RECENT CASES

TAKING THE FEAR OUT OF ORGANIZING: DANA II AND UNION NEUTRALITY AGREEMENTS

Introduction

In December 2010, the National Labor Relations Board (N.L.R.B. or "the Board") in Dana Corp. (hereinafter "Dana II") upheld the validity of a neutrality agreement between an employer and a union. The Board found that the agreement, which created a "framework" for organizing and future collective bargaining, did not violate section 8(a)(2) of the National Labor Relations Act of 1935 (N.L.R.A. or "the Act"), even though the agreement was negotiated before the union represented a majority of the workforce.

There are two reasons why Dana II represents a victory for organized labor. First, it allows unions to form neutrality agreements with employers without fear that the Board will strike down the agreements. Neutrality agreements make it easier for workers to form unions because they insulate workers from management intervention and intimidation during organizing campaigns. Additionally, neutrality agreements benefit employers by providing stability and predictability throughout the organizing process. Agreements that create a "framework" for organizing, such as the one in Dana II, are also consistent with the Act's goal of promoting "industrial peace" and allow for more employer free choice, not less.

Second, this case narrows the application of the "Majestic Weaving doctrine," which has come to stand for the proposition that unions cannot negotiate substantive terms and conditions of a collective bargaining agreement with an employer before they reach a majority of support from the workforce. The dissent argued for an expansive view of the ruling in Majestic Weaving, an interpretation that would have invalidated the

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1. 356 N.L.R.B. No. 49 (2010). This decision is referred to as "Dana II" in light of a well-known decision involving Dana Corporation in Dana Corporation (hereinafter "Dana I"), 351 N.L.R.B. 434 (2007). Dana I dealt with decertification petitions, and did not address the "framework" agreement at issue in Dana II.


agreement. The majority in Dana II correctly distinguished the facts of Majestic Weaving, finding it inapposite.

In so doing, the Board provided much-needed clarity regarding the applicability of Majestic Weaving. In this case note, I argue that the Board’s ruling narrows Majestic Weaving’s applicability to cases involving employers who negotiate with and grant exclusive recognition to a union that has not demonstrated majority support. Thus, if a neutrality agreement does not involve granting exclusive bargaining status to a minority union, Majestic Weaving is irrelevant.

II.
The Dana II Decision

Dana Corporation manufactures automotive parts in facilities throughout the United States. In 2002, the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (U.A.W.) began an organizing campaign at Dana’s St. John’s, Michigan facility.4 Dana and the U.A.W. entered into a Letter of Agreement (L.O.A.) one year later, “which set forth a framework to govern the relationship in the future, in the event that the majority of the St. John’s employees chose to designate the U.A.W. as their exclusive collective-bargaining representative.”

The L.O.A. set forth ground rules for the organizing campaign and included a written commitment from Dana to remain “totally neutral” on the issue of union representation, as well as a provision allowing for access to employee lists and to non-work areas for organizers.6 In addition, Dana and the U.A.W. outlined principles for future collective bargaining, should the union attain recognition through a card check process. For instance, both parties outlined subjects for bargaining including attendance, classifications, compensation, and healthcare costs. The parties also committed to a no-strike/no-lockout clause.7

Shortly after the U.A.W. requested a list of the employees pursuant to the L.O.A., three Dana employees filed unfair labor practice charges.8 In 2004, the General Counsel for Dana issued a complaint alleging that Dana rendered unlawful assistance to the U.A.W. in violation of the Act’s

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4. Dana II, 356 N.L.R.B. No. 49, at 2, 2010 WL 4963202, at *1. The U.A.W. and Dana have had a longstanding bargaining relationship, with the U.A.W. representing over 2,000 of Dana's employees in bargaining units throughout the country.
5. Id.
7. Id.
8. Id. at 3, 2010 WL 4963202, at *3.
prohibition against employer assistance to the union. An Administrative Law Judge (A.L.J.) found no such violation of the Act, rejecting the argument that the "LOA constituted a collective bargaining agreement from which recognition could be inferred."10

In December 2010, the Board agreed with the A.L.J. and dismissed the case on the merits, recognizing that a "certain amount of employer cooperation with the efforts of a union to organize is insufficient to constitute unlawful assistance."11 The Board majority found that the General Counsel's position was based on the false assumption that "any employer conduct having the potential to enhance an unrecognized union's status in the employees' eyes is unlawful."12 Not only was that position contrary to law, but, an agreement such as the one formed between the U.A.W. and Dana furthered one of the prime objectives of the N.L.R.A.—to promote "industrial peace."13

Moreover, the Board distinguished Majestic Weaving, a case where the Board found a section 8(a)(2) violation.14 Under the L.O.A., exclusive recognition was still contingent upon a majority of the workers signing union cards and having them verified by a neutral third-party.15 Without a sufficient showing of majority status, the framework for collective bargaining outlined in the L.O.A. would not go into effect.16 In contrast, Majestic Weaving involved an employer who gave (1) exclusive recognition to a minority union, and (2) subsequently negotiated a complete collective

9. Id. N.L.R.A. § 8(a)(2) makes it illegal for employers to "dominate or interfere with the formation or administration of any labor organization or contribute financial support to it." 29 U.S.C. § 158(a)(2) (2011). Its primary legislative purpose was "to eradicate company unionism, a practice whereby employers would establish and control in-house labor organizations in order to prevent organization by autonomous unions." Id. at 4, 2010 WL 4963202, at *5 (quoting I JOHN E. HIGGINS, JR. ET AL., THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NAT'L LABOR RELATIONS ACT, 418-419 (5th ed. 2006)).

10. Id. at 3, 2010 WL 4963202, at *4. The General Counsel argued that the LOA included specific terms and conditions of employment that was bargained for at a time when the union did not have majority status, which they believe was tantamount to "unlawful support" under § 8(a)(2). Id. Interestingly, the ALJ initially dismissed the complaint on procedural grounds, finding that by not pleading the "act" of unlawful recognition, the General Counsel's complaint failed to comply with the due-process guarantee in Section 102.15 of the Board's Rules and Regulations. Id. The ruling on the merits was the ALJ's alternative holding. Id. The Dana II majority did not address the procedural issue.

11. Id. at 4, 2010 WL 4963202, at *6 ("The quantum of employer cooperation which surpasses the line and becomes unlawful support is not susceptible to precise measurement. Each case must stand or fall on its own particular facts.") (quoting Steak & Brew of Huntington, 205 N.L.R.B. 1025, 1031 (1973)).

12. Id. at 7, 2010 WL 4963202, at *9.


14. Id.

15. Id. at 6, 2010 WL 4963202, at *8.

16. Id. at 7, 2010 WL 4963202, at *9.
bargaining agreement with that minority union.\textsuperscript{17} The Board found a significant difference between granting recognition "prematurely"—that is, before a union has demonstrated majority support—and agreeing to terms of a future collective bargaining contract before granting recognition.\textsuperscript{18}

Not only did the Dana II Board find no violation of section 8(a)(2), it found that the General Counsel’s position "frustrate[d] legitimate, indeed desirable, forms of union-employer cooperation."\textsuperscript{19}

\textbf{III. Dana II’s Significance}

\textit{Dana II} is significant for two reasons: first, it encourages unions and management to form pre-recognition neutrality agreements that promote employee free choice; and second, the decision narrows the applicability of the Majestic Weaving doctrine to cases where an employer grants exclusive recognition to a union that has not demonstrated majority support.

\textbf{A The Promotion of Employee Free Choice Through Neutrality Agreements}

In recent decades, unions have been forming neutrality agreements or labor-management accords with employers to better promote employee free choice during workers’ effort to unionize.\textsuperscript{20} Under many neutrality agreements, formulated both by management and by the union, managers at facilities where a union is organizing must refrain from actively campaigning against unionization.\textsuperscript{21} This allows workers to consider unionizing in relative comfort and security. Consequently, workers express their opinions on flyers and openly discuss unionizing in break rooms and in the cafeteria, acts that workers would be remiss to do in the absence of such an agreement.

As the access-provision in the L.O.A. between Dana and the U.A.W. established, neutrality agreements can also allow for increased access to the workplace for union organizers. During an organizing drive, an employer in the private sector may prohibit organizers from entering the facility, including the parking lot, cafeteria and other areas that may potentially be open to the public.\textsuperscript{22} But under a labor-management accord, an employer

\begin{itemize}
\item \textsuperscript{17} \textit{Id.} at 6, 2010 WL 4963202, at *8.
\item \textsuperscript{18} \textit{Id.} at 7-8, 2010 WL 4963202, at *9-11.
\item \textsuperscript{19} \textit{Id.} at 8, 2010 WL 4963202, at *10.
\item \textsuperscript{21} \textit{Id.} at 844.
\item \textsuperscript{22} See Lechmere \textit{v. NLRB}, 502 U.S. 527, 535-38 (1992) (holding that an employer may exclude nonemployees union organizers from its private property and describing a balancing test between private property rights and rights to concerted activity under the N.L.R.A.).
\end{itemize}
can agree to allow organizers to enter the facility under the neutrality agreement, permit organizers to sit in break rooms and hold informational sessions in the meeting rooms with no management interference.

The environment surrounding a typical private sector organizing campaign, conducted under the auspices of the N.L.R.B., is not conducive to promoting worker free choice. In such circumstances, management often disseminates misinformation through captive audience meetings, interrogates workers through one-on-one sessions with supervisors, and encourages acts of intimidation against union supporters. A neutrality agreement helps protect employees' ability to choose a union by removing the fear out of the organizing drive. Simultaneously, the agreement can accelerate the time before a union election is held. Under the N.L.R.A. rules governing elections, workers usually have to wait two months from the day they file a petition for an election to the time they actually vote. It is during this two-month period that management often mounts a visceral campaign to turn workers against the union using a variety of fear-inducing tactics. Under a neutrality agreement, workers sometimes are able to have an election in just a few weeks after filing.


