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## ARBITRATION AGREEMENTS IN ARKANSAS AFTER *CONCEPCION*

*John C. Williams\**

### I. INTRODUCTION

There are few constitutional rights that may not be waived. A criminal defendant may testify at his own trial and thereby waive his Fifth Amendment right against incrimination.<sup>1</sup> A criminal suspect may waive her Fourth Amendment right to require the police to obtain a warrant before searching her home.<sup>2</sup> The right guaranteed by the Seventh Amendment—that parties are entitled to a jury in any matter “at common law” where the amount in controversy is over twenty dollars—is no different.<sup>3</sup> Waiver of the Seventh Amendment right may occur in several forms: by consenting to a bench trial, for example, or by failing to file a timely jury demand.<sup>4</sup> But another, more troubling type of Seventh Amendment waiver has become increasingly prevalent—waiver via arbitration clause.

An arbitration clause is nothing more than a contractual declaration that the parties forfeit their right to litigate disputes in court. Instead, disputes will be submitted to a (theoretically neutral) arbitrator, who will apply specified arbitral rules. Where the contracting parties are on equal footing, arbitration is a beneficial procedure. It preserves judicial resources while allowing sophisticated actors to resolve their disputes. Disagreements between nations, between business entities, and between labor unions and management are all good candidates for arbitration. The key assumption, however, is that these parties have indeed agreed to arbitrate. If not, courts of competent jurisdiction remain available.

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1. See, e.g., *Colorado v. Spring*, 479 U.S. 564, 572 (1987) (“[A] suspect may waive his Fifth Amendment privilege, ‘provided the waiver is made voluntarily, knowingly and intelligently.’”).

2. See, e.g., *United States v. Matlock*, 415 U.S. 164, 170–71 (1974) (explaining that warrantless search may be justified by the consent of a defendant or someone with common authority over premises).

3. U.S. CONST. amend. VII. The requirement that the suit be “at common law” is not self-explanatory and raises a host of issues by itself. Suffice it to say that, under the Supreme Court’s jurisprudence, the right to a jury trial generally applies to suits that allege a claim for damages. See Suja A. Thomas, *A Limitation on Congress: “In Suits at Common Law”*, 71 OHIO ST. L.J. 1071, 1071–83 (2010) (explaining development of the “at common law” requirement).

4. See FED. R. CIV. P. 38(d) (“A party waives a jury trial unless its demand is properly served and filed.”).

Contrast a dispute between a large corporation and its customer. Corporations frequently insert arbitration clauses into form contracts that customers are required to sign in order to receive (often essential) goods and services. A nursing home may require its patient or her representative to sign a contract containing an arbitration clause, or a phone company may bury an arbitration clause in fine print that it is well understood no customer—even a sophisticated one—will read. Here, the waiver of the jury-trial right is more problematic. Typically the key criterion for a waiver of constitutional rights is that the waiver be consensual. Simply stated, a person must be acting voluntarily when giving up a right.<sup>5</sup> But that criterion is not present when a consumer signs a contract because she has no choice if she wants to receive the service, or if she does not even know that the contract she is signing contains an arbitration clause. Indeed, one might question whether there can *ever* be a meaningful waiver of the jury right through consumer contracts of adhesion. It is safe to say that, unless the consumer is a lawyer, the notion of future litigation does not enter a consumer's mind when she is purchasing a good or service. She needs the good or service now and does not care about the fine print. No person forfeits his Fourth or Fifth Amendment right via contract years in advance. He forfeits these rights when faced with the police search or with the opportunity of testify-

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5. This formulation simplifies the issue somewhat. "Consent" can mean many different things. For example, to consent to waive his Fourth Amendment right, must a suspect know that he may deny a police officer's request to conduct a search? The Supreme Court has said no. *See* *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973). Instead, the suspect's consent to search must be "not the result of duress or coercion." *Id.* Contrast that to trial rights guaranteed under the Constitution, waiver of which must be "knowing and intelligent." *See id.* at 237-38. Lack of duress is not enough—the defendant must actually know that it is a right he is waiving. *See id.* And the level of consent required to bind oneself to a contract is even lower, generally requiring only an objective manifestation that the party agreed to be bound. *See* Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 L. & CONTEMP. PROBS. 167, 170-76 (2004) (discussing difference between contractual consent and "knowing" consent). The question that has divided commentators is whether a lower standard is permissible or knowledge of the jury-trial waiver should be shown. *See id.* Moreover, the courts have sent mixed signals about whether a "knowing" waiver of a jury trial is required in the context of arbitration. *See* David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 641 (2010) ("[I]t is unclear whether the 'voluntary and informed' rule will remain good law. This fact-specific inquiry seems to conflict with the fact that courts routinely enforce arbitration clauses—which implicitly waive the right to a jury trial—even when there is copious evidence that the adherent did not know about the clause.").

Ultimately, the standard one favors depends on how highly one values the right under discussion. If one is especially concerned about warrantless searches, *Schneckloth's* standard is not good enough. This Article is not intended to develop a theory on how jealously the jury-trial right should be guarded or to otherwise engage the debate, other than to suggest that, as a general matter, a meaningful relinquishment of a right requires a conscious choice.

ing. In a similar vein, a truly knowing waiver of the Seventh Amendment right can only occur at the moment of truth—that is, when a dispute arises and the prospect of litigation or arbitration has entered the person’s mind.

How federal and Arkansas jurisprudence reflect these concerns is the subject of this Article. In recent cases, the United States Supreme Court has been clear that arbitration clauses in consumer contracts of adhesion should be enforced, no matter what the power dynamics between the contracting parties.<sup>6</sup> These cases hold that federal law preempts state law disfavoring arbitration. As such, they would seem to leave state courts little room to maneuver when they are faced with demands to compel arbitration. Yet state courts—and Arkansas courts in particular—have proven Houdini-like in escaping the logic of the federal cases. They have done so by using the last redoubt of state law in this area—the law of contract formation.<sup>7</sup> By raising the bar for the legal formation of arbitration agreements, Arkansas courts have mitigated some of the harshest effects of consumer arbitration clauses and have, at least through the backdoor, prevented these clauses from being enforced without the consumer’s true consent. At the same time, however, the Arkansas approach has raised important questions of federalism in an arena that was already full of them.

Part II of this Article examines federal cases governing the enforceability of consumer arbitration clauses. This Part focuses on the landmark case of *AT&T Mobility LLC v. Concepcion*<sup>8</sup>—which holds that the Federal Arbitration Act (FAA)<sup>9</sup> preempts state laws that disfavor arbitration—and examines how federal courts and state courts outside Arkansas have reacted to the ruling. Part III then turns to Arkansas’s unique approach to arbitration—an approach that has been amplified by a set of Arkansas Supreme Court cases decided in 2014. Part IV discusses the viability of these Arkansas cases in light of the recent expansion of FAA preemption. It concludes that the Arkansas approach does not run afoul of the FAA, a result that should apply in both state and federal court. Finally, it suggests that this outcome is a salutary one for reasons of federalism as well as fundamental fairness.

## II. THE NEW LAW OF ARBITRATION PREEMPTION

Though arbitration has been written into the federal statutes for ninety years, it is only relatively recently—within the last thirty years—that the FAA has acquired any real teeth. In the past five years, those teeth have become sharper. This Part explains how the U.S. Supreme Court has expanded

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6. See *infra* Part II.A.

7. See *infra* Part III.B.

8. 131 S. Ct. 1740 (2011).

9. 9 U.S.C. §§ 1–307 (2013).

the scope of the FAA and how lower federal courts have reacted to the Supreme Court's apparent mandate to enforce arbitration clauses without regard to state law.

