SUPREME COURT OF MISSOURI
en banc

Beverly Brewer,	)	
	)	
Respondent,	)	
v.	)	No. SC90647
	)	
Missouri Title Loans,	)	
	)	
Appellant.	)	

Appeal from the Circuit Court of City of St. Louis
The Honorable David L. Dowd, Judge

Opinion issued March 6, 2012

Missouri Title Loans, Inc. appeals a judgment finding that a class arbitration waiver contained in its loan agreement, promissory note and security agreement (agreement) is unenforceable. In *Brewer v. Missouri Title Loans, Inc.*, 323 S.W.3d 18 (Mo. banc 2010), this Court affirmed the judgment insofar as it held that the class arbitration waiver is unconscionable and reversed that part of the judgment ordering that the claim be submitted to an arbitrator to determine suitability for class arbitration. This Court held that the appropriate remedy was to strike the entire arbitration agreement.

The United States Supreme Court vacated *Brewer* in *Missouri Title Loans, Inc. v. Brewer*, No. 10-1027, 2011 WL 531553 (U.S. May 2, 2011), and remanded the case to this Court for further consideration in light of *AT&T Mobility, LLC, v. Concepcion*, 131 S.Ct. 1740 (2011). Applying *Concepion*, this Court finds that the presence and

enforcement of the class arbitration waiver does not make the arbitration clause unconscionable. This Court instead applies traditional Missouri contract law in looking at the agreement as a whole to determine the conscionability of the arbitration provision. This Court holds that Brewer has demonstrated unconscionability in the formation of the agreement. The appropriate remedy is revocation of the arbitration clause contained within the agreement. Consequently, the judgment is affirmed in part and reversed in part, and the case is remanded.

FACTS

Beverly Brewer borrowed $2,215 from the title company. The loan was secured by the title to Brewer's automobile. The annual percentage rate on the loan was 300 percent. The agreement provided that Brewer must resolve any claim against the title company in binding, individual arbitration governed by the Federal Arbitration Act (the act). No customer ever successfully has renegotiated the terms of the contract, including the arbitration provisions. Although the agreement provided that Brewer waived her right to litigate a dispute in court, the title company specifically retained its "right to seek possession of the Collateral in the event of default by judicial or other process including self-help repossession." In other words, the title company may utilize the courts to repossess the customer's vehicle, but the customer must go to arbitration to complain about violations of its rights under the contract.

In addition, the agreement stated that "[t]he parties agree to be responsible for their own expenses, including fees for attorneys, experts and witnesses." Unlike some arbitration contracts, such as the contract at issue in *Concepcion*, the agreement did not

provide an attorney fee multiplier or guaranteed minimum recovery if the consumer is awarded more than the title company's last offer. The arbitration contract in *Concepcion* provided that a consumer who is awarded more than AT&T's last offer is entitled to a minimum recovery of $7,500 and to double his or her attorney's fees. *Concepcion,* 131 S.Ct. at 1744. The cumulative real-world effect of the arbitration provisions in this case is that a consumer's minimum and maximum recovery from the title company are identical – $0.00 – for no consumer ever has filed an individual claim for arbitration against the title company.

Brewer made two payments to the title company of more than $1,000, but the payment only reduced her loan principal by 6 cents. Brewer filed a class action petition against the title company alleging violations of numerous statutes, including the state merchandising practices act. The title company filed a motion to dismiss or to stay the claims and to compel Brewer to arbitrate her claims individually. The trial court held a hearing and entered a judgment finding the class arbitration waiver in the loan agreement unconscionable and unenforceable. The trial court also considered a number of the other aspects of the clause, finding that it would be difficult for a consumer to understand that there was a disparity of bargaining power, that the provision was one-sided because only customers gave up their rights while the title company could pursue self-help or relief in the courts, and that the title company had admitted that the provision that each party be responsible for its own costs and attorney's fees in arbitration placed a high burden on consumers. It also found that they too rendered the agreement unconscionable when

considered as an individual action. The court ordered the claim to proceed to arbitration to determine whether it was suitable for class arbitration.