24. For a comprehensive overview of the types of tactics employers use to oppose unions, see KATE BROFENBRENNER, ECON. POL'Y INST. BRIEFING PAPER, NO HOLDS BARRED: THE INTENSIFICATION OF EMPLOYER OPPOSITION TO ORGANIZING 1-2 (May 20, 2009), http://www.epi.org/page/-/pdf/bp235.pdf ("According to our updated findings, employers threatened to close the plant in 57% of elections, discharged workers in 34%, and threatened to cut wages and benefits in 47% of elections. Workers were forced to attend anti-union one-on-one sessions with a supervisor at least weekly in two-thirds of elections. In 63% of elections employers used supervisor one-on-one meetings to interrogate workers about who they or other workers supported, and in 54% used such sessions to threaten workers.").


26. See Paul C. Weiler, Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRRA, 96 HARV. L. REV. 1769, 1777-78 (1983). During this two-month "time-lag," the employer, "will emphasize to its workers how risky and troubled life might be in the uncharted world of collective bargaining: the firm might have to tighten up its supervisory and personnel practices and reconsider existing, expensive special benefits; the union would likely demand hefty dues, fines, and assessments, and might take the employees out on a long and costly strike with no guarantee that there would be jobs at the end if replacements had been hired in the meantime; if labor costs and labor unrest became too great, the employer might have to relocate." Id. at 1778.

Another reason why unions have sought to form neutrality agreements is to protect unions from the delay "inherent in the Board's representation procedures" by providing for a fair and fast election. Roger C. Hartley, Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: the Newest Civil Rights Movement, 22 BERKELEY J. EMP. & LAB. L. 369, 381-382 (2001). There is empirical evidence showing that the delay that occurs between the time workers file for an election, and the time the workers have the opportunity to vote, generally favors the employer. Id. at 381.
I have seen the effectiveness of neutrality agreements firsthand. My first year as a union organizer was spent on a series of organizing campaigns with a neutrality agreement in place. Through this labor-management accord, our union successfully organized 9,000 workers in just a little over two years, all of whom won immediate benefits, such as free family health care and guaranteed raises.

In short, neutrality agreements make it easier for workers to organize by neutralizing the fear that often results from employer efforts to bust the union in the traditional N.L.R.B. recognition process.

B. The Flawed Assumption about Neutrality

The General Counsel in Dana II argued that the formation of the L.O.A. interfered with employee free choice because it granted the U.A.W. “privileged” status in the eyes of the workers and amounted to a “tacit recognition” of the union. Similarly, opponents of organized labor argue that neutrality agreements unfairly create a “gag rule” on speech by managers and employers who oppose unionization. However, the N.L.R.A. operates under the flawed assumption that the fairest way to conduct a union election involves giving an “equal” voice to managers who oppose unionizing and workers who favor it. But when a boss—who signs an employee’s paycheck, sets an employee’s schedule and decides an employee’s promotion—says a union is a bad idea, it is tough for the employee to disagree.

As Professor James Brudney stated in his much cited law review article, Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms:

The greater the amount of employer communication during a campaign, the less likely a union is to prevail in the election. While one could posit that this adverse impact stems primarily from the countervailing educative aspects of employer speech, research in the past two decades strongly suggests that it is the aggressive and hierarchical nature of employer communication that generates increased management success.

28. See generally Adrienne E. Easton & Jill Kriesky, Union Organizing Under Neutrality and Card Check Agreements, 55 INDUS. & LAB. REL. REV. 42 (2001) for an extensive quantitative comparison of union success rates under different types of neutrality agreements. Eaton and Kriesky obtained information over a two-year period on more than 100 organizing agreements, used in over 200 elections, from 36 national unions with 10,000 members or more.
31. Based on my six years as a union organizer, participating in both N.L.R.B. and neutrality agreement elections.
32. Brudney, supra note 20, at 832.
Limiting employer communication during a campaign levels the playing field by minimizing the “aggressive and hierarchical nature” of management speech. Neutrality agreements are far from “tacit recognitions” of the union that automatically leads to unionization. In fact, the majority of workers at the Dana plant subsequently rejected the U.A.W. Rather than limiting choice, such agreements help lead to “industrial peace” between the parties by removing the coercive nature of management activity in N.L.R.B. election processes and promoting greater employee free choice.

C. Dana II Narrows the Applicability of the Majestic Weaving Doctrine

There have been several arguments used in the past to challenge the validity of neutrality agreements, most of which have failed. One such legal theory involves applying the Majestic Weaving doctrine broadly to essentially state that it is unlawful for a union and an employer to engage in pre-majority bargaining over substantive terms and conditions of a collective bargaining agreement. While some cases have been interpreted as creating “exceptions” to Majestic Weaving, the Dana II decision narrows this doctrine’s reach to very specific circumstances—cases involving exclusive recognition of minority unions. In other words, Dana II stands for the proposition that premature recognition of a union—that is, recognition of a union that has not demonstrated majority status—is a necessary condition for the applicability of the Majestic Weaving doctrine.

In Majestic Weaving, the Board found that the employer Majestic unlawfully assisted the Teamsters union by bargaining with and granting recognition to the union before it could demonstrate majority status, a violation of section 8(a)(2). Additionally, a company supervisor

33. Dana II, 356 N.L.R.B. No. 49, at 8, 8 n. 25.
34. While the focus of my case note has been on the union’s motivation for signing onto neutrality agreements, employers’ have their own reasons as well. For instance, an employer may make the calculation that it is much better for their bottom line to allow workers the opportunity to unionize, rather than mounting an anti-union campaign that involves hiring expensive management consultants and lawyers. See generally, Brudney, supra note 20, at 835-40.
35. E.g., Adcock v. Freightliner LLC, 550 F.3d 369 (4th Cir. 2008) (rejecting allegation that a card-check/neutrality agreement was a bribe or a “thing of value” given to unions by the employer in violation of § 302 of the Taft-Hartley Act); Heartland Indus. Partners, 2005 NLRB LEXIS 271, at *3 (Jun. 16, 2005) (complaint charged that employer’s neutrality agreement with the union violated § 8(e) by requiring the company to extend the agreement to its newly-acquired subsidiaries).
36. See infra, note 45 (discussing the Dana II dissent).
37. Houston Div. of Kroger Co., 219 N.L.R.B. 388, 389 (1975) (concluding that it was not unlawful for a union and an employer to enforce a recognition clause that required an employer to extend an existing contract to new non-union facilities, even if this meant not conducting an N.L.R.B. election, provided that the union show majority support).
unlawfully facilitated the solicitation of authorization cards.\textsuperscript{39} The Board’s decision in that case was guided by the principles reflected in the Supreme Court’s decision in \textit{International Ladies’ Garment Workers Union v. National Labor Relations Board (“Bernhard-Altmann”),} \textsuperscript{40} just three years prior. In that case, the Court found that an employer violated section 8(a)(2) by recognizing a minority union as the exclusive bargaining representative.\textsuperscript{41} The employer had signed a Memorandum of Understanding with the union, which included an exclusive-representation provision, which ended a strike by its non-union employees.\textsuperscript{42} The union did not have majority status and the Court wrote that by granting recognition, the employer provided assistance to the union under a “deceptive cloak of authority.”\textsuperscript{43}

The dissent in \textit{Dana II} argued that the very act of negotiating substantive contract provisions in a L.O.A. with the U.A.W., a minority union at the time, amounts to a \textit{Majestic Weaving}-type violation.\textsuperscript{44} The dissent further argued that an employer violates section 8(a)(2) “if it either recognizes a union or negotiates terms and conditions of employment with a union before a majority of unit employees affected by these actions has designated the union as their bargaining representative . . . .”\textsuperscript{45}

Both the majority and the dissent recognize that at the time the L.O.A. was negotiated, the U.A.W. had not demonstrated majority status, nor had the employer exclusively recognized it as the bargaining agent.\textsuperscript{46} The disagreement between the majority and the dissent turns on the following question: should \textit{Majestic Weaving} be read to prohibit the negotiation of complete terms and conditions of employment only in cases where the employer has \textit{prematurely recognized} a union as the exclusive bargaining agent, which is before a showing of majority status? Or alternatively, should \textit{Majestic Weaving} be read to apply to all cases where an employer negotiates terms and conditions of employment with a minority union, even in cases where there is no exclusive recognition, and where the implementation of the terms and conditions of a “framework” agreement are contingent upon a showing of majority status?

For the dissent, the very act of “negotiat[ing] terms and conditions of employment” with a minority union is in and of itself sufficient for the

\begin{itemize}
\item \textsuperscript{39} \textit{Id.} at 860-61.
\item \textsuperscript{40} 366 U.S. 731 (1961).
\item \textsuperscript{41} \textit{Id.} at 736-37.
\item \textsuperscript{42} \textit{Id.} at 732-33.
\item \textsuperscript{43} \textit{Id.} at 736.
\item \textsuperscript{44} \textit{Dana II,} 356 N.L.R.B. No. 49, 10, 2010 WL 4963202, at *14 (Dec. 6, 2010) (Hayes, J., dissenting). Indeed the dissent found “no meaningful factual or legal distinctions” between \textit{Majestic Weaving} and \textit{Dana II}. \textit{Id.}
\item \textsuperscript{45} \textit{Id.} at 11, 2010 WL 4963202, at *15 (emphasis added).
\item \textsuperscript{46} \textit{Id.} at 7, 11, 2010 WL 4963202, at *9, *16.
\end{itemize}
action to fall under the purview of *Majestic Weaving*, rendering it “unlawful assistance.” This is a serious misreading of *Majestic Weaving* and in the words of the *Dana II* majority, “grounded in a different view of labor relations policy.” Policy rationales aside, the majority distinguished the facts of *Dana II* from *Majestic Weaving*. First, the majority described that *Majestic Weaving* involved an “initial, oral grant of exclusive recognition” by the employer to the union. No such exclusive recognition was given to the U.A.W. by Dana. Second, the parties in *Majestic Weaving* subsequently negotiated a complete collective bargaining agreement, despite a lack of majority status. In *Dana II*, the L.O.A. created a mere “framework” for future collective bargaining and did not contain an exclusive-representation provision, which was the infirmity of the agreement in *Bernhard-Altmann*. In fact, the L.O.A. “expressly prohibited Dana from recognizing the UAW without a showing of majority support.”

