstrapping occurred at all because the statute of limitations provision was placed *outside* the arbitration clause and was not referenced by the arbitration clause.[30] The court acknowledged that the statute-of-limitations provision ordinarily could be challenged as unconscionable, but decided the issue in a way that actually may discourage bootstrapping.[31] It held that because the provision was not in the arbitration clause, any challenge to the limitations period was a challenge to the contract as a whole rather than to the arbitration clause specifically, which meant that the issue had to be decided by an arbitrator rather than by a court.[32] Thus, by expressly declining to bootstrap the shortened limitations period into the arbitration clause, the defendant ensured that the dispute was sent to an arbitrator to decide whether the shortened limitations period was unconscionable as a matter of state law.[33]

In the other case Professor Leslie cites, he focuses on dicta from a district court ruling issued less than a month after *Concepcion* was decided.[34] There, the court acknowledged that if it had to decide the issue, it seemed possible that a state law rule invalidating a shortened statute of limitations "might well be preempted by the FAA."[35] But the court explained that it was not deciding the issue because it was not squarely presented under the facts of that case, and the court did not have the benefit of adversarial litigation on the question because the plaintiff's lawyer in the case "conceded the reasoning of *AT & T Mobility* indicates that federal law trumps state substantive unconscionability principles as applied to arbitration agreements."[36] Moreover, it is not surprising that the court might speculate about the possible reach of *Concepcion* since the case was less than a month old and courts had not had much time to apply it to other contexts. By contrast, many courts since then have analyzed the issue more fully and have found that shortened statutes of limitations in arbitration provisions can be invalidated without violating *Concepcion*, meaning that they cannot be made enforceable simply by placing them in an arbitration provision.[37]

30. *Id.* at 184.

31. *Id.*

32. *Id.*

33. *Id.*

34. Leslie, *supra* note 1, at 292–93, 293 n.178 (citing D'Antuono v. Serv. Rd. Corp., 789 F. Supp. 2d 308, 330–31 (D. Conn. 2011)).

35. *D'Antuono*, 789 F. Supp. 2d at 331.

36. *Id.*

37. Frankel, *supra* note 21, at 244–45 n.114 (citing cases).

B. Anti-Injunction Clauses

Professor Leslie argues that "*Concepcion* could make it easier for firms to use arbitration clauses as a mechanism to prevent injunctive relief" because some courts "have read *Concepcion* to preclude such invalidation of anti-injunction clauses in arbitration."[38] However, the cases he cites do not hold that provisions precluding an arbitrator from awarding injunctive relief must be enforced if a ban on injunctive relief would otherwise be unconscionable. Rather, the cases he cites indicate that arbitrators can award injunctive relief and that a rule striking down provisions barring arbitrators from awarding injunctive relief is not inconsistent with fundamental attributes of arbitration.

Several of the cited cases involve the viability of California's *Broughton–Cruz* rule, which does not concern a wholesale ban on injunctive relief. Rather, the *Broughton–Cruz* rule is a rule about which forum—an arbitrator or a court—should decide claims for public injunctive relief. The *Broughton–Cruz* rule established that parties cannot require arbitration of claims for public injunctive relief because of the difficulties involved with an arbitrator ordering and overseeing a public injunction.[39]

The Ninth Circuit has now suggested the FAA preempts that rule; not because courts must enforce provisions banning injunctive relief, but rather on the ground that arbitrators are able to award injunctive relief and that a presumption that they cannot reflects the kind of suspicion or hostility to arbitration that the FAA prohibits.[40] Thus, the cases reinforce, if anything, that injunctive relief is perfectly consistent with fundamental attributes of arbitration. Indeed, it does not appear that the arbitration clauses in these cases precluded injunctive relief. Instead, the issue was whether the injunctive relief claims should be decided by an arbitrator. Thus, the cases do not establish that arbitration clauses can ban injunctive relief claims and be immune to unconscionability challenges. Rather, they suggest that *Concepcion* would not preempt an unconscionability challenge to an anti-injunction provision because injunctive relief is perfectly consistent with arbitration. Indeed, in one of the cases Professor Leslie cites, the court did not find either that there was a ban on injunctive relief or that any such ban would be automatically enforceable, but instead it found that the claim for injunctive relief could be resolved in arbitration.[41]

Furthermore, the cases do not support the assertion that *Concepcion*

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38. Leslie, *supra* note 1, at 294.