The title company appealed, asserting that the act preempted the trial court's decision, that the class arbitration waiver was not unconscionable, and that the waiver was a valid and permissible exculpatory clause under Missouri law. This Court held that the class arbitration waiver was unconscionable and struck the arbitration agreement in its entirety.

The United States Supreme Court granted the title company's petition for writ of certiorari. *Mo. Title Loans, Inc. v. Brewer,* 131 S.Ct. 2875 (2011). The Court vacated *Brewer I* and remanded the case to this Court for further consideration in light of *Concepcion,* 131 S.Ct. 1740.

On remand, the title company asserts that the act wholly preempts Missouri's common law of unconscionability. Alternatively, the title company asserts that the availability of statutory attorney's fees negates Brewer's unconscionability defense because the fee provisions make it possible for consumers with small dollar claims to obtain counsel. Before addressing the title company's arguments, this Court must first address the law established in *Concepcion*.

ANALYSIS

I. *AT&T v. Concepcion*

Determining the law established in *Concepcion* is complicated. Justice Scalia authored an opinion joined by Chief Justice Roberts and justices Kennedy, Alito and Thomas, but Justice Thomas also filed a concurring opinion in which he indicated that,

although he concurred in Justice Scalia's opinion, he suggested a slightly different analysis than Justice Scalia. *Concepcion,* 131 S.Ct. at 1754 (Thomas, J., concurring). Justice Breyer filed a dissenting opinion, in which justices Ginsbug, Sotomayor and Kagan joined.

As a result, *Concepion* is best understood by considering Justice Scalia's majority opinion as further informed by Justice Thomas' concurrence. Both opinions, for slightly different reasons, stand for the proposition that the act generally does not permit a state to bar class action waivers by finding an arbitration agreement unconscionable on the basis of a class action waiver alone. The Scalia opinion does not state, however, that the federal act otherwise preempts traditional state law defenses to contract formation such as unconscionability, duress or fraud, and Justice Thomas is clear that he would apply those defenses. But *Concepcion* teaches these defenses cannot be used in a way that would hold otherwise valid arbitration agreements unenforceable for the sole reason that they bar class relief. That was what had happened in *Concepcion.*

In *Concepcion*, the plaintiffs sued AT&T in federal district court alleging they improperly were charged sales tax on the retail value of cellular phones provided for free under the terms of their service contract. *Id.* at 1744. The plaintiffs' suit was consolidated with a class action alleging in part that AT&T had engaged in false advertising and fraud by charging sales tax on the phones it had advertised as free. *Id.* AT&T filed a motion to compel individual arbitration pursuant to its contract with the plaintiffs. The district court specifically found that the arbitration agreement "was 'quick, easy to use' and likely to 'promp[t] full or … even excess payment to the

customer without the need to arbitrate.'" *Id.* at 1745. The district court also found that the provision of a $7,500 premium in the event the consumer was awarded more than AT&T's final written settlement offer served as "substantial inducement" for the consumer to pursue individual arbitration as opposed to class arbitration. *Id.* Although individual arbitration was more beneficial to a consumer than class arbitration, the district court held that the arbitration provision was unconscionable under the California Supreme Court's decision in *Discover Bank v. Superior Court,* 113 P.3d 1100 (Cal. 2005). *Id.*

Given this factual context, the question framed by the Scalia opinion is "whether § 2 [of the ACT] preempts California's [*Discover Bank*] rule classifying most collective-arbitration waivers in consumer contracts as unconscionable." *Id.* at 1746. *Discover Bank* held that a class action waiver in a consumer contract of adhesion is unconscionable when consumer claims against the defendant are predictably small and the plaintiff alleges a scheme to cheat consumers. *Id.* Notably absent from the formulation of the *Discover Bank* rule is any finding that the consumer is worse off under individual arbitration as opposed to class arbitration or that the individual terms of the arbitration agreement are otherwise onerous or unfair. *Id.* at 1750, 1753. The practical effect of the *Discover Bank* rule, therefore, is to invalidate class arbitration waivers in most consumer contracts even if traditional factors of unconscionability are absent.[1]

[1] Missouri courts have identified a number of factors indicating unconscionability. For instance, high pressure sales tactics, unreadable fine print, misrepresentation or unequal bargaining positions all indicate deficiencies in the making of a contract. *See Whitney v. Alltel Commc'ns, Inc*., 173 S.W.3d 300, 308 (Mo. App. 2005). Courts also consider