A. *Concepcion* and *Amex*

Arbitration has been the subject of federal law since 1925. In that year, Congress passed the Federal Arbitration Act to combat general judicial hostility to arbitration.<sup>10</sup> The FAA effectively created a new body of federal substantive law, though one that has accrued meaning only in the past three decades through U.S. Supreme Court interpretations.<sup>11</sup>

The FAA's crucial language appears at 9 U.S.C. § 2:

A written provision in . . . a contract evidencing a transaction involving commerce 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.

Thus, so long as the contract governs a transaction occurring in interstate commerce—not a difficult bar to meet<sup>12</sup>—then a court asked to enforce an arbitration agreement must do so *unless* there is a general contract defense to the arbitration agreement. The U.S. Supreme Court has made clear that the question is whether there is a contract defense to an arbitration agreement itself—if a party offers a defense to the contract as a whole instead of the arbitration provision alone, then the arbitration clause must be enforced.<sup>13</sup> Unless the clause specifically reserves a general contract defense

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10. See *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 592–93 (2008) (Stevens, J., dissenting) (“Prior to the passage of the FAA, American courts were generally hostile to arbitration.”).

11. See *Horton*, *supra* note 5, at 613, 619–23 (discussing historical expansion of the FAA).

12. Though seemingly every commercial transaction involves interstate commerce, it is not unheard of for Arkansas courts to avoid the FAA by finding that the parties were involved solely in intrastate activities. See *Ark. Diagnostic Ctr., P.A. v. Tahiri*, 370 Ark. 157, 166–67 (2007). As the FAA has expanded, so too has the notion of what sort of transactions occur in interstate commerce for the purpose of the FAA. As one commentator has explained, “even after the Supreme Court enlarged Congress’s Commerce Clause powers in the 1940s, it refused to equivalently broaden the FAA.” See *Horton*, *supra* note 5, at 614. However, by the 1990s, the Supreme Court had made clear that the FAA covers any sort of activity that Congress would be permitted to regulate under the Commerce power. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 268 (1995) (interpreting the phrase “involving commerce” as “extending the Act’s reach to the limits of Congress’ Commerce Clause power”).

13. This so-called *Prima Paint* rule—named after *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 403–04 (1967), the case in which it was established—is discussed *infra* Part IV.A, as is the rule’s relationship to Arkansas law.

to the court, the arbitrator will decide the validity of the general defense.<sup>14</sup> It is also well established that the FAA has preemptive effect—that is, it must be enforced in state as well as federal court and trumps any general state-law bans on arbitration.<sup>15</sup>

Sweeping as these rules are, they appear to be cabined by the savings clause of § 2 of the FAA. By reserving to the states their general contract defenses—“such grounds as exist at law or in equity”—§ 2 provides a seemingly powerful means for parties to challenge arbitration clauses that were fraudulently, mistakenly, coercively, or unconscionably obtained. However, the savings clause was seriously limited in *AT&T Mobility LLC v. Concepcion*,<sup>16</sup> a case with far-reaching implications for consumers, employees, and other parties who are subject to nonnegotiable contracts of adhesion.

The facts of *Concepcion* are those of a run-of-the-mill class action. The plaintiffs enrolled in AT&T’s service based upon an offer that the service would come with free phones.<sup>17</sup> When the plaintiffs learned they had been charged \$30 sales tax for the phones, they brought suit for false advertising and fraud and sought to certify the case as a class action.<sup>18</sup> However, their service contract contained a clause requiring bilateral arbitration—the plaintiffs were required to arbitrate only in their “individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.”<sup>19</sup> AT&T sought to arbitrate according to this clause, but the district court refused to compel arbitration.<sup>20</sup> The Ninth Circuit affirmed, holding that the arbitration clause was unconscionable.<sup>21</sup> Specifically, the Ninth Circuit applied the so-called *Discover* rule, a rule of California law that prohibits class-action waivers in consumer contracts of adhesion where the consumer alleges a scheme to cheat consumers out of small amounts of money.<sup>22</sup> Finding that the *Discover* rule is an unconscionability defense that exists “for the revocation of any contract,” the Ninth Circuit held that the FAA did not compel enforcement of the arbitration agreement.<sup>23</sup>

In a five to four decision, the Supreme Court reversed and held that the FAA preempts the *Discover* rule “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>24</sup> The majority

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14. See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444–46 (2006).

15. See *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

16. 131 S. Ct. 1740 (2011).

17. See *id.* at 1744.

18. See *id.*

19. *Id.*

20. *Id.* at 1744–45.

21. *Id.* at 1745.

22. *Concepcion*, 131 S. Ct. at 1745–46 (citing *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005)).

23. See 9 U.S.C. § 2 (2013); *Concepcion*, 131 S. Ct. at 1745.

24. *Id.* at 1743, 1753 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

explained that the most straightforward preemption analysis would occur where “state law prohibits outright the arbitration of a particular type of claim”—there, the state law plainly conflicts with the federal law and cannot stand.<sup>25</sup> But the *Discover* rule was not such a law, and “the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration.”<sup>26</sup> The court then proceeded to explain that even state-law defenses that are generally applicable to all contracts—in the FAA’s terms, “grounds as exist at law or in equity for the revocation of any contract”—could be preempted if “[i]n practice . . . the rule would have a disproportionate impact on arbitration agreements.”<sup>27</sup>

Did the *Discover* rule have a disproportionate impact on arbitration? Despite the “complex” analysis that the majority purported the problem to require, the case came down to a simple principle: class procedures are incompatible with arbitration, and thus with the FAA. As a result, any state-law rule requiring the availability of class procedures (whether in litigation or arbitration) is an obstacle to the purposes of the FAA and may not be enforced to invalidate an existing agreement to arbitrate.<sup>28</sup> Thus, though the savings clause of § 2 had appeared to sanction unconscionability analysis, *Concepcion* adds an extra layer of inquiry. The issue is not simply whether a state-law defense is available. Rather, *Concepcion* requires an inquiry into the practical effect of the state-law rule.<sup>29</sup> If it “interferes with fundamental attributes of arbitration,” then it must yield to the FAA.<sup>30</sup>

Arguably, *Concepcion* is narrow in scope. The *Discover* rule required parties to submit to class procedures that presumably would undermine the efficiency of arbitration.<sup>31</sup> Indeed, Part III.B of the opinion—almost half the text—can be read as a paean to arbitration and its efficiency benefits.<sup>32</sup> Other contract defenses—fraud, duress, mistake, and perhaps other forms of unconscionability—presumably lack an anti-arbitration bias and would withstand attack. Problematically, however, *Concepcion* does not state a clear rule of law, so this theory is difficult to assess. Ultimately, *Concepcion*

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25. See *id.* at 1747 (citing *Preston v. Ferrer*, 552 U.S. 346, 353 (2008)).

26. See *id.* at 1746–47.

27. 9 U.S.C. § 2; see *Concepcion*, 131 S. Ct. at 1747.

28. See *Concepcion*, 131 S. Ct. at 1748, 1750.

29. See *id.* at 1746–48. As Peter Rutledge has explained, “[T]he mere fact that an arbitration rule falls within a generally applicable state contract doctrine supplies merely a necessary—but no longer a sufficient—condition for that rule to survive Section 2 preemption. Instead, the rule must undergo a second level of federal review.” PETER B. RUTLEDGE, *ARBITRATION AND THE CONSTITUTION* 92 (2012).

30. See *Concepcion*, 131 S. Ct. at 1748.

31. See *id.* at 1746, 1750 (quoting *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005)).

32. See *id.* at 1748–53.

commands courts to scrutinize state legal rules to determine whether their application is inconsistent with the “fundamental attributes of arbitration.”<sup>33</sup> Other than that, it supplies mainly color and tone—one that encourages the enforcement of arbitration clauses and makes that the easiest decision for courts faced with FAA preemption arguments.