*Dana II* stands for the proposition that exclusive recognition of a minority union is a necessary condition for the application of the *Majestic Weaving* doctrine. The majority’s language throughout the opinion supports this. The majority found that while the law permits certain forms of cooperation between employers and minority unions, “an employer crosses the line between cooperation and support, and violates section 8(a)(2), when it recognizes a minority union as the exclusive bargaining representative.” The Board majority goes on to highlight the action of exclusive recognition as the distinctive feature of *Majestic Weaving* and *Bernhard-Altmann*. After distinguishing the provisions of the L.O.A. in *Dana II* from these two cases, the Board concludes that the L.O.A. itself “is not enough to constitute exclusive recognition,” the line that separates employer cooperation and unlawful support. In contrast, the dissent mistakes the exclusive recognition of a minority union—a necessary condition for a case to fall within *Majestic Weaving*’s purview—for a sufficient condition in finding “unlawful support” of a union by an employer.

Since exclusive recognition is a necessary condition to the applicability of the *Majestic Weaving* doctrine, it logically follows that if there is no exclusive recognition of a minority union, the doctrine does not apply.

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47. See id. at 10, 2010 WL 4963202, at *14.
48. Id. at 9, 2010 WL 4963202, at *11 (majority opinion).
49. Id. at 6, 2010 WL 4963202, at *8.
50. Id.
51. See *Bernhard-Altmann*, 366 U.S. at 736-37 (“the exclusive representation provision is the vice in the agreement”).
53. Id. at 5, 2010 WL 4963202, at *7.
54. Id. at 7, 2010 WL 4963202, at *9.
55. See id. at 10, 2010 WL 4963202, at *14.
Thus, a failure to exclusively recognize a union that has not demonstrated majority support is sufficient to make *Majestic Weaving* inapposite. Unlike the initial, oral recognition agreement between the employer and the union in *Majestic Weaving*, there was no "vehicle for prematurely granting a union exclusive bargaining status" in *Dana II*.56

**IV. Conclusion**

The Board correctly upheld the neutrality agreement in *Dana II*. In doing so, it significantly narrowed the reach of the *Majestic Waving* doctrine, removing an unnecessary obstacle to future, legitimate collective bargaining efforts by employers and unions. It also affirmed neutrality agreements as an appropriate vehicle for unionization that promotes free choice by taking the fear out of organizing.

*Jonah J. Lalas, J.D. 2012 (U.C. Berkeley)*

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A LUNATIC'S GUIDE TO SUING FOR $30: CLASS ACTION
ARBITRATION, THE FEDERAL ARBITRATION ACT AND
UNCONSCIONABILITY AFTER AT&T V. CONCEPCION

"What rational lawyer would have signed on to represent the Concepcions
in litigation for the possibility of fees stemming from a $30.22 claim? . . .
'Only a lunatic or a fanatic sues for $30.'"
– Justice Stephen Breyer, dissenting in AT&T Mobility LLC v. Concepcion

Described as a “far-reaching betrayal of some of the most fundamental
principles of American justice” and “as big a pro-business, pro-corporate
ruling as we’ve ever seen from the Roberts’ Court,” the Supreme Court’s
decision in AT&T Mobility LLC v. Concepcion has the potential to reshape
the landscape of complex civil litigation. Critics fear that Concepcion,
which struck down a California common law doctrine barring certain class
action arbitration waivers, has made it virtually impossible to invalidate an
arbitration clause containing a class action waiver. Given the increasing
prevalence of arbitration clauses, some critics have gone so far as to
categorize the decision as the “death knell to class action lawsuits in the
US,” particularly in the employment and consumer contexts.

While Concepcion only affects arbitration, an increasing number of
employment contracts now contain arbitration agreements. These
agreements bind the parties to resolve disputes arising under the contract
through a private decision maker instead of through the courts and set the
terms under which the arbitration takes place. These terms can include

2. Nan Aron, AT&T Mobility v. Concepcion: The Corporate Court Does It Again, HUFFINGTON
b_855161.html.
3. Andrew Cohen, No Class: The Supreme Court’s Arbitration Ruling, THE ATLANTIC (Apr. 27,
arbitration-ruling/237967.
4. AT&T v. Concepcion Supreme Court Ruling Bad News for Future Class Actions,
   court-ruling-bad-news-future-class-actions (quoting Jennifer Mercurio, Vice President & General
   Counsel for the Entertainment Consumers Association).
5. For a history of the rise of mandatory arbitration clauses, see Bryon Allyn Rice, Comment,
   Enforceable or Not?: Class Action Waivers in Mandatory Arbitration Clauses and the Need for a
6. See, e.g., Myriam Gilles, Opting Out of Liability: The Forthcoming, Near Total Demise of the
   Modern Class Action, 104 MICH. L. REV. 373 (2005); David Sherwyn et al., Assessing the Case for
class action waivers, which limit the parties to bilateral arbitration rather than class arbitration. In most cases, these contracts are written entirely by the employer and offered on a nonnegotiable basis to the employee. As employers typically prefer to defend cases individually, critics fear that making it harder to invalidate a class action arbitration waiver will encourage employers to include a class action arbitration waiver in all employment contracts, effectively precluding employees from accessing class proceedings in any form.

The unavailability of the class proceedings would have dire ramifications on employees seeking to vindicate their rights. Most significantly, the demise of class actions would severely constrain the ability of plaintiffs to pursue small dollar claims as the amount in controversy from an individual small dollar case are often not sufficient to cover the costs of an attorney or to make proceeding through the time consuming dispute resolution process worthwhile. As Justice Breyer noted in his dissent in Concepcion, "only a lunatic or a fanatic sues for $30." However, aggregating the claims can create a large enough award to make the case attractive to attorneys and can lessen the burden on individual plaintiffs. These concerns are particularly prevalent for low wage workers who are more likely to have smaller claims. Decreasing the likelihood of suits to enforce workplace rights also lessens the deterrent effect on employers to abide by the law. In addition, the notification requirements of class actions and class arbitrations serve to inform potential plaintiffs who were previously unaware of either their rights or that their rights had been


7. See Gilles, supra note 6, at 396-99 (describing the rise of class action waivers).


10. See, e.g., Phelps v. 3PD, Inc., 261 F.R.D. 548, 563 (D. Or. 2009) (recognizing the superiority of class actions due to the typically small size of individual awards); see also Catherine K. Ruckelshaus, Labor’s Wage War, 35 FORDHAM URB. L.J. 373, 386 (2008) (discussing factors, including the typically small size of each individual worker’s claim, that contribute to workers’ lack of access to the courts).
violated. Class proceedings also provide a measure of protection against retaliation by employers.

Far from the cataclysm predicted by critics, the impact of Concepcion in the lower courts has been modest. Most courts interpreting Concepcion simply read the decision as having pruned one of the most far reaching forms of unconscionability doctrine, leaving the bulk of the unconscionability jurisprudence intact. While Concepcion does make defeating motions to compel arbitration more difficult, there remain many strategies that will enable aspiring "lunatics" to sidestep Concepcion and continue pursuing their $30 claims.

I.
Invalidating Arbitration Agreements:
Unconscionability and the Federal Arbitration Act

Arbitration agreements are notoriously difficult to invalidate, and the fear of the plaintiffs’ bar is that Concepcion has eviscerated one of the only defenses. Plaintiffs seeking to invalidate an arbitration agreement must prove an applicable contract defense, such as fraud, duress or unconscionability. The most common of these defenses is unconscionability, a common law doctrine that voids any contract that is so unfair that "no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other."

In many states, unconscionability comprises substantive and procedural elements. Some states require only one element of unconscionability to be

11. One example is salary discrimination where potential plaintiffs might not know of a disparity unless informed. See Leonard Bierman & Rafael Gely, "Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law, 25 BERKELEY J. EMP. & LAB. L. 167, 178 (2004) (explaining that one-third of U.S. private sector employers have policies which bar employees from discussing their salaries and that those employees who perceive wage differentials observe them "without the full information necessary to evaluate the justifications for the differing wages”).

12. See ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA’S CITIES 9 (2009), available at www.unprotectedworkers.org/index.php/broken_laws/index (noting that 43% of the low wage workers who complained about violations of workplace standards were retaliated against, including by being fired, suspended or threatened with cuts in their hours or pay); Andrew C. Brunsden, Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts, 29 BERKELEY J. EMP. & LAB. L. 269, 296 (2008) (“Workers do not pursue rights claims in a vacuum; there are risks to participating in rights enforcement because one must decide whether to challenge employer practices from within the employment relationship.”).

13. Plaintiffs have also had some success arguing that the arbitration clause interferes with the plaintiff’s ability to vindicate a statutory right. See, e.g., Gentry v. Superior Court, 165 P.3d 556 (Cal. 2007). The U.S. Supreme Court has granted cert on it for the first time in the fall 2011 term. Greenwood v. CompuCredit Corp, 615 F.3d 1204 (9th Cir. 2010), cert. granted, 131 S. Ct. 2874 (2011).

present. Others evaluate unconscionability on a sliding scale where both are required but a contract with high procedural unconscionability does not require as much substantive unconscionability and vice versa. In California, procedural unconscionability focuses on "oppression or surprise due to unequal bargaining power," while substantive unconscionability focuses on "overly harsh or one-sided results."