The lack of any requirement of showing actual unconscionability meant that *Discover Bank* created an essentially categorical requirement of class arbitration, which resulted in class arbitration being "manufactured by *Discover Bank*, rather than consensual …." *Id.* at 1750. Requiring class arbitration under these circumstances sacrifices the federal act's goals of facilitating the prompt, informal resolution of disputes while also substantially disadvantaging defendants who did not consent to class arbitration in the first instance. *Id.* at 1751-52.[2] In addition to disadvantaging defendants, the *Discover Bank* rule can disadvantage consumers by requiring a court to find individual arbitration unconscionable even if, like the arbitration contract in *Concepcion*, the consumer is provided with favorable terms for individual arbitration. *Id.* at 1753. The net result of applying *Discover Bank* is that class arbitration waivers are rarely enforced. Instead, defendants are required to submit to procedures to which they did not consent, and consumers may be required to participate in class arbitration even if individual arbitration is more favorable to their interests. Consequently, the majority

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whether the terms of an arbitration agreement are unduly harsh. *Id.* This is a fact-specific inquiry focusing on whether the contract terms are so one-sided as to oppress or unfairly surprise an innocent party or which reflect an overall imbalance in the rights and obligations imposed by the contract at issue. *Woods v. QC Financial Services, Inc.*, 280 S.W.3d 90, 96 (Mo. App. 2008).

[2] As with any contract, the legally enforceable obligations of the parties are defined by mutual consent. "[I]t follows that a party may not be compelled under the ACT to submit to class arbitration unless there is a contractual basis for concluding the party agreed to do so." *Stolt-Nielsen v. Animal-Feeds Int'l Corp.*, 130 S.Ct. 1758, 1775 (2010). Therefore, a fundamental problem with the *Discover Bank* rule is that it requires courts to invalidate contractual provisions requiring individual arbitration and to order class arbitration even though the defendant, by including a class waiver, expressly withheld consent to class arbitration.

opinion held that the act preempted California's *Discover Bank* rule "[b]ecause it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress ….'" *Id*. (citations omitted).

Although the majority held that the *Discover Bank* rule was preempted by the federal act, it does not follow, as the title company contends, that all state law unconscionability defenses are preempted by the federal act in all cases. First, the expressly stated issue in *Concepcion* was whether California's *Discover Bank* rule was preempted, not whether all state law unconscionability defenses are preempted. The *Discover Bank* rule imposed a unique obstacle to arbitration because, in practice, it conditioned "the enforceability of certain arbitration agreements on the availability of class wide arbitration procedures," *Concepcion,* 131 S. Ct. at 1744, even if the arbitration contract at issue provides a consumer with more favorable terms in individual arbitration than in class arbitration. Not all state law contract defenses require class wide arbitration to the detriment of both the defendant and the plaintiff consumer. Accordingly, consistent with the stated issue in *Concepcion,* the Supreme Court's holding was expressly limited to finding that "California's *Discover Bank* rule is preempted by the act." *Id.* at 1753.

Second, the majority specifically acknowledged that the § 2 saving clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* at 1746, (citing *Doctors Assoc's., Inc., v. Casarotto,* 517 U.S. 681, 687, 116 S.Ct. 1652

(1996)). Holding that the § 2 saving clause preempts all state law unconscionability defenses would be inconsistent with both the saving clause and the majority's express recognition of unconscionability as one of the generally applicable contract defenses that retains vitality under the § 2 saving clause.

Finally, the majority opinion discusses in detail the many ways in which the arbitration provisions at issue in *Concepcion* are fair and reasonable and do not lead to an unconscionable result. *Id.* at 1753. This discussion would be superfluous if the majority intended to establish a rule completely preempting all state law unconscionability defenses. Therefore, the *Concepcion* majority recognizes that a case-by-case approach provides the appropriate analytical framework for assessing the applicability of state law contract defenses pursuant to the § 2 saving clause.

