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## AT&T's Long Game on Unconscionability

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## AT&T's Long Game on Unconscionability

Thanks to the Prawfs team for inviting me back to guest blog. I'll plan to blog on recent Supreme Court cases, my current scholarly projects, and other miscellaneous topics.

Last week the Supreme Court decided *AT&T Mobility v. Concepcion*, which held (5-4) that the Federal Arbitration Act preempted a state-law unconscionability rule that deemed an arbitration clause's ban on class proceedings unconscionable. If you wanted this result, this case presented a favorable vehicle through which to reach it. As Justice Scalia emphasized in his majority opinion, the arbitration clause at issue here had a number of interesting pro-consumer features: AT&T would pay the arbitration costs, the arbitration would take place in the customer's county, AT&T would pay a \$7500 minimum recovery plus double attorneys' fees if the arbitrator awarded more than AT&T's final settlement offer, etc. (One could genuinely question, as many have questioned, whether these features actually make individual arbitration of small claims viable in practice, but at least in relative terms this clause looks a lot better than those that strictly limit remedies, impose potentially high arbitration costs, and the like.) It seems likely to me that (1) these favorable facts helped the majority reach its preemption result and (2) now that this preemption holding is on the books, it will apply broadly, including to many less favorable clauses -- i.e., it seems preemption will be the rule rather than an exception. The vehicle matters to the development of the law.

And the vehicle probably wasn't an accident.

Those who have been following the issue know that the last decade or so has seen lots of cases in which various state and federal courts have found arbitration clauses (or restrictive aspects of them) unconscionable. The companies trying to enforce the clauses filed plenty of petitions for certiorari during that time asking the Supreme Court to slam the door on unconscionability challenges. They were all denied. One denial that, today, looks especially noteworthy came a few years ago in *T-Mobile v. Laster*. *Laster* was a lot like *Concepcion*. In fact, AT&T was initially T-Mobile's co-defendant in the case. T-Mobile filed a cert petition after the Ninth Circuit struck down its arbitration clause. The trade association filed an amicus brief in support. AT&T didn't seek certiorari, for they had given up back when they saw the writing on the wall in the Ninth Circuit. Indeed, AT&T filed an amicus brief telling the Court not to review the case! (Briefs available [here](#).) My (second-hand, hearsay) understanding is that this move made AT&T's attorneys very unpopular at cocktail parties for a while. AT&T's argument in the brief, though they don't put it this way, was essentially that the arbitration clause that had been struck down really wasn't that great. But it told the Court that it had developed a brand new arbitration clause that was so amazingly consumer-friendly that if any court struck it down, such a ruling would have to be preempted because it would represent a per se bar against class waivers even when consumers could profitably pursue individual arbitration. The new clause would make for a much less messy case, which the Court would probably welcome given the difficulty of reviewing state unconscionability rulings. *Concepcion* involved the clause AT&T had promised.

Perhaps this is just another illustration of the way a sophisticated repeat player can fashion a long-term litigation strategy in which it sacrifices some cases and waits for the right set of facts to develop. This is something that civil rights groups have done effectively in various instances. But it is also worth remembering that, like the tango, a long-term litigation strategy takes two. The Supreme Court's docket is discretionary, so it too can wait for the right vehicles in which to make law. By providing some key information at a critical time, AT&T might have helped the Court advance the Court's agenda, not just AT&T's.

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