The Federal Arbitration Act (FAA) limits the ability of courts to invalidate an arbitration agreement as unconscionable. Under the FAA, "a contract evidencing a transaction involving commerce [agreeing] to settle by arbitration a controversy thereafter arising out of such contract or transaction... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." As a result, the FAA preempts state unconscionability doctrines that explicitly disfavors arbitration contracts or that stand as an obstacle to the accomplishment of the purpose of the FAA. Concepcion was the first case in which the Supreme Court addressed the FAA preemption of state contract defenses.

II. Preemption and the Federal Arbitration Act: AT&T v. Concepcion

Critics fear that the Court's decision holding that the FAA preempted California Supreme Court's definition of unconscionability promulgated in Discover Bank v. Superior Court defined the FAA's preemptive scope so broadly that any definition of unconscionability would be an obstacle to the purpose of the FAA and would thus be preempted. This would effectively obviate unconscionability as a defense under the FAA. While California typically requires plaintiffs to show both substantive and procedural unconscionability through a fact-intensive inquiry, the Discover Bank court simplified the analysis into a bright line rule. The court held that a class action waiver is unconscionable when it is: 1) in a contract of

17. Armendariz, 6 P.3d at 689.
20. U.S CONST. art. VI, cl. 2. As there is no federal common law governing contracts, plaintiffs arguing that arbitration clauses are unconscionable must rely exclusively on state law. See Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) (holding that there is no federal common law).
22. Armendariz, 6 P.3d at 689.
adhesion; 2) where the dispute predictably involves small amounts of damages; and 3) when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money such that the waiver "becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another."23 The adhesive nature of the contract satisfied the procedural unconscionability element, while an allegation of fraud and the small size of the claim satisfied the substantive element.

The AT&T v. Concepcion arose when Vincent and Liza Concepcion sought to invalidate an arbitration agreement they signed with AT&T. The Concepcions had sued AT&T claiming that AT&T had engaged in false advertising and fraud by advertising that it would include a free phone with the purchase of a cell phone plan, then charging sales tax on phones it advertised as free. The Concepcions only claimed $30.22 in damages, so they filed their case as part of a class action in the Southern District of California.24 AT&T motioned to compel bilateral arbitration based on the clause in its cell phone contracts requiring that the parties resolve all disputes arising under the contract through mandatory binding arbitration and that the parties to bring claims in their "individual capacity, not as a plaintiff or class member in any purported class or representative group."25 The Concepcions claimed that the arbitration agreement was unconscionable under the Discover Bank rule, and AT&T argued that the FAA preempted the Discover Bank rule. The district court held that AT&T's arbitration agreement was unconscionable and that the FAA did not preempt the Discover Bank rule.26 The Ninth Circuit affirmed,27 and the Supreme Court granted cert to decide whether the FAA preempted the Discover Bank rule or whether it fell within the savings clause.

23. Discover Bank, 113 P.3d at 1109-10.
24. Concepcion, 131 S. Ct. at 1745.
25. Id. The contract allowed AT&T to make unilateral changes to the agreement which it did several times. At the time of the suit, the agreement permitted customers to initiate dispute proceedings by completing a one-page Notice of Dispute form available on AT&T's website. If the parties were unable to settle the claim within thirty days, the customer could invoke arbitration. If the parties proceeded to arbitration, the contract required AT&T to pay all costs for non-frivolous claims and prohibited AT&T from seeking reimbursement for attorney's fees. Arbitrations were to take place in the county in which the customer was billed and for claims of $10,000 or less, the customer had the option of proceeding in person, by telephone, or based only on submissions. Both parties maintained the right to bring a claim in small claims court instead of arbitration. The arbitrator could award any form of legal or equitable relief. If a customer received an arbitration award greater than AT&T's last written settlement offer, the contract required AT&T to pay a $7,500 minimum recovery and twice the amount of the claimant's attorney's fees.
27. Laster v. AT&T Mobility LLC, 584 F.3d 849 (9th Cir. 2009).
Rather than wiping out unconscionability, the Court, by a five-to-four vote, simply held that the Discover Bank rule was overbroad and thus preempted by the FAA. Writing for the majority, Justice Scalia began his analysis by noting that the FAA’s guiding principle was “to ensure the enforcement of arbitration agreements according to their terms.”

Turning to the savings clause, the Court reasoned that a savings clause “cannot in reason be construed as [allowing] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act.” Thus, a state law that, expressly or in effect, interfered with the enforcement of a contract according to its terms would be an obstacle to the purpose of the FAA and preempted.

Noting the differences between class arbitration and bilateral arbitration, the Court found that allowing a party to make ex post demands for class arbitration where it was previously prohibited would interfere with the enforcement of a contract according to its terms. In particular, the Court noted that class arbitration is more formal and slower than bilateral arbitration, sacrificing the principal benefits of arbitration relative to litigation. The Court also found that class arbitration increases the defendant’s risk in that the claims are larger and there is no appellate review.

Turning to the Discover Bank rule, the Court’s primary concern was that the rule was overbroad. An overly broad rule could stand as an obstacle to the purpose of Congress by sweeping in not simply unconscionable class action waivers, but also legitimate class action waivers that happened to fall within its scope. In reviewing each element of the Discover Bank rule, the Court found that none of them sufficiently limited the rule’s scope to alleviate this concern. The Court reasoned that limiting the rule’s application to contracts of adhesion was insufficient because virtually all consumer contracts are now contracts of adhesion. Similarly, the Court found the requirement that damages be small was “toothless and malleable” given that courts had found damages up to $4,000 sufficiently small. The Court held that even requiring an allegation that

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28. Concepcion, 131 S. Ct. at 1748. The Court also noted that the intent of the parties in signing an arbitration agreement to “facilitate streamlined proceedings.”
29. Id.
30. Id. at 1746. The Court also noted that this principle applies to both legislative context and judicial formulations of state contract law.
31. Id. at 1751.
32. Id. at 1752.
33. Id. at 1750. The Court makes no comment as to why all adhesion contracts are not unconscionable.
34. Id. (citing Oestreicher v. Alienware Corp., 322 Fed.Appx. 489, 492 (2009)). The Court made no comment as to what amount would be sufficiently small.
the agreement was "a scheme to cheat consumers" had no limiting effect as it only required an allegation.\(^{35}\)

The Court also expressed suspicion that public policy based definitions of unconscionability could allow states to mask hostility to arbitration through the use of apparently neutral criteria. Analogizing the availability of class proceedings to a run-of-the-mill procedural protection, the Court was concerned that judges could invalidate an arbitration agreement for failing to include any number of procedural protections such as the use of the Federal Rules of Evidence or judicially monitored discovery.\(^{36}\) Similarly, the Court also noted that preserving the viability of small dollar claims was a policy concern and thus irrelevant to the preemption analysis.\(^{37}\) Furthermore, the Court found relevant that AT&T's arbitration agreement required that AT&T pay claimants a minimum of $7,500 and twice their attorneys' fees if the arbitration award was greater than AT&T's last settlement offer, which provided defendants with a powerful incentive to settle prospective complaints.\(^{38}\)

Notably, eight justices implicitly endorsed the continuing viability of unconscionability as a defense under the FAA. In his concurrence, Justice Thomas argued that the savings clause only permits defenses related to the making of the agreement. This includes fraud and duress, but not unconscionability, which relates to the substance of the contract itself.\(^{39}\) However, Thomas was alone in his opinion, implying that the other justices recognize unconscionability as a viable defense. The four dissenting justices would have found that the FAA did not preempt the Discover Bank rule, thus invalidating AT&T's arbitration agreement as unconscionable, and also expressed concerns about the effects of the majority's decision on the viability of small claims.\(^{40}\)

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35. Id. The Court made no comment about the remaining elements of the Discover Bank rule such as superior bargaining power or effect on large numbers of consumers.

36. Id. at 1747.

37. Id. at 1753.

38. Id. The influence of the fee shifting and $7,500 rewards is illusory in the context of small claims as AT&T can avoid the penalties in every case by settling for the face value of the complaint. This means that small claims, such as the Concepcion's, are still financially unviable as the time and attorneys fees required to get to the point of arbitration could still exceed the face value of the claim.

39. Id. at 1755 (Thomas, J., concurring). Thomas contrasted the language of the body of the FAA, which provides that arbitration contracts shall be "valid, irrevocable, and enforceable" to the language in the savings clause, which references contract doctrines allowing for the "revocation" of any contract. Interpreting this difference in light of § 4 of the FAA, which states that "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue" the court must order arbitration "in accordance with the terms of the agreement," Thomas concluded that the savings clause applied only to defenses related to the formation of the contract. Id. at 1754-55.

40. Writing for the dissent, Justice Breyer argued that the Discover Bank rule was simply an application of California's unconscionability doctrine, and thus fell within the FAA's savings clause. The dissent argued that the FAA's objective was to assure that "courts treat arbitration agreements like all other contracts," and to ensure the expeditious resolution of disputes. In this light, the Discover Bank
III.
Judicial Treatment of Unconscionability Post-Concepcion

Contrary to the predictions of doom that followed in the wake of the decision, the effects of Concepcion in the lower courts have been modest. The fact that the Court found Discover Bank rule, one of the most sweeping formulations of unconscionability, overbroad has limited applicability to more narrow articulations of unconscionability that exist in the rest of the country. While Concepcion has eroded the weight some courts give to the factors used in the Discover Bank rule, the decision has had relatively little effect on the basic unconscionability frameworks used by most states. In the wake of Concepcion, “lunatics” have continued to bring their $30 claims and courts have continued to find arbitration agreements and class action waivers unconscionable.