For these reasons, title cmopany is incorrect in its assertion that the majority opinion compels the conclusion that the federal act requires state courts to replace the essentially categorical *Discover Bank* rule requiring class arbitration with another categorical rule requiring individual arbitration in every case, irrespective of the application of generally applicable contract defenses specifically retained by the § 2 saving clause. Instead, analysis of whether a particular state contract defense is preempted because it "stand[s] as an obstacle to the accomplishment of the act's objectives" depends on the factual posture of individual cases.

In his concurring opinion, Justice Thomas agrees that the federal act preempts state law contract defenses rooted in public policy concerns regarding arbitration, even if the policy nominally applies to contracts generally. *Id.* at 1754 (Thomas, J., concurring).

Like the majority opinion, Justice Thomas notes that state law contract defenses including "fraud, duress, and unconscionability 'may be applied to invalidate arbitration agreements without contravening § 2.'" *Id.* at 1755, n. 1 (quoting *Doctors Assoc's., Inc.*, 517 at 687). But Justice Thomas focuses his analysis on the text of the § 2 saving clause. The saving clause refers only to defenses that result in "revocation" of a contract and omits any reference to the "invalidation" or "nonenforcement" of a contract. *Id.* at 1754. Justice Thomas reasons that the text of the saving clause suggests that "the exception does not include all defenses applicable to any contract but rather some subset of those defenses." *Id.* In other words, the federal act requires "enforcement of an agreement to arbitrate unless a party successfully asserts a defense concerning the *formation* of the agreement …." *Id.* at 1755 (emphasis added). "Contract defenses that are unrelated to the making of the agreement—such as public policy—are *not* valid grounds for declining to enforce an arbitration agreement." *Id.* at 1755. Because the *Discover Bank* rule relies on a public policy rationale and does not concern the making of the arbitration agreement, Justice Thomas concludes that the act requires preemption of the *Discover Bank* rule and enforcement of the arbitration provision in AT&T's agreement. *Id.* at 1756.

After setting out this discussion, Justice Thomas nonetheless concurs in Justice Scalia's opinion because the twin foundations of both analyses are the same. First, the federal act does not preempt state law contract defenses pertaining to the formation of a contract. Justice Thomas recognizes this point explicitly, while the majority does so inferentially. The majority holds that the federal act preempts *Discover Bank* because it

"stand[s] as an obstacle to the accomplishment and execution the full purposes and objectives of Congress …." *Id.* at 1753. Application of the *Discover Bank* rule has nothing to do with contract formation. Consequently, the Supreme Court's preemption of *Discover Bank* does not preempt all state law defenses to contract formation.

The second and related proposition supported by both opinions is that the federal act preemption analysis requires a case-specific assessment of the arbitration contract at issue. The majority opinion holds that state law contract defenses, including unconscionablity, are preempted only if the defense "stand[s] as an obstacle to the accomplishment of the act's objectives." *Id.* at 1748. The question of whether a state law unconscionablity defense stands as "an obstacle to the accomplishment of the act's objectives" requires analysis of the particular facts of the case. Likewise, Justice Thomas' focus on contract formation defenses such as fraud, duress, and unconscionability necessarily requires an analysis of the facts leading to the alleged formation of the contract at issue. Therefore, at a minimum, the rationales of both the majority opinion and Justice Thomas' concurrence permit state courts to apply state law defenses to the formation of the particular contract at issue.

This interpretation is confirmed by the Supreme Court's holding in *Marmet Health Care Center, Inc., v. Brown*, 565 U.S. ___ (2012). In *Marmet*, a state court held that the federal act does not preempt state public policy against pre-dispute arbitration agreements that apply to personal injury and wrongful death claims against nursing homes. *Slip op. at* 3. Alternatively, the state court held that the arbitration agreements were unconscionable. *Slip op. at* 4. The Supreme Court reversed the judgment because the

state court's public policy rationale is the type of "categorical rule" prohibiting arbitration of a particular type of claim identified in *Concepcion* as "contrary to the terms and coverage of the FAA." *Slip op. at* 4. The Supreme Court remanded the case for consideration of whether, absent the public policy rationale, the arbitration clauses at issue "are unenforceable under state common law principles that are not specific to arbitration and pre-empted by the FAA." *Slip op. at* 5. The Supreme Court's remand for consideration of generally applicable state law contract defenses, such as unconscionablity, confirms that *Concepcion* permits state courts to apply state law defenses to the formation of the particular contract at issue.