39. Cruz v. PacifiCare Health Sys., Inc., 66 P.3d 1157, 1161–65 (Cal. 2003); Broughton v. Cigna Healthplans of Cal., 988 P.2d 67, 78 (Cal. 1999).

40. Ferguson v. Corinthian Colls., Inc., 733 F.3d 928, 934–37 (9th Cir. 2013); Kilgore v. Key Bank, Nat'l Ass'n, 718 F.3d 1052, 1059–61 (9th Cir. 2013) (en banc).

41. Arellano v. T-Mobile USA, Inc., No. C 10-05663, 2011 WL 1842712, at *2 (N.D. Cal. May 16, 2011) ("Plaintiff's first, second, third, fourth, fifth, sixth, and ninth claims for injunctive relief will proceed immediately to arbitration.").

foreclosed unconscionability challenges to anti-injunction provisions. Even after *Concepcion*, if a ban on injunctive relief would be unconscionable as a matter of generally applicable state law, then it can be found unconscionable even if the ban is placed in an arbitration clause. In fact, the Ninth Circuit, after indicating that *Concepcion* preempted California's *Broughton–Cruz* rule, went on to apply state unconscionability principles to the arbitration clause.[42] Similarly, in the only other case that Professor Leslie cites, the court did not find that *Concepcion* invalidated an unconscionability challenge to an anti-injunction provision. Instead, it found that the provision, to the extent it prohibited injunctive relief on behalf of the "public at large" rather than on behalf of the plaintiffs themselves, was not unconscionable as a matter of state law—i.e., that the provision was enforceable whether it was placed inside or outside the arbitration clause.[43] Bootstrapping was simply a nonissue.[44]

C. Damages Caps

Professor Leslie also argues that state rules establishing that caps on damages are unconscionable may no longer be valid after *Concepcion* and thus that such caps may be bootstrapped into arbitration clauses.[45] He cites a single, unpublished federal district court case from 2011, but I do not read the case as expanding *Concepcion* to damages caps.[46] Rather, the court in that case stated that unconscionability mostly survives *Concepcion*:

> In the wake of Concepcion, the decision has been interpreted to bar challenges to arbitration agreements on the grounds that they contain class action waivers, but not to prevent courts from considering other unconscionability arguments that do not "interfere[ ] with fundamental attributes of arbitration and thus create[ ] a scheme inconsistent with the FAA."[47]

It then applied state unconscionability doctrine to the plaintiff's challenges to the arbitration clause and found that the challenged provisions were not procedurally unconscionable as a matter of state law.[48]

To the extent the case addressed FAA preemption at all, it did so only

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42. Kilgore v. Key Bank, Nat'l Ass'n, 673 F.3d 947, 963–64 (9th Cir. 2012), *vacated on other grounds*, 718 F.3d 1052 (9th Cir. 2013) (en banc).

43. Schatz v. Cellco P'ship, 842 F. Supp. 2d 594, 612–13 (S.D.N.Y. 2012).

44. Indeed, parties have continued to argue that arbitration clauses banning injunctive relief are unconscionable even if the *Broughton–Cruz* rule is no longer valid. That issue is currently before the California Supreme Court. McGill v. Citibank, 345 P.3d 61 (Cal. 2015).

45. Leslie, *supra* note 1, at 293–94.

46. *Id.* at 294 n.184 (citing Alvarez v. T-Mobile, USA, Inc., 2011 WL 6702424 (E.D. Cal. Dec. 21, 2011)).

47. Alvarez v. T-Mobile, USA, Inc., 2011 WL 6702424, at *6 (E.D. Cal. Dec. 21, 2011) (quoting *Concepcion*, 563 U.S. at 344).

48. *Id.* at *6–7.

to say that if it were to address substantive unconscionability, it would find that California's rule prohibiting arbitration of claims for public injunctive relief does not survive *Concepcion* and possibly that limits on punitive damages do not survive *Concepcion*.[49] But as explained above, invalidating California's rule prohibiting arbitration of claims for public injunctive relief has no bearing on arbitration bootstrapping, and even if the case could be read as suggesting that the FAA preempts applying unconscionability to an arbitration clause's ban on punitive damage awards, it is inconsistent with numerous post-*Concepcion* decisions rejecting FAA preemption in that circumstance.[50] Indeed, there is no reason to think that applying unconscionability to damages caps should be preempted because there is nothing about allowing parties to obtain damages that they are statutorily authorized to obtain that is inconsistent with fundamental attributes of arbitration.