The Supreme Court employed a similar pro-arbitration tone in *American Express Co. v. Italian Colors Restaurant* (“*Amex*”).<sup>34</sup> Plaintiffs, a group of merchants required to agree to defendant’s terms to accept American Express for payment, brought a federal antitrust claim to challenge defendant’s fees.<sup>35</sup> However, defendant’s terms contained an arbitration agreement that forbade class arbitration.<sup>36</sup> Rather than asserting a state-law defense to the arbitration clause as in *Concepcion*—indeed, they had no state claim—plaintiffs invoked the “effective vindication” doctrine, a judicial rule that blocks enforcement of arbitration agreements when they prevent parties from pursuing federal statutory remedies.<sup>37</sup> Specifically, plaintiffs argued that the arbitration clause—for reasons including but not limited to its prohibition of class procedures—made it prohibitively expensive to pursue their claim.<sup>38</sup> While an individual merchant’s maximum statutory remedy was about \$38,000, the expert analysis needed to prove its antitrust theory could have cost more than \$1 million.<sup>39</sup> In other words, without a class mechanism, an individual merchant could have paid \$1 million in expert costs for a \$38,000 judgment—hardly a rational economic choice.

The majority rejected application of the effective-vindication doctrine.<sup>40</sup> In doing so, it focused on the class arbitration ban and explained that “[t]ruth to tell, . . . *AT&T Mobility* all but resolves this case.”<sup>41</sup> The majority saw the case as ultimately boiling down to a contest between arbitration and the prosecution of low-value claims—the same fundamental issue as in *Concepcion*.<sup>42</sup> And in that contest, arbitration clearly won: “[T]he FAA’s command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims.”<sup>43</sup>

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33. *See id.* at 1748.

34. 133 S. Ct. 2304 (2013).

35. *Id.* at 2308.

36. *Id.*

37. *Id.* at 2310.

38. *See id.* at 2308, 2310–11.

39. *See id.* at 2308.

40. *Amex*, 133 S. Ct. at 2310–12.

41. *See id.* at 2312.

42. *See id.*

43. *See id.* at 2312 n.5.



## B. Arbitration After *Concepcion*

*Concepcion* and *Amex* suggest an obvious path to corporations wishing to avoid both litigation with consumers and class-wide procedures: simply insert an arbitration provision into the customer's terms of service. Whether the Supreme Court's recent jurisprudence has in fact led to a torrent of new arbitration clauses is an open question; for example, a recent study focused on franchise agreements and found that the use of arbitration clauses in those agreements had not increased as much as had been predicted.<sup>44</sup> However, arbitration provisions have long been a favored approach to limiting consumer litigation.<sup>45</sup> There is no reason to believe the use of those provisions would do anything but increase in a post-*Concepcion* world.<sup>46</sup> And while there may be other paths to restrict the use of arbitration clauses in consumer contracts of adhesion—for example, the Consumer Financial Protection Bureau has issued a study of the use of consumer arbitration clauses<sup>47</sup> and has the authority to pass a rule limiting or prohibiting arbitration provisions in agreements for consumer financial products<sup>48</sup>—*Concepcion* and *Amex* are the status quo for now.

What does that status quo mean from a practitioner's standpoint? In terms of legal rules, *Concepcion* and *Amex* are absolutely clear on one point:

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44. See Peter B. Rutledge & Christopher R. Drahozal, "Sticky" Arbitration Clauses? *The Use of Arbitration Clauses After Concepcion and Amex*, 67 VAND. L. REV. 955, 957–61 (2014).

45. The use of consumer arbitration clauses seems to vary by product but is especially widespread in financial and telecommunications contracts. See Horton, *supra* note 5, at 607 & n.8 (discussing study finding that seventy-five percent of consumer financial and telecommunications contracts contained an arbitration provision).

46. Indeed, Rutledge and Drahozal explain that there are reasons to believe the franchise agreements they reviewed will be less susceptible to respond to *Concepcion* than consumer agreements. See Rutledge & Drahozal, *supra* note 44, at 983–84. And anecdotally, at least, corporate arbitration procedures appear to be responsive to *Concepcion* and *Amex*. The most publicized example of increased corporate boldness in the consumer-arbitration arena is General Mills' recent revisions to its terms of service, which would make arbitration binding if a consumer downloaded coupons or interacted with the company in a number of other basic ways. See Stephanie Strom, *When 'Liking' a Brand Online Voids the Right to Sue*, N.Y. TIMES, Apr. 17, 2014, at B1, available at <http://www.nytimes.com/2014/04/17/business/when-liking-a-brand-online-voids-the-right-to-sue.html?ref=business>. The company quickly retracted the policy in reaction to public uproar. See Stephanie Strom, *General Mills Reverses Itself on Consumers' Right to Sue*, N.Y. TIMES, Apr. 20, 2014, at A17, available at [http://www.nytimes.com/2014/04/20/business/general-mills-reverses-itself-on-consumers-right-to-sue.html?\\_r=0](http://www.nytimes.com/2014/04/20/business/general-mills-reverses-itself-on-consumers-right-to-sue.html?_r=0).

47. CONSUMER FIN. PROTECTION BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A) (2015), available at [http://files.consumerfinance.gov/f/201503\\_cfpb\\_arbitration-study-report-to-congress-2015.pdf](http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf).

48. Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(b), 12 U.S.C. § 5518(b) (2013).

if a state law forbids certain categories of claims from being arbitrated, then the FAA preempts that law. Both the Supreme Court<sup>49</sup> and the lower federal courts<sup>50</sup> have stood ready to enforce that principle.<sup>51</sup> However, *Concepcion* is less clear about situations where state laws are applied in a manner that disfavors arbitration. On the one hand, *Concepcion* could be narrowly construed as holding only that, because class procedures are incompatible with arbitration, a state cannot require arbitration to be conducted on a class-wide basis. However, the broad language of *Concepcion* and *Amex* appears to reach much beyond that basic idea. In light of this new landscape, what arguments are available to parties seeking to avoid a consumer arbitration clause?

### 1. Formation

First, the parties might attempt to avoid a confusing preemption analysis altogether by arguing that there was never an agreement to arbitrate in the first place. As the Supreme Court has explained, the purpose of the FAA is to “ensure that private arbitration agreements are enforced according to their terms.”<sup>52</sup> “[T]he FAA does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that ‘arbitration proceed *in the manner provided for in [the parties’] agreement.*”<sup>53</sup> Put even more directly, “the basic objective” of the FAA “is not to resolve disputes in the quickest manner possible, no matter what the parties’ wishes, but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms.”<sup>54</sup> Indeed, even *Concepcion*

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49. See, e.g., *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1202 (2012) (preempting state law rule that prevented arbitration of nursing home-related claims).

50. See, e.g., *Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928, 930 (9th Cir. 2013) (holding that the FAA preempts California rule preventing arbitration of claims for injunctive relief in certain circumstances).

51. Notably, the Arkansas Arbitration Act, which was passed in 2011, contains categorical carve-outs preventing the use of arbitration agreements in tort, employment, and insurance cases. See ARK. CODE ANN. § 16-108-230(b) (2010). These carve-outs unquestionably conflict with the FAA, and any state court that enforced them could expect a summary reversal from the United States Supreme Court along the lines of *Marmet*. As one commentator has suggested, the approach the Arkansas Supreme Court has taken is perhaps an attempt to effectuate the spirit of the Arkansas Arbitration Act without running afoul of preemption doctrine. See Katherine B. Church, Comment, *Arkansas and Mandatory Arbitration: Is the Feeling Really Mutual?*, 65 ARK. L. REV. 343, 354, 378 (2012). The Arkansas Supreme Court’s approach is discussed in detail in Part III *infra*.

52. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989).

53. *Id.* at 474–75 (alteration in original) (quoting 9 U.S.C. § 4 (2013)).

54. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 947 (1995) (citations omitted) (internal quotation marks omitted).

confirmed the “fundamental principle that arbitration is a matter of contract.”<sup>55</sup> Thus, if the parties did not contract to arbitrate in the first place, then arbitration is not a valid procedure.

Arguments that parties did not have a valid agreement to arbitrate—or, more narrowly, that they did not agree to arbitrate the specific claim at issue in the case—are dependent upon contract wording as well as the particular facts surrounding the parties’ interactions. In federal court, at least, such arguments have been met with mixed success. And though formation arguments technically avoid the preemption inquiry, they nonetheless may become entangled in a broad preemption analysis and *Concepcion*’s pro-arbitration approach.

Where the court perceives the formation argument to hinge on the semantic wording of the contract, the party seeking to avoid arbitration has a tough row to hoe. For example, in *Murphy v. DirecTV, Inc.*,<sup>56</sup> the parties’ contract contained a clause saying that the arbitration provision was unenforceable if “the law of your state would find this agreement to dispense with class arbitration procedures unenforceable.”<sup>57</sup> The plaintiffs, residents of California, argued that under this clause they had not agreed to arbitrate because the *Discover* rule barred class waivers at the time they enrolled in the defendant’s services.<sup>58</sup> The district court disagreed, holding that *Concepcion* was retroactive.<sup>59</sup> Because the FAA had *always* preempted laws barring class waivers, the plaintiffs could not rely on the *Discover* rule to negate the arbitration clause.<sup>60</sup>

In a similar vein, arguments that the wording of the arbitration agreement does not encompass the dispute at issue are likely to fall in light of the broad federal policy in favor of arbitration.<sup>61</sup> In this circumstance, the parties

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55. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011) (quoting *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010)).

56. 724 F.3d 1218 (9th Cir. 2013).

57. See *id.* at 1224.

58. See *id.* at 1225.

59. *Id.* at 1225–26.

60. See *id.* at 1226. *Murphy* is subject to criticism because it fails to acknowledge that the *Discover* rule and other similar rules have force where the FAA does not apply. For instance, if the contract does not evidence interstate commerce, the *Discover* rule continues to have meaning because the FAA does not govern such contracts. If the *Discover* rule is not entirely void, there is no reason that the parties could not have referenced it to determine whether arbitration would be required. However, *Murphy* proceeds as if the *Discover* rule no longer has any conceivable application after *Concepcion*. The U.S. Supreme Court has recently agreed to review a California state-court case that conflicts with *Murphy*. See *DirecTV, Inc. v. Imburgia*, 225 Cal. App. 4th 338 (2014), *cert. granted*, 83 U.S.L.W. 3742 (U.S. Mar. 23, 2015) (No. 14-462).

61. See *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) (“Section 2 is a congressional declaration of a liberal federal policy favoring arbitra-

do not contest that they reached some agreement to arbitrate; rather, they dispute that the agreement requires them to arbitrate the subject matter of their lawsuit.<sup>62</sup> An exemplary recent case is *Sanchez v. Nitro-Lift Technologies, LLC*,<sup>63</sup> in which the plaintiffs sought to litigate a Fair Labor Standards Act claim for failure to pay overtime wages.<sup>64</sup> The defendant sought to enforce an arbitration agreement that appeared in the plaintiffs' noncompete agreement.<sup>65</sup> The court reasoned that the first step was to determine whether the arbitration clause was broad or narrow.<sup>66</sup> Because the clause stated that the parties agreed to arbitrate "[a]ny dispute, difference or unresolved question," the court found the clause to be broad and applied the rule that "[w]here the arbitration clause is broad, there arises a presumption of arbitrability."<sup>67</sup> The court rejected the argument that the clause should be limited because it appeared in the specific context of a noncompete agreement and did not concern issues such as overtime pay.<sup>68</sup> Perhaps the narrowness of the contract created some ambiguity about whether the parties intended to arbitrate unrelated disputes.<sup>69</sup> But that ambiguity did not matter, because "all ambiguities must be resolved *in favor* of arbitrability."<sup>70</sup> In short, under the reasoning of *Sanchez*, the so-called "rebuttable" presumption of arbitrability appears to be ironclad if the court designates an arbitration clause as "broad."

In contrast to linguistic challenges to the arbitration clause's construction, a court might be more likely to preclude arbitration where the power dynamics between the parties and the nature of their interaction suggest that one party did not genuinely agree to arbitrate. For instance, in *Nguyen v. Barnes & Noble Inc.*,<sup>71</sup> the defendant sought to enforce an arbitration provi-

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tion agreements, notwithstanding any state substantive or procedural policies to the contrary.").

62. The distinction between initial formation of an arbitration agreement and the scope of an agreement is an important one, for the federal policy in favor of arbitration does not apply to formation questions. See *Drusco Rests., Inc. v. Steak N Shake Enters., Inc.*, 765 F.3d 776, 781 (7th Cir. 2014) ("[T]he FAA's policy in favor of arbitration applies when determining the *scope* of an agreement to arbitrate, but not when deciding whether there is an agreement to arbitrate in the first instance.").

63. 762 F.3d 1139 (10th Cir. 2014).

64. *Id.* at 1141.

65. *See id.* at 1143.

66. *See id.* at 1146 (quoting *Cummings v. FedEx Ground Package Sys., Inc.*, 404 F.3d 1258, 1261 (10th Cir. 2005)).

67. *See id.* at 1146–47 (first alteration in original) (emphasis omitted) (quoting *Cummings*, 404 F.3d at 1261).

68. *See id.* at 1145–47.

69. *See Sanchez*, 762 F.3d at 1147.

70. *See id.* at 1147 (quoting *Armijo v. Prudential Ins. Co. of Am.*, 72 F.3d 793, 798 (10th Cir. 1995)).

71. 763 F.3d 1171 (9th Cir. 2014).

sion that appeared in a “browsewrap” agreement.<sup>72</sup> In a browsewrap agreement, a corporation links to its terms and conditions at the bottom of a screen rather than requiring the consumer to (purportedly) read and click agreement.<sup>73</sup> The court held that the plaintiff had not agreed to arbitrate because the link was not sufficiently conspicuous and there was no other evidence that the plaintiff had seen the terms and conditions.<sup>74</sup> However, *Nguyen* does not reach to a situation where a corporation buries an arbitration agreement in fine print, so long as it actually gives the consumer the fine print.<sup>75</sup> It merely prohibits the corporation from enforcing an arbitration clause that a consumer had to “ferret out” from the corporation’s website.<sup>76</sup>

## 2. State-Law Defenses

Besides formation arguments, consumers may also continue to assert state-law defenses against arbitration agreements—including an unconscionability defense—when the situation warrants. Here the court must be careful not to run afoul of *Concepcion*’s command that state defenses cannot be used in a manner that disfavors arbitration.<sup>77</sup> The Ninth Circuit grappled with this problem in *Chavarria v. Ralphs Grocery Co.*<sup>78</sup> There, the defendant imposed an arbitration policy that was a condition of employment, that did not guarantee a neutral arbitrator, and that required the plaintiff to pay significant arbitration fees.<sup>79</sup> The court held the arbitration provision to be unconscionable and then determined that the FAA did not preempt it.<sup>80</sup> The court reasoned that *Concepcion* states a nondiscrimination rule: arbitration agreements must be treated the same as other contractual provisions.<sup>81</sup> However, the fact that a defense merely implicates an arbitration provision does not mean that it treats the arbitration provision differently from other contracts: “Of course, any state law that invalidated this provision would have a disproportionate impact on arbitration because the term is arbitration specif-

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72. *See id.* at 1174, 1176.