A. Distinguishing Discover Bank

The Discover Bank rule was a unique formulation of unconscionability doctrine that is readily distinguishable from the rules used in most other states. The very feature of the Discover Bank rule that drew the ire of the Concepcion majority, its breadth, was the rule’s most distinguishing feature. By using a simplified analysis focusing on only three elements rather than a fact-intensive inquiry, the Discover Bank rule could, in theory, sweep in contracts that were not so one sided as to be oppressive.

Limiting the ability of courts applying Discover Bank to consider other factors that weigh against unconscionability could result in contracts being erroneously categorized as unconscionable. By focusing solely on whether the arbitration clause was part of an adhesion contract, the rule’s procedural analysis would include an adhesion contract written in plain language where the signer consciously agreed to every term after a thorough explanation by the other party. Similarly, the Discover Bank rule evaluated substantive unconscionability through only two indicators: a small claim and an allegation of a scheme to cheat consumers. The Concepcion majority did not totally disregard either element as formulated in the Discover Bank rule, but rather found them vague and over inclusive.41 Under Discover Bank, a plaintiff who thoroughly understood and

rule did not disfavor arbitration as it applied equally to class action litigation waivers and class action arbitration waivers. The dissent also argued that the appropriate comparison is not between bilateral and class arbitration, but between class arbitration and class action litigation, demonstrating that class arbitrations are more efficient than judicial class actions. The dissent also raised federalism concerns arguing that states should have discretion to tailor their own contract defenses. Id. at 1756-62 (Breyer, J., dissenting).

41. See id. at 1750 (majority opinion) (finding that simply requiring an allegation of fraud was not sufficiently limiting, and that the requirement that a claim be small had been interpreted too liberally to include claims up to $4,000).
consciously agreed to every term of an arbitration agreement and had no evidence that the agreement was unfair could satisfy the third prong by simply accusing the other party of a scheme to cheat consumers out of a small sum of money. A finding that such a rule is overbroad does not necessarily affect other more nuanced articulations of unconscionability.

B. Return to Traditional Unconscionability Frameworks

The distinctiveness of the Discover Bank rule reduces the effect of Concepcion. As the fact-intensive inquiries used in most states directly address the Court's concerns about Discover Bank's overbreadth, these rules are easily distinguishable from the holding in Concepcion. While courts have found unconscionability doctrines relying entirely on public policy grounds preempted, unconscionability doctrines involving fact-intensive inquiries remained intact in the wake of Concepcion.

The unconscionability frameworks that have suffered post-Concepcion are bright line rules based in public policy. For example, in Litman v. Cellco Partnership, the Third Circuit held that the FAA preempted New Jersey's Rehoboth Beach rule, which held that all class action waivers in litigation and arbitration were unconscionable due to their capacity to function as exculpatory clauses. This rule was even broader than Discover Bank as it did not even evaluate the size of the claim in dispute or whether the arbitration agreement was in an adhesion contract. Similarly, several district courts have held that the FAA preempts Pennsylvania's Thibodeau rule, which held that all adhesion contracts that unfairly favors the drafting party are unconscionable. Like Rehoboth Beach and Discover Bank, Thibodeau overly simplified the unconscionability analysis, effectively holding that an adhesion contract satisfied procedural unconscionability, and any amount of unfairness towards the non-drafting party, regardless of how well the party understood the terms, was sufficient evidence of substantive unconscionability to invalidate the contract.

Post-Concepcion, courts in states using fact-intensive inquiries to evaluate the unconscionability of an arbitration clause have continued to apply their pre-Concepcion frameworks. Illinois courts for example, have continued to apply the fact-intensive analysis used by the Illinois Supreme Court.  

42. Id.

43. Litman v. Cellco P'ship, 655 F.3d 225, 231 (3d Cir. 2011) (holding that the FAA preempted Muhammad v. Cnty. Bank of Rehoboth Beach, 912 A.2d 88 (N.J. 2006)). The Rehoboth Beach court also gave some weight to the fact that the clause was part of an adhesion contract and that the parties had unequal bargaining power, but the Third Circuit interpreted the Rehoboth Beach rule as a ban on class action waivers. Litman, 655 F.3d at 228 n.2. Courts have found that the FAA preempted similar rules in Florida and Washington. See Cruz v. Cingular Wireless, LLC, 648 F.3d 1205, 1212 (11th Cir. 2011); Adams v. AT&T Mobility, LLC, No. C10–763RAJ, 2011 WL 4720194 *9 (W.D. Wa. Sept. 20, 2011).

Court in *Kinkel v. Cingular Wireless LLC*,\(^45\) to determine whether a class action waiver is procedurally and substantively unconscionable. The *Kinkel* court found procedural unconscionability based on the fact that the contract was “offered in a form contract on a take-it-or-leave-it basis,” that the waiver was “hidden in a maze of fine print where it was unlikely to be noticed, much less read,” and that “it did not inform [the plaintiff] that she would have to pay anything at all towards the cost of arbitration.”\(^46\) The court found substantive unconscionability based on the fact that the size of the claim was so small that the plaintiff would not be able to vindicate it without class proceedings, that it contained a strict confidentiality clause that would deny future plaintiffs access to precedent while allowing the defendant to accumulate experience, and that it contained a liquidated damages provision that was illegal under Illinois law.\(^47\) The Northern District of Illinois explicitly applied *Kinkel* in the post-*Concepcion* case of *Tory v. First Premier Bank*, where it examined the readability of the contract, the emphasis on the arbitration clause, the plaintiff’s ability to opt-out of the arbitration clause within 30 days of signing the agreement and the existence of cost shifting provisions to determine whether the arbitration clause and class action waiver in a consumer contract were unconscionable.\(^48\)

Similarly, California courts have simply returned to their pre-*Discover Bank* formulation of unconscionability post-*Concepcion*, which entails a fact-based inquiry into whether the contract is both substantively and procedurally unconscionable.\(^49\) As the court in *Sanchez v. Valencia Holding Co.* noted, “with the exception of the *Discover Bank* rule, the Court acknowledged that the doctrine of unconscionability is still a basis for invalidating arbitration provisions.”\(^50\) Applying the pre-*Discover Bank* rule, the *Sanchez* court found the arbitration provision procedurally unconscionable because “its location on the back of the last page [behind even the signature line] in small font with reduced line spacing made it unnoticeable to the buyer.”\(^51\) The court found substantive unconscionability based on excessively one sided provisions allowing an appeal if an award

\(^45\) 857 N.E.2d 250, 262-63 (Ill. 2006) (applying *Razor*, 854 N.E.2d at 622). Illinois requires only procedural or substantive unconscionability to void a contract, not both. *Id.*

\(^46\) *Id.* at 265-66 (internal quotations omitted).

\(^47\) *Id.* at 274-76.

\(^48\) No. 10 C 7326, 2011 WL 4478437 *3 (Sept. 26, 2011). Based on these factors the court found that the arbitration agreement was not unconscionable.

\(^49\) See *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 689 (Cal. 2000), which details California’s fact-intensive unconscionability inquiry. *Armendariz* held that procedural unconscionability focuses on “oppression or surprise due to unequal bargaining power,” while substantive unconscionability focuses on “overly harsh or one-sided results.”

\(^50\) No. B228037, 2011 WL 5027488 *7 (Oct. 24, 2011). The court also distinguished *Concepcion* on the grounds that it was not ruling on the unconscionability of the class action waiver.

\(^51\) *Sanchez*, 2011 WL 5027488 *9.*
exceeds $100,000 or includes injunctive relief, while exempting repossessions and requiring the appealing party to pay the filing fees of both parties in advance.52 While the arbitration clause in Sanchez included a class action waiver, the court did not include the waiver in its analysis, instead finding the unconscionable provisions were not severable and invalidating the entire clause.53 The practices of Illinois and California are consistent with practices in Colorado, Massachusetts, New York, New Mexico, Georgia, Missouri, Ohio, and others.54

Returning to fact-intensive inquiries further insulates state unconscionability doctrines from preemption. The conservative justices of the Concepcion majority are typically concerned with federalism, and fact-intensive unconscionability inquiries that more closely resemble the rest of the state’s unconscionability doctrine could heighten these federalism concerns as the decision could have greater implications on the state’s unconscionability doctrine. Conversely, striking down a bright line rule applying only to specific types of contracts will likely feel less intrusive on state sovereignty. By prohibiting any facially neutral rule that has an adverse impact on arbitration contracts, the Court has adopted a view on FAA preemption similar to disparate impact doctrine in the Title VII context. Doing away with the facially neutral rule and turning to individualized unconscionability inquiries can limit the scope of this apparently broad rule as it is harder to show that a policy of individualized inquiries has a disparate impact on arbitration contracts. In addition, making the unconscionability decisions more fact-specific can limit the effect of future FAA unconscionability decisions as there will be more ways to distinguish the decision.

C. Uncertain Effects on the Weight of the Discover Bank Factors

While traditional fact-intensive unconscionability frameworks remain intact, Concepcion has heightened the standard for satisfying unconscionability inquiries. Concepcion’s rejection of the assessment that a contract of adhesion, a small amount and an allegation of fraud are sufficient to show unconscionability also calls into question the weight that courts should give to these factors. As the Discover Bank rule was such a

52. Id. at *10-17.
53. Id. at *17-18.
low bar, courts are divided as to where the bar currently is and how much weight to give the Discover Bank factors.

In rejecting the Discover Bank rule, the Court effectively held that a contract of adhesion is not independently sufficient to establish procedural unconscionability. Bernal v. Burnett reflects this change. Finding that the plaintiff was “essentially arguing that the adhesive nature of the contracts at issue [...] makes the arbitration clause unconscionable,” the court granted the defendant’s motion to compel arbitration and explicitly noted that but for Concepcion the analysis would have come out differently.\(^55\) However, other courts evaluating procedural unconscionability on a sliding scale with substantive unconscionability have continued to hold that an adhesion contract is evidence of some degree of unconscionability even after Concepcion.\(^56\) This suggests that the fact that an arbitration clause was part of an adhesion contracts remains a legitimate factor in a procedural unconscionability analysis, but it cannot be given determinative weight.