D. Other terms

Professor Leslie asserts that courts are allowing bootstrapping of several other types of contract terms: non-coordination clauses, clauses that impose high costs, and fee-shifting provisions.[51] I agree with Professor Leslie that anti-coordination provisions are, unfortunately, susceptible to bootstrapping. To the extent that efforts to coordinate are seen as analogous to collective action or class actions, then, as Professor Leslie astutely points out, an anti-coordination provision could be read as a kind of anti-collective action provision that the Supreme Court has held must be enforced.[52]

However, with respect to high costs and fee-shifting provisions, the cases he cites either (a) find that the provision is not unconscionable as a matter of state law, not that unconscionability is preempted,[53] or (b) are not representative for reasons stated above.[54] Indeed, a leading treatise explains that the view that *Concepcion* and *Italian Colors* preempt challenges based on excessive costs or fees is "mistaken," because there is nothing about imposing prohibitively high costs that is fundamental to arbitration.[55] There

49. *Id.*

50. Frankel, *supra* note 21, at 243 n.109 (citing cases).

51. Leslie, *supra* note 1, at 282.

52. *Id.* at 290–91, 295.

53. *Id.* at 288 n.162 (citing Carrell v. L & S Plumbing P'ship, Ltd., 2011 WL 3300067 (S.D. Tex. 2011)). In *Carrell*, the Court applied Texas state-law unconscionability principles to plaintiff's challenge to the costs imposed by the arbitration provision, and found that the plaintiffs did not meet their burden of proof under Texas law of showing that the costs of arbitration would prevent them from enforcing their statutory rights. *Carrell*, 2011 WL 3300067, at *4. It did not find that the FAA preempted plaintiffs' unconscionability challenge. *Id.*

54. *Id.* at 289 n.163 (citing D'Antuono v. Serv. Rd. Corp., 789 F. Supp. 2d 308, 330–31 (D. Conn. 2011)). For reasons why *D'Antuono* is an outlier case, see *supra* notes 34–37 and accompanying text.

55. F. PAUL BLAND ET AL., CONSUMER ARBITRATION AGREEMENTS 162–65 (7th ed. &

are a number of cases finding that arbitration provisions imposing excessive fees or fee-shifting provisions can be struck down as unconscionable and are not preempted by the FAA.[56]

E. Incentives Not to Bootstrap

If bootstrapping were to increase, and if courts were to say that the FAA requires enforcement of bootstrapped provisions even if they would otherwise be unenforceable, then I agree with Professor Leslie that bootstrapping could become a significant problem. It may be worth considering, however, whether businesses currently have countervailing incentives not to bootstrap potentially unconscionable provisions into an arbitration clause and thereby risk having the arbitration clause struck down. In the consumer arena, the provision that businesses want to protect most is the class action ban.[57] The reason is, as Professor Leslie points out, that class action bans function as immunity clauses.[58] Because many consumer claims involve small dollar injuries inflicted on a large number of people, a class action or some other form of collective action is the only meaningful way for consumers to pursue relief. The alternative to a class action ban is not individual arbitration, it is no arbitration, because there is insufficient incentive to bring the claim on an individual basis.[59] Recent research from the Consumer Financial Protection Bureau confirms that very few consumers pursue claims in individual arbitration and that the amount of relief that the number of individuals who receive relief through individual arbitrations is exponentially smaller than the number of consumers who benefit from class claims.[60]

Supp. 2016).

56. Frankel, *supra* note 21, at 245–46 (examining cases that held the FAA does not preempt state law challenges to these types of provisions); *see also* Nesbitt v. FCNH, Inc., 811 F.3d 371, 379–81 (10th Cir. 2016) (striking down arbitration clause that imposed excessive costs and fees on plaintiff); Drahozal, *supra* note 21, at 166 (discussing that courts have held arbitration agreements unconscionable due to excessive costs and that *Concepcion* should not change this application of the unconscionability doctrine).

57. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 362–63 (2011) (Breyer, J., dissenting).

58. Leslie, *supra* note 1, at 275–77.

59. *See* Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.").

60. The Consumer Financial Protection Bureau (CFPB), in a comprehensive study of arbitration provisions in consumer financial services contracts, found that consumers initiated an average of 411 individual arbitrations per year for the years 2010–2012. CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT 11 (2015), http://www.consumerfinance.gov/reports/arbitration-study-report-to-congress-2015 [https://perma.cc/FW7J-NTGA]. For the years 2010 and 2011, consumers received total relief of $360,000, or $180,000 per year, for an average of $1,060 in relief for the 341 consumers whose cases reached a decision. *Id.* at 12. By contrast, during the period of 2008–2012, the study found that class actions

If the class action ban is preserved, then other potentially unconscionable terms become less important. If there is virtually no risk of anyone bringing an individual claim in the first place, then there is no need for businesses to try to shorten the statute of limitations, cap damages, or ban injunctive relief. Thus, businesses have every incentive to go out of their way to ensure that there is nothing else in the arbitration provision that could cause it, and its class action ban, to get struck down as unconscionable.

The arbitration provision in *Concepcion* itself is a good example.[61] Rather than loading the clause with business-friendly provisions, the defendant, AT&T Mobility, loaded the clause with consumer-friendly terms.[62] As the Supreme Court noted, the arbitration provision at issue

> specifies that AT & T must pay all costs for nonfrivolous claims; that arbitration must take place in the county in which the customer is billed; that, for claims of $10,000 or less, the customer may choose whether the arbitration proceeds in person, by telephone, or based only on submissions; that either party may bring a claim in small claims court in lieu of arbitration; and that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages. The agreement, moreover, denies AT & T any ability to seek reimbursement of its attorney's fees, and, in the event that a customer receives an arbitration award greater than AT & T's last written settlement offer, requires AT & T to pay a $7,500 minimum recovery and twice the amount of the claimant's attorney's fees.[63]

That way, there was no risk of a party claiming any other part of the arbitration provision was unconscionable, thus risking the downfall of the whole clause including the class action ban.

Similarly, Professor Myriam Gilles conducted empirical research that found that many companies have adopted "consumer-friendly" arbitration clauses after *Concepcion*.[64] This makes sense, because now that class action bans can be enforced, bootstrapping other questionable provisions into an arbitration clause carries a risk of knocking out the class action ban.

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involving financial services products provided relief to an average of 70 million consumers a year in an average amount of $540 million per year. *Id.* at 16. Thus, the amounts awarded in individual arbitrations are a pittance compared to the amounts paid out in class actions. If companies can eliminate class actions, then they eliminate almost all of their litigation exposure.

61. *Concepcion*, 563 U.S. at 336–37.

62. *Id.*

63. *Id.*

64. Myriam Gilles, *Killing Them with Kindness: Examining "Consumer-Friendly" Arbitration Clauses after* AT&T Mobility v. Concepcion, 88 NOTRE DAME L. REV. 825, 828 (2012) ("Following *Concepcion*, bilateral arbitration clauses themselves are evolving to *permit* vindication of rights, by providing that companies will absorb otherwise non-recoupable costs and fees, and by posting 'bounties,' premiums and other features . . . .").

Professor Leslie explains that if a court finds some other provision in an arbitration clause unconscionable, it can either strike down the offending provision and leave the remainder of the arbitration clause in place, or it can, in certain circumstances, strike down the entire arbitration clause, thus taking down the class action ban with it.[65] Indeed, the Tenth Circuit recently held that a plaintiff could bring a collective action in court under the Fair Labor Standards Act (FLSA), even though the arbitration clause banned collective action, because the entire arbitration clause was unconscionable.[66] The court found that the provision's requirements that the parties split the cost of the arbitrator's fee and that each party bear its own costs made arbitration prohibitively expensive and prevented the plaintiff from effectively vindicating her rights.[67] This shows why companies have a reason not to bootstrap, in order to avoid any risk to the most important arbitration term, the class action ban.