73. *See id.* at 1175–76 (citing *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004)).

74. *See id.* at 1175–79. Stated verbatim, the court’s holding was “that where a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on—without more—is insufficient to give rise to constructive notice.” *Id.* at 1179.

75. *See id.*

76. *See id.*

77. *See supra* Part II.A.

78. 733 F.3d 916 (9th Cir. 2013).

79. *See id.* at 922–23.

80. *See id.* at 926–27.

81. *See id.* at 927.

ic. But viewed another way, invalidation of this term is agnostic towards arbitration. It does not disfavor arbitration; it provides that the arbitration process must be fair.”<sup>82</sup>

Similarly, in *Jackson v. Payday Financial, LLC*,<sup>83</sup> the Seventh Circuit held an arbitration provision unconscionable because it required the plaintiff to arbitrate on tribal lands that did not, in actual fact, have procedures for arbitration.<sup>84</sup> The defendant argued that the unconscionability defense was arbitration-specific or else had a disproportionate impact on arbitration agreements.<sup>85</sup> The court rejected this argument, stating that “[i]t hardly frustrates FAA provisions to void an arbitration clause on the ground that it contemplates a proceeding for which the entity responsible for conducting the proceeding has no rules, guidelines, or guarantees of fairness.”<sup>86</sup>

### 3. *Reaction of Other State Courts*

While there are ways for consumers to avoid arbitration in federal court, they appear to be limited to truly egregious conduct by the party seeking arbitration (such as penning a sham arbitration clause) or to situations where the consumer could not possibly have seen the arbitration language. As a result, state courts have created their own avenues for avoiding FAA preemption and “are eager to protect their traditional role as the final arbiter of contracts.”<sup>87</sup> As a recent article in the *Yale Law Journal* attests, state courts have employed various strategies to escape *Concepcion*’s apparent command that arbitration clauses trump rules of state law.<sup>88</sup> In California, courts have tended to limit *Concepcion* by holding that the FAA only preempts a state law that undermines the “fundamental attributes of arbitration.”<sup>89</sup> Thus, if an arbitration clause allows only one party to recover attorney’s fees, then the clause might be declared unconscionable because attorney’s fees are not a unique attribute of bilateral arbitration.<sup>90</sup> In Washington, the courts have read *Concepcion* to preempt only categorical uncon-

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82. *Id.*

83. 764 F.3d 765 (7th Cir. 2014).

84. *See id.* at 779–81.

85. *See id.* at 778–79.

86. *Id.* at 779.

87. *See* James Dawson, Comment, *Contract After Concepcion: Some Lessons from the State Courts*, 124 *YALE L.J.* 233, 234 (2014).

88. *See id.*

89. *See id.* at 235–37 (citing *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184 (Cal. 2013)).

90. *See id.* at 236–37 (citing *Ajamian v. CantorCO2e, L.P.*, 137 Cal. Rptr. 3d 773 (Cal. Ct. App. 2012)).

scionability rules, such as the *Discover* rule.<sup>91</sup> Under this approach, the FAA prohibits unconscionability analysis only if it fails to account for the specific provisions of a given arbitration clause.<sup>92</sup> In Missouri, the courts have used the language of procedural unconscionability to strike down clauses where there was a marked imbalance of bargaining power between the parties.<sup>93</sup>

These cases are all based on the continued application of the unconscionability defense after *Concepcion*. Arkansas has not been a leader on this front. The Yale piece suggests that Arkansas has merely “applied *Concepcion*, but ha[s] done so while casting doubts on its wisdom.”<sup>94</sup> But in actual fact, Arkansas courts may have gone further than the courts of any other state in counteracting the effects of *Concepcion* on consumer arbitration clauses. They have done so not through unconscionability analysis, however, but through another means: strict scrutiny of contract formation. The Arkansas courts’ development of formation doctrine—which rapidly gained speed in 2014—is the subject of Part III.

### III. THE ARKANSAS APPROACH

The Arkansas Supreme Court has long employed a unique approach to contract formation in the context of arbitration.<sup>95</sup> Specifically, the court has employed the “mutual obligation” doctrine to ensure that the parties are placed on equal footing in their ability to arbitrate (or litigate) a claim.<sup>96</sup> Because this doctrine goes to formation, it presumably falls outside the scope of the FAA and *Concepcion*—if the parties never formed an agree-

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91. *See id.* at 237 (citing *Gandee v. LDL Freedom Enters., Inc.*, 293 P.3d 1197 (Wash. 2013)).

92. *See id.* For example, in *Concepcion*, the arbitration clause had a number of provisions favorable to the consumer, but the *Discover* rule nonetheless required the corporation to face claims in court. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744–45 (2011). Under the Washington approach, an arbitration clause might still be unconscionable if it forced the consumer to arbitrate in an inconvenient location or to face a biased arbitrator.

93. *See Dawson, supra* note 87, at 238 (citing *Brewer v. Mo. Title Loans*, 364 S.W.3d 486 (Mo. 2012) (en banc)). Dawson also notes that some courts might even maintain their authority under *Concepcion* by defining “arbitration” narrowly. *See id.* at 239–40. Thus, if an arbitration clause did not permit a neutral umpire, for example, the procedure would not be “arbitration” and thus would not be preempted by the FAA. *See id.* However, Dawson finds no court that has actually taken this approach and cites only a pre-*Concepcion* case that defined “arbitration” narrowly. *See id.* (citing *Cheng-Canindin v. Renaissance Hotel Assocs.*, 57 Cal. Rptr. 2d 867, 875 (Cal. Ct. App. 1996)).

94. *See id.* at 235 & n.13 (citing *LegalZoom.com, Inc. v. McIllwain*, 2013 Ark. 370, at 7–9, 429 S.W.3d 261, 265).

95. For a comprehensive analysis of the Arkansas Supreme Court’s pre-2014 approach to arbitration cases, see Church, *supra* note 52.

96. *See, e.g., Asbury Auto. Used Car Ctr., L.L.C. v. Brosh*, 364 Ark. 386, 390–93, 220 S.W.3d 637, 640–42 (2005).

ment to arbitrate, then the FAA has no role. A full decade of Arkansas jurisprudence supports this approach, but 2014 was a high-water mark. As the law now stands, the mutual-obligation doctrine has received the full blessing of the Arkansas Supreme Court in a broad array of contexts. Not only that, but the court has also expanded its approach to strictly scrutinize mutuality of agreement, thus suggesting another way in which consumers might contest forced arbitration clauses.

#### A. *Pre-Concepcion*

Arkansas doctrine on mutual obligation was a product of the payday lending industry. In the first case to establish that an arbitration clause must be supported by mutual obligation, the plaintiffs sued a payday lender for violating Arkansas usury law.<sup>97</sup> The defendant sought to compel arbitration on the basis of a clause that required the parties to submit to arbitration any claim “except, only, insofar as actions of [the defendant], to collect amounts due it.”<sup>98</sup> The court first reviewed general Arkansas contract law. As the court explained, the formation of arbitration agreements is assessed by the same standards as contracts generally, which require (1) competent parties, (2) subject matter, (3) legal consideration, (4) mutual agreement, and (5) mutual obligations.<sup>99</sup> Mutual obligation, the court further explained, means “that the terms of the agreement must fix a real liability upon both parties.”<sup>100</sup> The arbitration clause at issue failed to do that, because it permitted the payday lender, and only the payday lender, to litigate a specific set of claims.<sup>101</sup> Therefore, it was void for lack of mutual obligation.<sup>102</sup>

The mutual obligation rule was applied against payday lenders so many times that some argued it was specifically a payday lending rule.<sup>103</sup> However, the court made clear that it is applicable to arbitration clauses of all

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97. See *Showmethemoney Check Cashers, Inc. v. Williams*, 342 Ark. 112, 114, 121, 27 S.W.3d 361, 362, 366–67 (2000). The author of *Showmethemoney* is Lavenski Smith, currently a judge on the United States Court of Appeals for the Eighth Circuit. See *id.* at 114, 27 S.W.3d at 362; *Active and Senior Judges*, U.S. CT. APPEALS FOR EIGHTH CIRCUIT, <http://www.ca8.uscourts.gov/active-and-senior-judges> (last visited Mar. 23, 2015).