For these reasons -- and as this Court also holds in *Robinson v. Title Lenders, Inc.*, ___ S.W.3d ___ (Mo. banc 2012)(No. *SC91728*, decided concurrently with this case) -- *Concepcion* permits state courts to apply state law defenses to the formation of the particular contract at issue on a case-by-case basis. Accordingly, this Court will analyze the issues in this appeal to determine if, under the factual record presented, Brewer has established a defense to the formation of the agreement's arbitration clause. Because no party has requested remand, and because, unlike in *Robinson*, here the trial court did reach other factual issues in determining that the arbitration clause was unconscionable, the record is sufficient in this case for this Court to determine the conscionability of the arbitration clause.

II. Standard of Review

The judgment will be affirmed if it is supported by substantial evidence, it is not against the weight of the evidence, and does not erroneously declare or apply the law.

Woods v. QC Fin. Servs., Inc., 280 S.W.3d 90, 94 (Mo. App. 2008). The issue of whether a dispute is subject to arbitration is subject to de novo review. *Id.*

III. Defenses to Contract Formation

Unlike *Concepcion*, which concerned the enforceability of a class waiver, the issue in this case is whether the arbitration agreement as a whole is unconscionable.[3] The purpose of the unconscionability doctrine is to guard against one-sided contracts, oppression and unfair surprise. *Cowbell, LLC v. Borc Building and Leasing Corp.*, 328 S.W.3d 399, 405 (Mo. App. 2010); *see also Woods*, 280 S.W.3d at 96. Oppression and unfair surprise can occur during the bargaining process or may become evident later,

[3] While Missouri courts traditionally have discussed unconscionability under the lens of *procedural* unconscionability, *Woods*, 280 S.W.3d at 94-95, and *substantive* unconscionability, *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 858 (Mo. banc 2006), *Concepcion* instead dictates a review that limits the discussion to whether state law defenses such as unconscionability impact the *formation* of a contract. In fact, in his concurring opinion, Justice Thomas specifically delineated past precedent of the Supreme Court applying defenses relevant to the *formation* of a contract. 131 S.Ct. at 1755 (Thomas, J. concurring) (noting *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (defenses of fraud, duress and unconscionability could be applied to invalidate arbitration agreements without contravening section 2); *Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 547 (2008) (describing fraud and duress as "traditional grounds for the abrogation of [a] contract" that speaks to "unfair dealing at the contract formation stage"); *Hume v. United States*, 132 U.S. U.S. 406, 411, 414 (1889) (describing an unconscionable contract as one "such as no man in his senses and not under delusion would make" and suggesting that there may be "contracts so extortionate and unconscionable on their face as to raise the presumption of fraud in their inception" (internal quotation marks omitted))). Accordingly, the analysis in this Court's ruling today -- as well as this Court's ruling in *Robinson v. Title Lenders, Inc.*, SC 91728 -- no longer focuses on a discussion of procedural unconscionability or substantive unconscionability, but instead is limited to a discussion of facts relating to unconscionability impacting the formation of the contract. Future decisions by Missouri's courts addressing unconscionability likewise shall limit review of the defense of unconscionability to the context of its relevance to contract formation.

when a dispute or other circumstances invoke the objectively unreasonable terms. In either case, the unconscionability is linked inextricably with the process of contract formation because it is at formation that a party is required to agree to the objectively unreasonable terms.

The evidence in this case supports a determination that the agreement's arbitration clause is unconscionable. There was evidence that the entire agreement -- including the arbitration clause -- was non-negotiable and was difficult for the average consumer to understand and that the title company was in a superior bargaining position. Brewer could not negotiate the terms of the agreement, including the terms of the arbitration clause. Indeed, the evidence further demonstrated that no consumer ever successfully had renegotiated the terms of the title company's arbitration contract.