Still, in the end, it may sound like I am just quibbling over the meaning of a few of the many cases that have addressed FAA preemption after *Concepcion*. What's the big deal? People disagree about the meaning of cases all the time. The reason I am concerned is that I believe Professor Leslie's logic, if accepted, could justify greater arbitration bootstrapping rather than less.

III. The Risk of Increasing Arbitration Bootstrapping

Although Professor Leslie strongly criticizes the concept of arbitration bootstrapping, I worry that the article could actually increase judicial approval of bootstrapping. By reading *Concepcion* broadly to preempt all unconscionability challenges to arbitration clauses, Professor Leslie's reasoning would require lower courts to allow bootstrapping of any unconscionable provision in an arbitration clause, whether they want to or not. While Professor Leslie criticizes *Concepcion*, he does so primarily by arguing that it was wrongly decided, rather than by arguing that lower courts have room to interpret it narrowly. But that does not help lower courts because they are bound by *Concepcion* whether it was decided correctly or incorrectly. Thus, by suggesting that courts are applying bootstrapping logic more often than they really are, and by suggesting that *Concepcion* requires them to allow bootstrapping, his reasoning could lead courts to sanction bootstrapping in situations where they are not currently doing so.

First, if *Concepcion* truly spells the end of unconscionability defenses to arbitration provisions, as Professor Leslie suggests, then any unconscionable provision can be bootstrapped and there is nothing any

65. Leslie, *supra* note 1, at 327–29.

66. Nesbitt v. FCNH, Inc., 811 F.3d 371, 380–81 (10th Cir. 2016).

67. *Id.* at 377–79.

lower court can do to strike it down. By contrast, if *Concepcion* is read as being primarily limited to class action bans, then bootstrapping would also be limited primarily to class action bans.

While I have suggested that *Concepcion* and *Italian Colors* deserve a narrow reading, Professor Leslie gives both *Concepcion* and *Italian Colors* a broad reading and suggests that they eliminate any application of unconscionability to arbitration clauses. He asserts throughout the article that:

- "In tandem, these two decisions operate to dismantle entire fields of law, including laws against fraud, deception, predatory conduct, antitrust violations, and employment discrimination";[68]
- The decisions have "signaled a judicial willingness to enforce all manner of arbitration clauses [not just limited to class action bans], even if the clause includes provisions that would violate state law or make effective vindication of one's rights impossible";[69]
- Concepcion held that "judges cannot use the unconscionability doctrine to invalidate a term embedded in an arbitration agreement";[70]
- After *Concepcion*, "simply by placing an unconscionable contract term in an arbitration agreement, firms can make unconscionable terms enforceable";[71]
- "[B]y limiting the ability of courts to use the unconscionability doctrine as a method of constraining anti-plaintiff terms in an arbitration clause, *Concepcion* encourages firms to load their arbitration agreements with otherwise-unenforceable provisions";[72]
- Under *Concepcion*'s reasoning, "courts defer to all manner of anti-consumer contract terms, as long as the terms are situated within an arbitration clause";[73]
- "The Court has further claimed that Congress intended to prevent states from doing anything to protect their citizens from unconscionable arbitration clauses imposed through contracts of adhesion";[74] and
- "The Supreme Court has claimed that Congress intended

68. Leslie, *supra* note 1, at 268.
69. *Id.* at 271.
70. *Id.* at 292.
71. *Id.* at 293.
72. *Id.* at 295–96.
73. *Id.* at 299.
74. *Id.*

> arbitration clauses to trump 'public policy' concerns of the states, such as protecting citizens from unconscionable contract terms."[75]

If unconscionability is truly gone, then courts have no way to stop bootstrapping. Not only that, courts would be required to apply bootstrapping logic to unconscionability challenges where they currently have not applied it, thus increasing bootstrapping rather than decreasing it. And they would have no way to implement the solution that Professor Leslie offers—severing unconscionable provisions from arbitration clauses or striking down the arbitration clause altogether.[76]