98. *Showmethemoney*, 342 Ark. at 117, 27 S.W.3d at 364.

99. *Id.* at 119–20, 27 S.W.3d at 366 (citing *Found. Telecomms. v. Moe Studio*, 341 Ark. 231, 16 S.W.3d 531 (2000); *Hunt v. McIlroy Bank & Trust*, 2 Ark. App. 87, 616 S.W.2d 759 (1981)).

100. *Id.* at 121, 27 S.W.3d at 366 (citing *Townsend v. Standard Indus., Inc.*, 235 Ark. 951, 954–55, 363 S.W.2d 535, 537 (1962)).

101. See *id.*, 27 S.W.3d at 366–67.

102. See *id.*, 27 S.W.3d at 367.

103. See, e.g., *Money Place, LLC v. Barnes*, 349 Ark. 411, 78 S.W.3d 714 (2002); *Cash in a Flash Check Advance of Ark., L.L.C. v. Spencer*, 348 Ark. 459, 74 S.W.3d 600 (2002); *E-Z Cash Advance, Inc. v. Harris*, 347 Ark. 132, 60 S.W.3d 436 (2001).



stripes in *Tyson Foods, Inc. v. Archer*.<sup>104</sup> That case involved a contract dispute between a large pork processor and one of its producers.<sup>105</sup> The contract contained an arbitration clause, but in a separate clause the contract also permitted Tyson to “pursue any other remedies at law or equity” upon the producer’s default.<sup>106</sup> The court held that the arbitration provision lacked mutuality and restated its mutual obligation rule in the arbitration context: “[T]here is no mutuality where one party uses an arbitration agreement to shield itself from litigation, while at the same time reserving its own ability to pursue relief through the court system.”<sup>107</sup>

One additional notable development occurred in *Alltel Corp. v. Sumner*,<sup>108</sup> this one involving the requirement of mutual agreement. The defendant telephone company in that case sought to compel arbitration of a claim brought by its customers, asserting that the plaintiffs were subject to terms of service containing an arbitration clause.<sup>109</sup> In support of this assertion, the phone company produced an affidavit from one of its executives saying that the plaintiffs would have received the terms of service in the regular course of business.<sup>110</sup> The court addressed the requirement of mutual agreement, holding that it required “notice as to the terms and subsequent assent.”<sup>111</sup> The court then found that the phone company—the party seeking to compel arbitration—had failed to make this showing through the affidavit alone.<sup>112</sup> Mutual agreement was lacking because there was “insufficient proof that [the plaintiffs] were given a contract which provided for the requirement of arbitration.”<sup>113</sup>

*Tyson* and *Sumner* thus culminated an active period in the development of arbitration law in Arkansas. These cases established two basic rules. First, to show mutual agreement, the party seeking arbitration must produce some evidence to show that the other party knew of and assented to the arbitration agreement.<sup>114</sup> Second, the arbitration clause must treat the parties the same—if it allows one party to litigate a class of claims, then it is void for

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104. 356 Ark. 136, 144–46, 147 S.W.3d 681, 686–87 (2004).

105. *See id.* at 139, 147 S.W.3d at 682–83.

106. *See id.* at 142–43, 147 S.W.3d at 685.

107. *See id.* at 146, 147 S.W.3d at 687 (citing *E-Z Cash Advance*, 347 Ark. 132, 60 S.W.3d 436; *Showmethemoney*, 342 Ark. 112, 27 S.W.3d 361). The court did not comment on the fact that the provision of the contract that destroyed mutual obligation occurred outside the arbitration clause itself. *See id.* at 140–46, 147 S.W.3d at 683–88. However, this issue would flare up later, as discussed in Part III.B.3 *infra*.

108. 360 Ark. 573, 203 S.W.3d 77 (2005).

109. *See id.* at 574–75, 203 S.W.3d at 78–79.

110. *See id.* at 575, 203 S.W.3d at 79.

111. *See id.* at 576, 203 S.W.3d at 80.

112. *See id.* at 578, 203 S.W.3d at 81.

113. *See id.* at 576–79, 203 S.W.3d at 80–81.

114. *See Sumner*, 360 Ark. at 576–78, 203 S.W.3d at 80–81.

lack of mutual obligation.<sup>115</sup> Though the court engaged in what might be seen as a modest expansion of this doctrine in 2012—finding a lack of mutual obligation where one party was not permitted to seek a damages remedy<sup>116</sup>—the contours of Arkansas arbitration law remained fairly well settled until 2014.<sup>117</sup>

## B. Major Developments in 2014

Arbitration cases appeared frequently on the Arkansas Supreme Court's docket in 2014, and almost every case either provided a major clarification of arbitration law or established a new rule altogether. Moreover, most of these cases were pro-consumer. This Section examines three specific areas in which the court issued significant precedent: arbitration procedure, mutual agreement, and—most significantly—mutual obligation.

### 1. Arbitration Procedure

A motion to compel arbitration presents two distinct questions. First, did the parties have an agreement to arbitrate in the first place? Second, and assuming that the answer to the first question is yes, does the party seeking

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115. See *Tyson Foods, Inc. v. Archer*, 356 Ark. 136, 145–46, 147 S.W.3d 681, 687 (2004). The court has not addressed the other three requirements for a valid contract—competent parties, consideration, and “subject matter”—in the context of arbitration. The requirements of competent parties and consideration appear to be self-apparent. The requirement of subject matter appears to be meaningless. It is difficult to envision a contract that would be negated for lack of subject matter, and the court has never explained how that might happen.

116. See *Independence Cnty. v. City of Clarksville*, 2012 Ark. 17, at 7–8, 386 S.W.3d 395, 400. Previous cases had found that arbitration clauses lacked mutual obligation because one party did not have to arbitrate claims at all. See, e.g., *Tyson Foods*, 356 Ark. 136, 147 S.W.3d 681; *Showmethemoney Check Cashers, Inc. v. Williams*, 342 Ark. 112, 27 S.W.3d 361 (2000). *Independence County* can be seen as an expansion because, even though each party had to arbitrate claims, the arbitration clause provided unequal remedies in arbitration. See *Independence Cnty.*, 2012 Ark. 17, at 7–8, 386 S.W.3d at 400.

117. Notably, the disparity in *Independence County* favored the party opposing arbitration. The appellant in the case was a county that promised to provide electrical power; the appellee was a city that promised to purchase it. See *Independence Cnty.*, 2012 Ark. 17, at 1, 386 S.W.3d at 396. The arbitration clause prevented the arbitrator from awarding the county damages from the city for failure to purchase the power. See *id.* at 7–8, 386 S.W.3d at 400. The county sought to arbitrate despite this disadvantage, but the court invoked the mutual-obligation rule against it. See *id.* at 3, 7–8, 386 S.W.3d at 398, 400. The broader point—perhaps a subtle one but important all the same—is that a party disadvantaged by a lack of mutual obligation cannot waive the mutual-obligation issue. The clause must be mutual regardless of which party seeks to enforce it. The court drove this point home more forcefully in a mutual-agreement case, *Pine Hills Health & Rehabilitation, LLC v. Matthews*, 2014 Ark. 109, 431 S.W.3d 910, discussed *infra* Part III.B.2.

to avoid arbitration have a state contract-law defense available? A question of procedure then arises: Does a circuit court judge faced with a motion to compel arbitration have discretion to decide these questions in any order she prefers?