The evidence also demonstrated that the terms of the agreement are extremely one-sided. Unlike in *Concepcion*, in which AT&T shouldered the costs of arbitration and would pay double the customer's attorney's fees if the customer recovered more than AT&T had offered prior to arbitration, the agreement here provides that the parties are to bear their own costs. In *Concepcion*, the arbitration clause waived AT&T's right to seek reimbursement for attorney's fees incurred in defending against a consumer's claim. In contrast, the title company did not waive its right to seek attorney's fees and, therefore, could seek to recover attorney's fees incurred in defending a claim. The fact that no consumer ever has arbitrated a claim against the title company under these terms makes it clear that the agreement stands as a substantial obstacle not just to arbitration but also to the resolution of any consumer disputes against the title company.

The evidence in this case is also fundamentally different from that in *Concepcion* because Brewer presented expert testimony from three consumer lawyers who testified it was unlikely that a consumer could retain counsel to pursue individual claims. There was no such record in *Concepcion.* A claim such as Brewer's would require significant expertise and discovery, and it would not be financially viable for an attorney because of the complicated nature of the case and the small damages at issue. The title company presented no contrary evidence from attorneys who said they were willing to take such cases other than on a pro-bono or rare voluntary basis.

While the majority opinion in *Concepcion* makes it clear that the unavailability of counsel is not alone sufficient to invalidate the requirement of individual arbitration, it remains one of the relevant considerations in assessing the overall conscionability of an arbitration contract. The *Discover Bank* rule was not preempted because it conditioned the enforceability of an arbitration contract on the availability of an attorney. Instead, the critical flaw leading to the preemption of the *Discover Bank* rule was that it required class arbitration even if class arbitration disadvantaged consumers and was unnecessary for the consumer to obtain a remedy. *Discover Bank*, therefore, was inconsistent with the core purpose of the federal act, which is to ensure enforcement of private arbitration agreements to promote informal, efficient dispute resolution. *Concepcion*, 131 S.Ct. at 1748-1749. Because the purpose of the act is to ensure efficient dispute resolution, the analysis in *Concepcion* assumes the availability of a practical, viable means of individualized dispute resolution through arbitration. In some cases, the availability of counsel is a relevant consideration for determining whether the act's interest in dispute

resolution will be satisfied. As noted above, the totality of Brewer's evidence, including the lack of available counsel, demonstrates that there is no practical, viable means of individualized dispute resolution.

The title company asserts that the availability of attorney's fees and punitive damages under the state merchandising practices act negates Brewer's argument that attorneys are unwilling to handle claims such as hers. The title company notes that reported cases indicate that some lawyers are willing to handle cases brought under the federal truth in lending and fair debt collection practices acts and that this proves that statutory damages provide sufficient financial incentive for attorneys to assist consumers in individual, small dollar claims. The deficiency in the title company's argument is that it presents a totally theoretical position that attorneys *should* want to take such cases. Speculation is not a substitute for evidence. In this case, there was specific and uncontradicted evidence before the trial court demonstrating that attorneys were unlikely to take claims such as Brewer's on an individual basis. Even if some attorneys may take some cases because of the potential availability of fees under the merchandising practices act, this does not prove that Brewer would have the benefit of counsel in attempting to obtain a remedy on an individual basis.

Finally, the agreement does not bilaterally provide that any and all disputes between the parties arising out of or related to the agreement must be decided by binding, individual arbitration under the federal act. Instead, the title company drafted the agreement to bind the consumer to individual arbitration for all claims against the title company, but it specifically reserved its right to forego arbitration "to seek possession of

the Collateral in the event of default by judicial or other process including self-help repossession." In the context of a title loan transaction, this is a particularly onerous provision because among the lender's chief remedies in the event of default is either judicial or self-help repossession. The title company reserves its right to obtain its primary remedies through the court system while requiring Brewer to obtain her only meaningful remedy – monetary compensation for the alleged violation of consumer protection laws – through individual arbitration.[4]

The disparity in bargaining power, in addition to the disparity between Brewer's remedial options and the title company's remedial options, constitutes strong evidence that the agreement is unconscionable. The title company requires Brewer to arbitrate all of her claims in the interests of efficient, streamlined dispute resolution. However, when the title company's interests are at stake, the title company is free to discard the efficiencies of arbitration in favor of litigating a claim against Brewer. It is unlikely that the ramifications of such provisions are comprehended by the average consumer or comport with the reasonable expectations of an average member of the public.