Professor Leslie does not give lower courts a path for striking down unconscionable terms that are bootstrapped into arbitration clauses and in fact suggests that *Concepcion* forbids them from doing so.[77] He heaps plenty of well-deserved scorn on *Concepcion*, *Italian Colors*, and the last 30 years of arbitration precedent. But he does so by arguing that the cases were wrongly decided, not by questioning the breadth of their reach. In particular, Professor Leslie asserts (and persuasively so) that the Court has misread the FAA's legislative history and that a more accurate reading shows that the framers intended the Act to apply to commercial contractual disputes between merchants, not to statutory and tort disputes between businesses and consumers, let alone to collective action and class claims.[78] That is all well and good for a Supreme Court willing to reconsider thirty years of arbitration decisions, or for a Congress willing to enact legislative reforms to the FAA, but Professor Leslie acknowledges, as he must, that neither is likely in the near future.[79] As a result, under Professor Leslie's reading, corporations can bootstrap virtually anything into an arbitration clause and there is nothing that courts can do to stop it.

To be sure, Professor Leslie, late in the article, asserts that some principles of *Concepcion* "do not apply to the other anti-consumer terms that firms embed in arbitration clauses" and that "other anti-consumer terms embedded in arbitration clauses are sufficiently distinguishable from class action waivers that courts can sever them without running afoul of *Concepcion*."[80] I wish that this part of Professor Leslie's analysis was given more prominence, as I agree with it for all the reasons stated earlier. But that language is hard to square with the article's earlier and repeated pronouncements about how *Concepcion* reaches all unconscionability

75. *Id.* at 312.

76. *Id.* at 324.

77. *Id.* at 325–27.

78. *Id.* at 308–12.

79. *Id.* at 320–21. Whether the Court's revised makeup following the death of Justice Antonin Scalia will affect the likelihood that the Court will revisit *Concepcion* and *Italian Colors* remains to be seen.

80. *Id.* at 325.

challenges rather than just class action bans. I worry that a reader may be more likely to focus on those statements and to overlook his caveat about *Concepcion* that comes near the end of the article.

The upshot is that the article could justify bootstrapping rather than invalidate it. Professor Leslie may be correct that the Supreme Court has made a mess of its arbitration jurisprudence, but that does not help lower courts that are tasked with trying to make sense of it. They are bound by the Supreme Court whether the Court gets it right or the Court gets it wrong. And if (a) *Concepcion* is what gives rise to the arbitration bootstrap, and (b) *Concepcion* has a broad reach rather than a narrow one, as Professor Leslie suggests, then his logic will require lower courts to sanction arbitration bootstrapping broadly to all unconscionability challenges, including to unconscionability challenges to which courts have currently said that *Concepcion* does not apply. Maybe I am being overly pessimistic, but I hope that Professor Leslie's article does not encourage the very result he is fighting against.

IV. Conclusion

Perhaps the one thing that is keeping corporations from pursuing bootstrapping more aggressively is the risk of having the class action ban struck down in a case where a court invalidates an entire arbitration clause based on an unconscionable provision rather than just striking the unconscionable portion of the clause. It will be interesting to see whether that disincentive to bootstrap continues to hold true or whether the Supreme Court will strike down the rule that a court can invalidate an entire arbitration provision based on unconscionable terms rather than just striking the terms themselves. Professor Leslie's analysis of whether courts can and should sever unconscionable terms from an arbitration clause or refuse to enforce the entire arbitration clause is prescient. At the time of writing, the Supreme Court had granted certiorari in the case of *MHN Government Services v. Zaborowski*,[81] which presented the question of whether California's practice of determining when an arbitration clause can be struck down entirely based on the presence of unconscionable provisions is preempted by the FAA. Though the Supreme Court ended up dismissing the case because the parties settled,[82] a pro-preemption ruling might have emboldened companies to start inserting additional unconscionable terms into their arbitration clauses without the worry that a decision striking down those unconscionable terms would also strike down the class action ban. That is reason enough to hope that the members of the Court read Professor Leslie's article and become acquainted with the concept of arbitration

81. MHN Gov't Servs., Inc. v. Zaborowski, 601 F. App'x 461, 464 (9th Cir. 2014), *cert. granted*, 136 S. Ct. 27 (2015).

82. *See Justices Dismiss Pending Arbitration Case*, 84 U.S.L. WK. 1503 (2016).

bootstrapping. If they see how preempting state severability principles could cause corporations to load up their arbitration clauses with more and more unconscionable terms, then perhaps they will be less likely to continue to expand the FAA's preemptive reach. One can hope. But then again, I am an arbitration pessimist.