In *Bank of the Ozarks, Inc. v. Walker*,<sup>118</sup> the court appeared to answer this question with an emphatic “no.” Before the circuit court in that case, the defendant moved to compel arbitration, and the plaintiffs argued both that there was no agreement to arbitrate and that the arbitration provision in the parties’ contract was unconscionable.<sup>119</sup> The circuit court ruled only that the arbitration agreement was unconscionable, thereby acting on the defense before determining whether an arbitration agreement existed in the first place.<sup>120</sup> The court explained that “[a] threshold inquiry is whether a valid agreement to arbitrate exists.”<sup>121</sup> It therefore reversed and remanded for the circuit court to conduct this inquiry.<sup>122</sup>

With *Walker*, the court appeared to provide lower courts with a clear rule: always address the existence of an arbitration agreement first. However, the court added a caveat just over a month later in *Asset Acceptance, LLC v. Newby*.<sup>123</sup> In that case, when faced with a motion to compel arbitration, the circuit court issued a statement from the bench indicating that, even if the parties had agreed to arbitrate, the plaintiff waived its right to arbitration by invoking the court’s jurisdiction.<sup>124</sup> In other words, the circuit court assumed without deciding that the parties had agreed to arbitrate. The circuit court then entered an order saying merely that the plaintiff’s “Motion to Compel Arbitration and Stay Plaintiff’s Complaint is denied.”<sup>125</sup> As in *Walker*, the circuit court expressed no view of whether there was an agreement to arbitrate in the first instance.<sup>126</sup> However, the result was different this time. Notwithstanding the circuit court’s statement from the bench, the supreme court relied on its written order, which “simply state[d] that the motion is denied without specifying the basis for its decision.”<sup>127</sup> The supreme court then applied the following rule: “[W]hen a circuit court denies a motion without expressly stating the basis for its ruling, that ruling encompasses the issues presented to the circuit court by the briefs and arguments

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118. 2014 Ark. 223, 434 S.W.3d 357. Full disclosure: The author was counsel for the plaintiff on appeal in *Walker*.

119. *Id.* at 2–3, 434 S.W.3d at 359.

120. *See id.* at 5, 434 S.W.3d at 360.

121. *Id.* at 4, 434 S.W.3d at 360.

122. *Id.* at 7, 434 S.W.3d at 361.

123. 2014 Ark. 280, 437 S.W.3d 119.

124. *See id.* at 3–4, 437 S.W.3d at 121.

125. *See id.* at 4, 437 S.W.3d at 121.

126. *See id.*

127. *See id.* at 6, 437 S.W.3d at 122–23.

of the parties.”<sup>128</sup> The supreme court thus proceeded to the merits without remanding the case.<sup>129</sup>

*Walker* and *Newby* establish a clear set of rules for obtaining arbitration orders from circuit courts and preserving issues for appeal. First, the written order—and not a statement from the bench—controls.<sup>130</sup> Second, the circuit court must address formation issues first.<sup>131</sup> However, the circuit court has some flexibility in the way it writes its orders. It need not issue detailed reasons for its decision; instead, it need only issue a blanket denial of a motion to compel.<sup>132</sup> If the party opposing arbitration has argued both formation and defenses, then the order encompasses both and both are preserved for appeal.<sup>133</sup>

These rules might be attacked as inconsistent with a coherent procedural system. Indeed, some of the court’s own members have said as much in concurring opinions.<sup>134</sup> Ultimately, however, the court’s procedural decisions during the 2014 term have a notable substantive effect. By requiring a

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128. *Id.*, 437 S.W.3d at 123 (citing ARK. R. CIV. P. 52(a); *Hardin v. Bishop*, 2013 Ark. 395, 430 S.W.3d 49).

129. *See id.* at 7, 437 S.W.3d at 123.

130. *See Newby*, 2014 Ark. 280, at 6, 437 S.W.3d at 123 (citing *Nat’l Home Ctrs., Inc. v. Coleman*, 370 Ark. 119, 257 S.W.3d 862 (2007)).

131. *See Bank of the Ozarks, Inc. v. Walker*, 2014 Ark. 223, at 4, 434 S.W.3d 357, 360.

132. *See Newby*, 2014 Ark. 280, at 6–7, 437 S.W.3d at 123.

133. *See id.* at 6–7, 437 S.W.3d at 123. This approach entails additional pitfalls for litigants, as illustrated by *Evangelical Lutheran Good Samaritan Society v. Kolesar*, 2014 Ark. 279, 2014 WL 2814816. There, the circuit court issued a blanket order denying the defendant’s motion to compel arbitration. *See id.* at 4–5, 2014 WL 2814816, at \*4–5. On appeal, the defendant addressed only a few of the arguments that the plaintiff had made in the circuit court (and thus that, per the *Newby* rule, the circuit court had ruled on). *See id.* at 6, 2014 WL 2814816, at \*6. The supreme court held that the circuit court’s decision must be affirmed because the appellant failed to address all of the plaintiff’s arguments in the circuit court: “[W]hen a circuit court bases its decision on more than one independent ground, as the circuit court did here when it denied the motion to compel arbitration in its entirety, and the appellant challenges fewer than all those grounds on appeal, we will affirm without addressing any of the grounds.” *Id.* at 6, 2014 WL 2814816, at \*6. Theoretically the rule makes sense: if a lower court rules against the appellant on a number of independent grounds, then the appellant must convince the appellate court to reverse each ground in order to change the outcome. It is not realistic, however, to say that a circuit court that issues a blanket order denying arbitration has agreed with every argument made by the party seeking to avoid arbitration. *Newby* thus creates a major inefficiency in appellate procedure by requiring an appellant to address every argument made in the circuit court, no matter how outlandish that argument might be. A better path is to require the circuit court to state the specific grounds for its rulings and to assume that it hasn’t considered any additional grounds argued.

134. *See, e.g., GGNHC Holdings, LLC v. Chappel*, 2014 Ark. 545, at 8, 453 S.W.3d 645, 650. (Goodson, J., concurring) (“*Bank of the Ozarks* represents a clear departure from our traditional appellate rules governing contract cases, where we have never required a circuit court to rule on the existence of a contract before addressing any equitable defenses raised by the parties.”).

circuit court to address formation, whether directly or in a blanket order, formation is always at issue in an appeal. And because, unlike defense-based rules, formation-based rules are not susceptible to FAA preemption under *Concepcion*, the Arkansas Supreme Court has much more breathing space to consider the validity of arbitration clauses. The court has taken full advantage of that breathing space, as is apparent in its recent cases on mutual agreement and mutual obligation.

## 2. *Mutual Agreement*

*Alltel Corp. v. Sumner* has been the most important precedent on mutual agreement since it was issued in 2005. As explained above, that case essentially establishes an evidentiary rule: the party seeking arbitration must submit proof to show the other party's notice of and assent to the arbitration provision.<sup>135</sup> The court did not change the basic framework of that approach in 2014. However, in two separate cases, it stiffened its position on the evidence that a party must bring to show mutual agreement.