The effect of Concepcion on the other Discover Bank factors is less straightforward. The Court did not find that the amount of the dispute was irrelevant, simply that Discover Bank’s formulation was “toothless and malleable” given that courts had found damages up to $4,000 sufficiently small.\(^57\) Some courts have interpreted this to mean simply that $4,000 is not sufficiently small.\(^58\) Others have held that the economic viability of cases is no longer a relevant factor in unconscionability analyses.\(^59\) Similarly, the court did not hold that fraud was irrelevant, simply that an allegation of fraud was insufficient.\(^60\) Courts have held that the fact that an arbitration agreement effectively functions as an exculpatory clause is not independently dispositive of unconscionability,\(^61\) while other courts have

\(^{55}\) Bernal, 2011 WL 2182903 at *6. The Bernal court maintained its pre-Concepcion unconscionability framework noting that “because Colorado’s [seven factor balancing] test for unconscionability of a contract provision does not explicitly disfavor arbitration (class or otherwise), [...] there does not appear to be any reason why the [pre-Concepcion unconscionability framework] is not still good law.” This differs from the sliding scale in states like California, Illinois and Missouri where plaintiffs need only show some degree of procedural unconscionability.

\(^{56}\) See, e.g., Hendricks v. AT&T Mobility LLC, No. C 11-00409, 2011 WL 5104421 (N.D. Cal. Oct. 26, 2011) (holding that “because there is no dispute that the contract was one of adhesion, [...] it was at least minimally procedurally unconscionable” and that “it does seem to remain an accurate statement of the law even in light of the Supreme Court’s observation in Concepcion”).

\(^{57}\) Concepcion, 131 S.Ct. at 1750 (citing Oestreicher v. Alienware Corp., 322 Fed.Appx. 489, 492 (2009)).

\(^{58}\) See Feeney, 28 Mass.L.Rptr. 652 at *9.


\(^{60}\) Concepcion, 131 S. Ct. at 1750.

\(^{61}\) See supra, note 43.
continued to sever provisions of arbitration agreements because they effectively made claims economically unviable.\(^{62}\)

**IV. Proving Unconscionability Post-Concepcion**

The potential devaluation of the Discover Bank factors requires that plaintiffs reevaluate the way they make unconscionability arguments. Prior to Concepcion, the adhesive nature of the contract, the amount in dispute and the economic viability of individual actions were important factors in unconscionability inquiries. In order to compensate for the doubt Concepcion has cast on the weight of the Discover Bank factors, plaintiffs must identify additional indicators of procedural and substantive unconscionability to supplement their arguments.

**A. Procedural Unconscionability**

Procedural unconscionability focuses on “oppression or surprise due to unequal bargaining power.”\(^{63}\) The special scrutiny of adhesion contracts is a proxy for various oppressive conditions that commonly accompany adhesion contracts, such as nonnegotiable terms, unequal bargaining power, or situations where one party did not understand the terms of the contract, that indicate a lack of a meaningful choice in the contract’s formation.\(^{64}\) Focusing on the underlying elements that cause this oppressive effect would narrow the procedural unconscionability test without sacrificing its ability to reach the contracts most disconcerting to plaintiffs.

Lack of meaningful negotiation over the terms of a contract could indicate lack of consent to the terms and thus unconscionability. Pre-Concepcion, courts found that terms “offered in a form contract on a take-it-or-leave-it basis”\(^{65}\) or that were non-negotiable where the defendant was in a superior bargaining position\(^{66}\) could evidence procedural unconscionability. Post-Concepcion, courts have continued to evaluate the ability of the parties to consent to the terms in question. The Tory court found a contract was not unconscionable in part because it had a provision

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64. Lack of meaningful choice in a contract’s formation is a generally applicable definition of unconscionability. See, e.g., Frank’s Maint. & Eng’g Inc. v. C.A. Roberts Co., 408 N.E.2d 403, 409-10 (Ill. App. Ct. 1980).


66. Brewer v. Mo. Title Loans, Inc., 323 S.W.3d 18, 23 (Mo. 2010), vacated, 131 S. Ct. 2875 (2011). See also Post v. Jones, 60 U.S. 150 (1856) (invalidating the sale of goods where the purchaser took advantage of the fact that the seller’s ship was wrecked in order to demand a lower price).
allowing the consumer to opt-out of the arbitration clause within thirty days of signing the agreement.\textsuperscript{67}

Similarly, contracts that impede the ability of a party to understand the terms could also indicate lack of consent and thus unconscionability.\textsuperscript{68} The structure and accessibility of a contract is important to this inquiry. Pre-\textit{Concepcion} courts found significant that the waiver was "hidden in a maze of fine print where it was unlikely to be noticed, much less read," and that did not inform the plaintiff of key terms such as the distribution of costs for the arbitration.\textsuperscript{69} Post-\textit{Concepcion}, courts have continued to examine accessibility, finding procedural unconscionability based on the location of the arbitration clause "on the back of the last page [behind even the signature line] in small font with reduced line spacing."\textsuperscript{70} Other courts have found contracts not to be unconscionable because the arbitration clause was clearly labeled, in all caps and bold print.\textsuperscript{71}

The identity and sophistication of the plaintiffs could also be indicators of the relative bargaining power and the ability of the parties to understand a contract.\textsuperscript{72} A high level executive likely has greater bargaining power and greater ability to negotiate the individual terms of the contract. On the contrary, a minimum wage janitor has less bargaining power and ability to object to unfavorable terms. The executive also likely has a greater ability to review the contract and understand its implications whereas a court should be more concerned that the janitor has unknowingly signed away important rights.

B. Substantive Unconscionability

Substantive unconscionability focuses on "overly harsh or one-sided results."\textsuperscript{73} A small claim and an allegation of fraud are simply two indicators that an arbitration agreement with a class action waiver was excessively one sided. Post-\textit{Concepcion}, the challenge for plaintiffs is to identify other ways to describe the excessively one-sided effects of class action waivers.


\textsuperscript{68} See, e.g., Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) (holding that a contract with a hidden clause allowing the store to repossess items the customer previously bought if the customer defaulted on current purchase was unconscionable); McDonald v. Mobil Coal Producing, Inc., 789 P.2d 866 (Wyo. 1990) (holding that the disclaimer in an employment manuals was not sufficiently prominent, making the employment manual binding on the employer).

\textsuperscript{69} \textit{Kinkel}, 857 N.E.2d at 265-66 (internal quotations omitted).


\textsuperscript{71} \textit{Tory}, 2011 WL 4478437 at *4.

\textsuperscript{72} See, e.g., \textit{Williams}, 350 F.2d 445 (taking the plaintiff's lack of education into account when evaluating unconscionability).

\textsuperscript{73} \textit{Armendariz}, 6 P.3d at 689. California is representative of unconscionability doctrines nationwide. See, e.g., Razor v. Hyundai Motor America, 854 N.E.2d 607, 622 (Ill. 2006).
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The inclusion of provisions that disproportionately benefit one side in an arbitration agreement is evidence of substantive unconscionability. For example, courts have found arbitration agreements unconscionable based on the inclusion of confidentiality agreements that would prevent potential plaintiffs from notifying one another of potential claims, or that would allow defendants to accumulate experience while denying plaintiffs access to precedent.\textsuperscript{74} Post-\textit{Concepcion}, courts have found unconscionable provisions allowing appeals if an award exceeded a maximum amount but not a minimum amount as consumers would most likely be the party suing for large damages.\textsuperscript{75} Similarly, the court found prohibiting injunctive relief while exempting repossessions unconscionable as injunctive relief was the consumer's equivalent to repossession.\textsuperscript{76} A class action waiver is a one-sided provision as employers would rarely have occasion to bring a class action against their employees. Plaintiffs would have to contend with the counterargument that the expediency and simplicity of bilateral arbitration bilateral arbitration provides benefits both parties.\textsuperscript{77}

Courts recognize that arbitration proceedings with insufficient procedural protection can evidence substantive unconscionability. As access to counsel is an aspect of due process, class action waivers that effectively preclude plaintiffs from obtaining counsel in a case where counsel is necessary to navigate complex law or procedures could be unconscionable. This inquiry is a heavily fact dependent. Forcing a plaintiff into bilateral arbitration without representation where the arbitration involves few procedural formalities and is substantively uncomplicated, such as a factual dispute over a violation of workplace rules, may not be unconscionable. Class action waivers have drawn more judicial scrutiny though where the case involved a "complicated area of law," would require "significant expertise and discovery," and "it was unlikely that a consumer could retain counsel to pursue individual claims" due to the small amount.\textsuperscript{78} The waiver could also be excessively one-sided, particularly where the defendants will likely be heavily represented.\textsuperscript{79}

While courts have held unconscionability doctrines relying solely on the exculpatory effects of class action waivers preempted in the wake of \textit{Concepcion},\textsuperscript{80} the exculpatory effects of an arbitration clause can still evidence unconscionability. Post-\textit{Concepcion}, courts continue to recognize

\textsuperscript{74} See, e.g., \textit{Kinkel}, 857 N.E.2d at 275-276.
\textsuperscript{75} \textit{Sanchez}, 2011 WL 5027488 *10-17.
\textsuperscript{76} \textit{Id}.
\textsuperscript{77} See, e.g., \textit{Concepcion}, 131 S. Ct. at 1753.
\textsuperscript{78} \textit{Brewer v. Mo. Title Loans, Inc.}, 323 S.W.3d 18, 23 (Mo. 2010), \textit{vacated}, 131 S. Ct. 2875 (2011).
\textsuperscript{79} \textit{Id}.
\textsuperscript{80} See supra, note 43.
the related argument that an arbitration clause is unconscionable where it interferes with a plaintiff's ability to vindicate a statutory right.\textsuperscript{81} Situations where forcing a plaintiff into bilateral arbitration could interfere with the plaintiff's ability to vindicate a statutory right include cases where the procedural costs were prohibitively high, or where the specific statute requires multiple plaintiffs to bring certain claims.\textsuperscript{82} Regardless of its continuing viability as an independent defense,\textsuperscript{83} interference with the ability to vindicate a statutory right could be an indicator of substantive unconscionability.\textsuperscript{84}