The arbitration contract at issue in *Concepcion* is fundamentally different from the agreement in this case. In *Concepcion*, the contract provided an informal 30-day dispute

[4] Not only does the title company retain the right to seek judicial remedies, the title company further protects its interests by charging an extremely high interest rate to compensate for the risks inherent in its lending practices. While there is no allegation that the 300-percent annual interest rate that the title company charges is illegal, it plainly illustrates the fact that the agreement is drafted to limit substantially the remedial options of often financially distressed consumers while allowing the title company substantial latitude in protecting its financial interests.

resolution procedure. *Id.* at 1744. If the consumer was dissatisfied, he or she could seek arbitration by filling out a form provided on AT&T's website. *Id.* AT&T would pay all costs of arbitration of any non-frivolous claim. *Id.* Arbitration would occur in the customer's home county and could be by telephone, in person or on paper for small claims. *Id.* AT&T never could seek attorney's fees, while the consumer was entitled to double fees if awarded more than AT&T's last offer. *Id.* Customers who utilized the opportunity to resolve their claims either informally or through this arbitration process, were "essentially guarantee[d] to be made whole." *Id.* at 1753, citing *Laster v. AT&T Mobility, LLC*, 584 F.3d 849 856, n. 9 (9th Cir. 2009).

In contrast, the agreement at issue in this case does not provide for informal complaint resolution. Arbitration is required for any dispute, at the cost of the customer, while the title company has a choice of simply repossessing the collateral by force or through suit in court rather than using arbitration. The title company never pays the costs of arbitration or attorney's fees for the customer, even if the customer wins. The obstacle to dispute resolution posed by these provisions is illustrated by the simple fact that no customer has utilized the arbitration clause to recover. As arbitration is the only remedy, this means that no customer has obtained relief. As a result, far from fulfilling the purpose of the federal act of providing a prompt and informal method of resolving disputes, the arbitration clause here is itself "an obstacle to the accomplishment of the act's objectives."

For these reasons, this Court finds that the unconscionable aspects of the agreement indicate that it is a contract that no person "in his senses and not under

delusion would make." *Concepcion*, 131 S.Ct. at 1755 (Thomas, J. concurring)(citing *Hume v. United States*, 132 U.S. 406, 411, 10 S.Ct. 134, 33 L.Ed. 393 (1889)). Brewer has established, therefore, that the circumstances under which the agreement was made are unconscionable. The arbitration clause of the agreement is unconscionable and unenforceable.

CONCLUSION

The judgment finding the class arbitration waiver unconscionable is affirmed because the entire arbitration agreement is unconscionable and unenforceable. The judgment is reversed, however, to the extent that it severs the class arbitration waiver and requires an arbitrator to determine the propriety of class arbitration. The case is remanded.

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Richard B. Teitelman, Chief Justice

Stith, J., Pfeiffer, Sp.J., and Wolff, Sr.J., concur; Fischer, J., dissents in separate opinion filed: Breckenridge, J., concurs in opinion of Fischer, J.; Price, J., dissents in separate opinion filed. Russell and Draper, JJ., not participating.

SUPREME COURT OF MISSOURI
en banc

BEVERLY BREWER,	)	
	)	
Respondent,	)	
v.	)	**No. SC90647**
	)	
MISSOURI TITLE LOANS,	)	
	)	
Appellant.	)	

DISSENTING OPINION

The circuit court entered its judgment in this case on August 5, 2009. That judgment, which struck down the prohibition of the class arbitration, was affirmed by a majority of this Court, but I joined the dissent authored by Judge Price. The United States Supreme Court thereafter issued its decision in *AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740 (2010), granted certiorari, vacated this Court's opinion in *Brewer v. Missouri Title Loans*, 232 S.W.3d 18 (Mo. banc 2010) (*Brewer I*) and remanded for further proceedings consistent with *Concepcion*. In my view, and to be consistent with *Concepcion* and this Court's unanimous opinion in *Robinson v. Title Lenders*, ___ S.W.3d ___ (Mo. banc 2012) (No. SC91728, decided concurrently with this case), the circuit court's judgment must be reversed and remanded to the circuit court for further factual determinations because the circuit court admittedly and explicitly "considered only the arbitration clause of defendant's contract, and [did] not consider the contract as a whole." Circuit court judgment at 2.