Concepcion implicitly supports the importance of procedural safeguards and the ability of plaintiffs to effectively vindicate claims. The Court specifically noted that under AT&T's arbitration agreement "aggrieved customers who filed claims would be essentially guaranteed to be made whole" and that "the Concepcions were better off under their arbitration agreement with AT&T than they would have been as participants in a class action, which could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars."\textsuperscript{85} Courts have used the apparently generous terms of AT&T's arbitration clause as a point of contrast in subsequent cases.\textsuperscript{86}

Due to the Court's general skepticism of class proceedings, showing that a class action waiver is substantively unconscionable per se is likely to be more challenging than demonstrating procedural unconscionability. One way to compensate for this in sliding scale jurisdictions is to focus on the procedural unconscionability of the contract such that less evidence of substantive unconscionability is required. Another approach is to focus on the other terms of the arbitration and then argue that the class action waiver is unseverable, invalidating the entire arbitration agreement.\textsuperscript{87} In either case, Concepcion has made defeating a motion to compel arbitration more difficult, but options remain.

\textsuperscript{82} Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 80-81 (2000) (remanding for further findings on whether that the existence of large arbitration costs would preclude the plaintiff from the vindicating her statutory right); Chen-Oster v. Goldman, Sachs & Co., No. 10 Civ. 6950, 2011 WL 1795297 (S.D.N.Y. July 7, 2011) (invalidating a class action waiver because bringing a pattern and practice case of discrimination under Title VII requires multiple plaintiffs).
\textsuperscript{83} The Supreme Court granted cert on this issue in its Fall 2011 term. See Greenwood v. CompuCredit Corp., 615 F.3d 1204 (9th Cir. 2010) cert. granted, 131 S. Ct. 2874 (2011).
\textsuperscript{84} In the pre-Concepcion case of In re Olshan Found. Repair Co., 328 S.W.3d 883, 892 (Tex. 2010), Texas incorporated interference with a statutory right as part of its unconscionability test.
\textsuperscript{85} Concepcion, 131 S. Ct. at 1753 (internal citations removed). AT&T's arbitration agreement required AT&T to pay claimants a minimum of $7,500 and twice their attorney's fees if they obtain an arbitration award greater than AT&T's last settlement offer and as a result.
The Court’s emphasis on the legislative intent of the FAA should also serve as an ameliorating principle to the FAA’s interpretation. Just as an overly broad interpretation of unconscionability can interfere with the legislative intent of the FAA, so too can an overly narrow interpretation. While the savings clause must be interpreted in light of the overall purpose of the FAA, the savings clause itself is an integral part of the FAA. The very inclusion of the savings clause indicates that Congress intended to exclude contracts defined as unconscionable, so defining unconscionability too narrowly and thus requiring courts to enforce unconscionable contracts is also contrary to the purpose of the FAA.

V.
Conclusion

Insanity has been defined as doing the same thing over and over again and expecting different results. In the wake of Concepcion, many lower courts have appropriately found the Discover Bank rule readily distinguishable from the unconscionability as it existed in most other jurisdictions, limiting the potential impact of the decision. In holding that the FAA preempted one of the most aggressive formulations of state unconscionability doctrine as it related to arbitration clauses, the Court simply returned unconscionability to the traditional fact-intensive inquiry required in all other circumstances and used in most other states. This has allowed plaintiffs to continuing prevailing on many of the same claims they had brought prior to Concepcion.

As Concepcion left the manner in which courts conduct unconscionability analyses unsettled. The challenge now for advocates is to reevaluate the way they construct unconscionability analyses and to reshape the field in light of the potential devaluation of the Discover Bank factors. In this sense, this jurisprudence needs those lunatics to continue pressing their $30 cases in full expectation that the court will rule differently this time. After all, in the words of George Orwell: “What can you do against the lunatic who is more intelligent than yourself, who gives your arguments a fair hearing and then simply persists in his lunacy?”

Jerett Yan, J.D. 2012 (U.C. Berkeley)

Section 10(c) of the National Labor Relations Act (N.L.R.A. or “the Act”) authorizes the National Labor Relations Board (N.L.R.B. or “the Board”) to order a violating party to “take such affirmative action . . . as will effectuate the policies of the Act.” Since the early days of the N.L.R.A., the Board has invoked its remedial power to order a violating party to post notices of the violation in conspicuous places around the workplace. The goal of the notice remedy is to “inform employees of their rights and the legal limits of the [violating party’s] conduct,” and it has historically consisted of printed pieces of paper on bulletin boards.

In *J & R Flooring*, the Board expanded the standard notice remedy to include electronic forms of communication, such as email and company-wide intranet systems. Prior to the decision, the Board had only ordered electronic distribution in cases in which it found, in the initial unfair labor practice hearing, that the violating party already communicated with employees electronically. Now, the standard remedial order automatically requires the violating party to post notice through electronic means, if it typically communicates with employees electronically. The decision marked a rare shift in the standard N.L.R.A. remedy.

I.

BACKGROUND

In drafting the N.L.R.A., Congress contemplated that the Board would have the remedial power to order the posting of “appropriate bulletins.” Notice posting has been an “essential element of the Board’s remedies for
unfair labor practices since the earliest cases under the Act.\textsuperscript{6} The very first bound volume of Board decisions contained a remedial notice order.\textsuperscript{7} Because notice orders comprised a "significant" part of the Board's remedial scheme, they quickly took hold as a standard remedy.\textsuperscript{8} Over the years, the language of the orders has become uniform; for example, Administrative Law Judges (A.L.J.) routinely require that violating parties post notices in "conspicuous places."\textsuperscript{9} The Board has also standardized the language of the notice itself. In the decision underlying \textit{J & R Flooring}, the A.L.J. ordered posting of a typically-worded notice:

\begin{quote}
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government
The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

\begin{itemize}
\item Form, join, or assist a union
\item Choose representatives to bargain with us on your behalf
\item Act together with other employees for your benefit and protection
\item Choose not to engage in any of these protected activities.
\end{itemize}

WE WILL NOT fail and refuse to bargain collectively and in good faith with [the union].

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative our unit employees, and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit.

FLOORING SOLUTIONS OF NEVADA, INC., D/B/A FSI
\end{quote}

\begin{itemize}
\item \textsuperscript{6} \textit{J & R Flooring}, 356 N.L.R.B. No. 9, 2; see also \textit{In the matter of Pennsylvania Greyhound Lines, Inc.}, 1 N.L.R.B. 1, 52 (1935); \textit{rev'd,} 91 F.2d 178 (3d Cir. 1937); \textit{rev'd,} 303 U.S. 261 (1938) (judicially legitimizing remedial notice under the Act); \textit{NLRB v. Falk Corp.}, 308 U.S. 453, 462, (1940) (overturning a Seventh Circuit decision to weaken the notice language the NLRB had ordered); \textit{Express Publ'g Co.}, 312 U.S. at 438 (noting that the issuance of an order "advising the employees of the Board's order and announcing the readiness of the employer to obey it is within the authority conferred on the Board by [Section] 10(c) of the Act").
\item \textsuperscript{7} \textit{In the matter of Pennsylvania Greyhound Lines,} 1 N.L.R.B at 52.
\item \textsuperscript{9} \textit{E.g., id.}\
\end{itemize}
The notice remedy informs employees that they have rights, and that the violating party shall not interfere with those rights. Its purpose, however, goes beyond information: Courts and the Board have opined that the notice remedy can actually counter an N.L.R.A. violation by "dispelling and dissipating the unwholesome effects" of unfair labor practices. It is a "therapy" that reminds employees that the N.L.R.B. is working to protect them so that they can freely exercise their rights. Remedial notice provides "a warming wind of information and, more important, reassurance.

The Board has repeatedly recognized that the notice best serves these purposes when easily viewable by the maximum number of targeted employees. The Board customarily orders violating parties to post physical notice on bulletin boards, and may order posting in other locations, such as "timeclocks, department entrances, meeting hall entrances, and dues-payment windows." The Board tailors the notice remedy "to ensure that a respondent employer actually apprises its employees of the Board's decision and their rights under the Act." The Board has, for example, required that the notice be printed in various languages, read aloud to employees, mailed to employees, adjusted to the employment pattern of a seasonal business, and published locally. Until J & R Flooring, however, standard Board orders only required notice to be posted by the violating party and "maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted," without expressly requiring posting by electronic means.