The circuit court's judgment was very specific as to the issue it decided. "The issue to be decided is whether the arbitration clause of Missouri Title Loans, Inc. is unconscionable and therefore unenforceable." Circuit court judgment at 1. The circuit court, as specifically stated above, did not consider whether the contract as a whole was unconscionable.

The principal opinion expressly considered "traditional Missouri contract law in looking at the agreement as a whole to determine the conscionability of the arbitration provision," and then went on to factually determine plaintiff "has demonstrated unconscionability in the formation of the Agreement." Slip op. at 2.

The dissenting opinion authored by Judge Price recognizes section 2 of the FAA preserves agreements to arbitrate to be invalidated only by "'generally applicable contract defenses such as fraud, duress, or unconscionability,' but not by defenses that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" Slip op. at 1-2. Therefore, the opinion authored by Judge Price would "enforce the contract as written." *Id.* at 2.

In my view, if the circuit court would have had the benefit of the United States Supreme Court's opinion in *Concepcion* and this Court's unanimous opinion in *Robinson*, it would have realized the legal necessity to consider the contract as a whole under applicable state law concepts of unconscionability to resolve this case. I am of the view it is the circuit court's prerogative and function to determine all the facts necessary and then apply the law in accordance with these recent case decisions to those facts.

Therefore, I would reverse and remand for further proceedings consistent with *Concepcion* and *Robinson*.[1]

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Zel M. Fischer, Judge

[1] The requirement to remand this case is also consistent with the recent United States Supreme Court case in *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. ____ (2012).

SUPREME COURT OF MISSOURI
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Appellant.	)	

DISSENTING OPINION

The circuit court entered its judgment in this case on August 5, 2009. That judgment, which struck down the prohibition of the class arbitration, was affirmed by a majority of this Court, but I joined the dissent authored by Judge Price. The United States Supreme Court thereafter issued its decision in *AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740 (2010), granted certiorari, vacated this Court's opinion in *Brewer v. Missouri Title Loans*, 232 S.W.3d 18 (Mo. banc 2010) (*Brewer I*) and remanded for further proceedings consistent with *Concepcion*. In my view, and to be consistent with *Concepcion* and this Court's unanimous opinion in *Robinson v. Title Lenders*, ___ S.W.3d ___ (Mo. banc 2012) (No. SC91728, decided concurrently with this case), the circuit court's judgment must be reversed and remanded to the circuit court for further factual determinations because the circuit court admittedly and explicitly "considered only the arbitration clause of defendant's contract, and [did] not consider the contract as a whole." Circuit court judgment at 2.

The circuit court's judgment was very specific as to the issue it decided. "The issue to be decided is whether the arbitration clause of Missouri Title Loans, Inc. is unconscionable and therefore unenforceable." Circuit court judgment at 1. The circuit court, as specifically stated above, did not consider whether the contract as a whole was unconscionable.

The principal opinion expressly considered "traditional Missouri contract law in looking at the agreement as a whole to determine the conscionability of the arbitration provision," and then went on to factually determine plaintiff "has demonstrated unconscionability in the formation of the Agreement." Slip op. at 2.

The dissenting opinion authored by Judge Price recognizes section 2 of the FAA preserves agreements to arbitrate to be invalidated only by "'generally applicable contract defenses such as fraud, duress, or unconscionability,' but not by defenses that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" Slip op. at 1-2. Therefore, the opinion authored by Judge Price would "enforce the contract as written." *Id.* at 2.

In my view, if the circuit court would have had the benefit of the United States Supreme Court's opinion in *Concepcion* and this Court's unanimous opinion in *Robinson*, it would have realized the legal necessity to consider the contract as a whole under applicable state law concepts of unconscionability to resolve this case. I am of the view it is the circuit court's prerogative and function to determine all the facts necessary and then apply the law in accordance with these recent case decisions to those facts.

Therefore, I would reverse and remand for further proceedings consistent with *Concepcion* and *Robinson*.[1]

_____
Zel M. Fischer, Judge

[1] The requirement to remand this case is also consistent with the recent United States Supreme Court case in *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. ____ (2012).