Over the years, the Board has occasionally changed the language of the standard notice-posting order, and the language of the notice itself. In 1996 and 1997, it modified the standard order to require mailing of the order to former employees if a violating employer goes out of business, or closes

10. Teamsters Local 115, 640 F.2d at 400; see also Falk Corp., 308 U.S. at 462; see also N.L.R.B. CASE HANDLING MANUAL, PART III COMPLIANCE §10518.
12. J.P. Stevens and Co. v. NLRB, 417 F.2d 533, 539 (5th Cir. 1969).
13. Teamsters Local 115, 640 F.2d at 400-01.
15. N.L.R.B. CASEHANDLING MANUAL, PART THREE COMPLIANCE, § 10518.2.
the location of the violation.\textsuperscript{24} In 2001, the Board added the hours of the Regional Office and the Board's website to the notice, and made its language the less legalistic to more effectively reach employees.\textsuperscript{25}

Within the last decade, however, the Board twice declined to consider whether a standard order of posting by electronic means would better serve remedial goals. In 2003, in \textit{International Business Machines}, the Board held that the "conspicuous places" language of the standard order did not include electronic forms of communication. The charging union asserted that since the employer's notices to employees are "customarily posted" electronically, the A.L.J.'s order for posting in "conspicuous places including all places where notices to employees are customarily posted" included the employer's intranet and email systems.\textsuperscript{26} The A.L.J. and the General Counsel rejected that interpretation, and the Board denied review.\textsuperscript{27} "If the Union wanted [the electronic posting] provision in the order," the Board declared, "it should have specifically sought such an order from the judge and the Board."\textsuperscript{28}

In the 2006 case \textit{Nordstrom, Inc.}, the Board again declined to consider whether electronic posting would better serve remedial policy. Even without such a discussion, it held that to receive the electronic notice remedy, a charging party must submit evidence of the violating party's electronic communications at the initial unfair practice hearing—not after.\textsuperscript{29} Upon review of the A.L.J.'s initial order, the Board declined the charging union's request for electronic posting because there was no evidence in the record to support an order for electronic notice.\textsuperscript{30} Chairman Battista wrote for the majority of the three-member panel that it would be inappropriate to apply a "one-size-fits-all" electronic notice remedy and to leave the enforcement details for the compliance stage, because "[t]here may be material differences among employers' intranet systems."\textsuperscript{31} On the other hand, Member Liebman would have required electronic notice as a default, either by a finding that "conspicuous places" in the standard order already included electronic notice, or by amending the standard order.\textsuperscript{32} Although \textit{Nordstrom} ostensibly settled the issue of the electronic notice remedy, this disagreement among the Board members foreshadowed that the Board would soon reopen it.

\textsuperscript{24} Excel Container, Inc., 325 N.L.R.B. 17 (1997).
\textsuperscript{25} In re Ishikawa Gasket Am. Inc., 337 N.L.R.B. 175, 176-67 (2001).
\textsuperscript{27} \textit{id.} at 967.
\textsuperscript{28} \textit{id.}
\textsuperscript{29} \textit{Id.} at 967.
\textsuperscript{30} \textit{Id.} at 294.
\textsuperscript{31} \textit{Id.}
\textsuperscript{32} \textit{Id.} at 294 n.5.
II. AMICUS BRIEFING

On May 14, 2010, the Board called for amicus briefs in several cases on whether it should overturn Nordstrom to require electronic notice as a standard remedy. One of these cases was J & R Flooring, which would ultimately serve as the Board's vehicle for the policy change. Amici in favor of a standard electronic notice remedy included the N.L.R.B. General Counsel, the American Federation of Labor and Congress of Industrial Organizations (A.F.L.-C.I.O.), the Service Employees International Union (S.E.I.U.), and the charging unions in the various cases (a local chapter of the Machinists union, A.F.L.-C.I.O., and a local chapter of the Painters union). Amici opposed to the policy change included the National Right to Work Foundation, the Chamber of Commerce of the United States, Bodman LLP, the Texas Association of Business, and the charged parties.

The amici in favor of a policy change presumed that the American workplace has changed dramatically since the Board issued its first notice-posting order in the 1930's. The General Counsel noted that "by 2003, 77 million workers in the United States (55.5 percent of employed persons) used a computer at work." The S.E.I.U. submitted that by 2008, a majority of American workers used email at work. The A.F.L.-C.I.O. listed a wide range of ways that the American worker uses computer technology.

In the modern era of electronic communication, amici argued, bulletin boards have become an inadequate posting forum. The A.F.L.-C.I.O. submitted that because posting on bulletin boards used to be an effective method of communication, the early Board clearly desired that the notice actually reach employees. Over time, bulletin boards became obsolete, yet employers continued to post remedial notices on them, and only on them. The S.E.I.U. noted that, to the extent that employers still use bulletin boards, they brim with dozens of legal notices required by state and federal laws. "This proliferation of legal notices," the S.E.I.U. asserted, "has turned bulletin boards into the workplace equivalent of the small-print

33. The underlying decision reporting the unfair labor practice can be found at J & R Flooring, 355 N.L.R.B. No. 123 (2010). In brief, an employer unlawfully refused to cooperate with a Section 8(f) union as the union attempted to gain Section 9(a) status. Id. at 9.
37. Id. at 9.
38. Id.
legal disclaimers at the end of an advertisement—entirely expected but generally ignored."\(^{39}\)

Amici further argued that employees may suffer retaliation for reading physical notice. The S.E.I.U. noted that the surveillance and retaliation problem was especially problematic with physical posting because the posting party is already a proven violator of the N.L.R.A. “Indeed, even where the employer has unlawfully created the impression of surveillance—has led employees to feel that it is ‘peering over their shoulders, taking note of who is involved in union activities, and in what particular ways,’ the Board still has not altered the traditional posting requirement to ensure that workers may review the notice in private.”\(^{40}\) By contrast, employees can read emailed notice in the privacy of their workstation, or even at home.

Amici in favor of the policy change insisted that since the N.L.R.A. mandates the Board “shall issue... an order... to take such affirmative action as will effectuate the policies of the Act,” it is the Board’s duty to ensure that the notice remedy is effective. The only way to do that in the electronic age, amici generally argued, is to adopt electronic notice as a standard remedy.

On the other side of the debate, amici advanced three principal arguments: (1) the proposed change in remedial policy would be unfair to violating parties, (2) electronic notice should continue to be reserved for egregious violations, and (3) the remedy should equally apply when unions are the violating party.

First, amici asserted that standard electronic notice would be unfair.\(^{41}\) The U.S. Chamber of Commerce argued that electronic notice runs the risk of disenfranchising certain employees, because some employees work from home, yet not all of them have internet at home.\(^{42}\) The Texas Association of Business worried that electronic communications may be “tampered with” and more easily passed around than physical notice. This would invite the victimized employees or others to “disrupt or defame respondents.”\(^{43}\)

Second, amici opposing the policy change argued that electronic notice should be reserved for egregious violations of the Act. Emailing notice, the Texas Association of Business argued, is more akin to distribution than to posting. Because distribution has typically been an extraordinary remedy for severe unfair labor practices, electronic “distribution” of notice should not become the norm.

40. Id. at 8 (quoting Flexsteel Industries, 311 N.L.R.B. 257, 257 (1993)).
42. Id. at 12.
Finally, *amici* opposing the change argued that the standard electronic remedy should also apply when a union is the violating party.\textsuperscript{44}

III. DECISION AND DISSENT

On October 22, 2010 the Board changed the standard remedial policy in a three to one decision. For the first time, it ordered a violating party to post electronic notice without a special showing that the violating party typically uses electronic forms of communication. The majority consisted of Chairman Liebman and Members Becker and Pearce. Member Hayes issued a dissenting opinion.

The Board added the following to the standard order:

In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, or other electronic means, if the Respondent typically communicates with its employees [members] by such means.\textsuperscript{45}

While the Board believed that posting in “conspicuous places, including all places where notices to employees or members are customarily posted” was already broad enough to include electronic communications, it added the new language “to obviate any possible uncertainty about the meaning of that language.”\textsuperscript{46}

The Board reasoned that the changing American workplace requires an updated notice remedy. Citing studies, it stated that “[e]lectronic communications are now the norm in many workplaces, and it is reasonable to expect that the number of employers communicating with their employees through electronic methods will continue to increase.”\textsuperscript{47} The Board observed that the bulletin board is no longer the most common forum for communication with employees, and that modern “telecommuting and the decentralization of workspaces” make it even less likely that employees will see physical notices. Electronic notice, by contrast, will “[ensure] that remedial notices are adequately communicated to the employees or members affected by the unfair labor practices.”\textsuperscript{48}

The majority was not convinced that electronic notice is unfair, even though emailed notice is easily distributable and tampering may be

\textsuperscript{44. Amicus Brief of the Chamber of Commerce of the United States at 8, J & R Flooring, 356 N.L.R.B. No. 9.}
\textsuperscript{45. J & R Flooring, 356 N.L.R.B. No. 9.}
\textsuperscript{46. Id.}
\textsuperscript{47. Id.}
\textsuperscript{48. Id.}
possible. "In reality," the Board stated, "respondents have never had
dominion over Board-ordered remedial notices."49

The majority was also unconvinced that the remedy should be reserved
for egregious or recidivist violations. While recognizing that electronic
notice had previously been an extraordinary remedy, the majority stated that
the new policy would not be particularly onerous because it would apply
only to violators who already communicate with employees through
electronic means.

The decision brings about two procedural changes. First, the charging
party no longer bears a burden to prove that the violating party
communicates with employees electronically. Instead, the new standard
remedy assumes that the employer communicates electronically, unless the
violating party can rebut this presumption. Second, the decision shifted the
question of the violating party’s communication habits from the unfair
practice hearing to the compliance stage.

Writing in dissent, Member Hayes worried that the compliance stage
will be an ineffective forum for application of the notice remedy to
individual cases. Because there are myriad forms of electronic
communication, he opined, “the majority unnecessarily complicates the
relative tasks of the General Counsel and administrative law judges in
defining what a particular respondent’s remedial obligations should be.”

Notwithstanding Member Hayes’ worries, future challenges to the
application of the remedy will give the new standard remedial order an
accompanying standard practical meaning. Board decisions will, for
example, clarify the remedial expectation for violators that use both email
and intranet, violators that use email only, and violators falling into other
classes. Future litigation will also dictate the scope and importance of this
decision. For example, the decision will be remembered as a major shift in
remedial policy if the Board and courts uphold orders of front page, large-
font notice on a company-wide intranet, alongside an email with the notice
attached. But the decision will be less important if the Board and courts
uphold orders allowing notice to hide in darker corners of cyberspace, as
physical notice has effectively hidden on bulletin boards for years.

Alexander R. Rivera, J.D. 2012 (U.C. Berkeley)

49. Id.