The first case was *Asset Acceptance, LLC v. Newby*.<sup>136</sup> After issuing the procedural ruling discussed in Part III.B.1, the court turned to the question of whether there was mutual agreement to arbitrate.<sup>137</sup> The purported arbitration provision appeared in a credit card agreement that the plaintiff, a debt collector, claimed to have acquired.<sup>138</sup> After the defendant countersued, the plaintiff sought to compel arbitration and attached a copy of the credit card agreement. However, the agreement was unsigned, and the plaintiff offered no additional evidence connecting the defendant to the agreement.<sup>139</sup> The plaintiff instead argued that the defendant's use of the credit card constituted acceptance of the arbitration terms.<sup>140</sup> However, the defendant denied she had ever used the card, and the circuit court made no factual finding that she did.<sup>141</sup> Thus, the court refused to compel arbitration and held that the plaintiff failed to show that the defendant had agreed to arbitrate.<sup>142</sup>

While *Newby* might be viewed as a straightforward application of *Sumner*, the court's decision in *Pine Hills Health & Rehabilitation, LLC v. Matthews*<sup>143</sup> was not so modest. In that case, the defendant sought to compel arbitration on the basis of an arbitration agreement that the plaintiff's repre-

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135. See *Alltel Corp. v. Sumner*, 360 Ark. 573, 576–79, 203 S.W.3d 77, 80–81 (2005).

136. 2014 Ark. 280, 437 S.W.3d 119.

137. See *id.* at 7, 437 S.W.3d at 123.

138. See *id.* at 2–3, 437 S.W.3d at 120–21.

139. See *id.* at 9, 437 S.W.3d at 124.

140. See *id.* at 2, 9, 437 S.W.3d at 120, 124.

141. *Id.* at 9, 437 S.W.3d at 124.

142. *Newby*, 2014 Ark. 280, at 11, 437 S.W.3d at 125.

143. 2014 Ark. 109, 431 S.W.3d 910.

sentative had signed.<sup>144</sup> The agreement was a three-page document, but the defendant submitted only the first two pages.<sup>145</sup> The third page contained a signature line for the defendant.<sup>146</sup> The court held that the lack of the defendant's signature, coupled with the lack of any other evidence regarding conduct that would evidence the defendant's assent, meant that mutual agreement was lacking.<sup>147</sup>

The result in *Matthews* is striking—the defendant had required the plaintiff to sign the arbitration clause, so clearly it believed arbitration was appropriate. While it is well established that a party may assent to a contract through actions as well as through documents, typically the issue is whether the person seeking to *avoid* an agreement has acted in a manner consistent with the agreement.<sup>148</sup> Whatever the merits of its logic, though, *Matthews* puts defendants on notice of their strict responsibility to produce evidence showing that both parties agreed to arbitrate a dispute.

### 3. *Mutual Obligation*

Though the court's mutual-agreement decisions favored consumers, those decisions could arguably be confined to their facts and therefore be of limited precedential importance. In two cases involving mutual obligation, however, the court made significant structural changes that are likely to have a deep impact on the enforceability of consumer arbitration clauses in Arkansas.

The first case, *Regional Care of Jacksonville, LLC v. Henry*,<sup>149</sup> involved a dispute between a nursing home and a patient. The plaintiff's admission agreement contained an arbitration clause that, in form at least, imposed mutual obligations on the parties: it provided "that any dispute between the Parties, other than a dispute over billing or collecting for services," would be arbitrated.<sup>150</sup> Thus the parties each agreed to arbitrate disputes, except the parties agreed *not* to arbitrate billing disputes.<sup>151</sup> However, the court cut through this formal mutuality and held that, as a realistic matter, only the defendant nursing home, and not the individual patient, was

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144. *See id.* at 2, 431 S.W.3d at 912.

145. *See id.* at 4, 431 S.W.3d at 913.

146. *Id.*, 431 S.W.3d at 913.

147. *See id.* at 7–8, 431 S.W.3d at 915–16.

148. For example, in *DirecTV, Inc. v. Murray*, the court explained "that a party, by knowingly accepting the benefits of a proposed contract, is bound by its terms." 2012 Ark. 366, at 8, 423 S.W.3d 555, 561–62. However, the court found that the plaintiff in that case had not agreed to arbitrate when she cancelled a twelve-month contract nine or ten days after initially signing it. *See id.* at 9, 423 S.W.3d at 562.

149. 2014 Ark. 361, 444 S.W.3d 356.

150. *See id.* at 3, 444 S.W.3d at 358.

151. *See id.*, 444 S.W.3d at 358.

likely to have a billing dispute that it would bring to court.<sup>152</sup> “By reserving the right to litigate billing or collection disputes,” the court explained, “[the defendant] excluded from arbitration the only likely claim it might have against a resident.”<sup>153</sup> Because the *practical effect* of the arbitration provision was to permit only the nursing home to access a court, mutual obligation was lacking and there was no agreement to arbitrate.<sup>154</sup>

The approach in *Henry* was not an entirely new one. *Henry* extensively discusses *E-Z Cash Advance, Inc. v. Harris*,<sup>155</sup> a payday-lender case holding that an arbitration clause allowing each party to access small claims court lacked mutuality because the payday lender was likely to use no other venue and thus could never be forced to arbitrate.<sup>156</sup> However, *Henry* is important for its firm rejection of a formal mutuality rule. It is not enough that the parties are theoretically put on the same footing. Rather, the court will take a close look at the realities of the situation to determine whether, in practice, only one party has court access or whether the parties are otherwise given unequal rights in regard to arbitration.

The court drove this point home in *Alltel Corp. v. Rosenow*,<sup>157</sup> the most sweeping arbitration decision of the 2014 term. In that case, the parties’ contract contained an arbitration clause that seemed to be a model of mutuality, apparently requiring both parties to arbitrate any and all disputes.<sup>158</sup> However, the court focused on a term that appeared prior to the arbitration clause: “If we do not enforce any right or remedy available under this Agreement, that failure is not a waiver.”<sup>159</sup> The court interpreted this clause as “an ‘out’ to the required arbitration.”<sup>160</sup> Because “Alltel, and only Alltel, was permitted to reject [arbitration] without consequence,” mutual obligation was lacking and there was no agreement to arbitrate.<sup>161</sup>

Though *Rosenow* is couched in the language of previous mutual-obligation cases—that one party cannot reserve litigation to itself while denying it to another party—it appears to be much broader. In fact, the mutuality-destroying clause that the court cites says nothing about whether Alltel can reject arbitration. Quite the reverse is true: it permits Alltel to access arbitration when the other party lacks that access. The clause indeed treats the parties differently, though not for the reasons the court seems to

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152. *See id.* at 8, 444 S.W.3d at 361.

153. *Id.*, 444 S.W.3d at 361.

154. *See id.*, 444 S.W.3d at 361.

155. *See Henry*, 2014 Ark. 361, at 7–8, 444 S.W.3d at 360–61.

156. *See E-Z Cash Advance, Inc. v. Harris*, 347 Ark. 132, 141, 60 S.W.3d 436, 442 (2001).

157. 2014 Ark. 375, 2014 WL 4656609.

158. *See id.* at 7, 2014 WL 4656609, at \*4.

159. *See id.* at 7–8, 2014 WL 4656609, at \*4.

160. *See id.* at 8, 2014 WL 4656609, at \*4.

161. *See id.* at 8–9, 2014 WL 4656609, at \*4.

think. Typically if a party litigates a case long enough, it cannot later change course and attempt to compel arbitration.<sup>162</sup> The doctrine of waiver may preclude a party from arbitrating if it “[s]ubstantially invoke[s] the litigation machinery before asserting its arbitration right.”<sup>163</sup> The cited clause excepts Alltel—but not its customers—from this waiver rule.<sup>164</sup> The court’s characterization of the contract in *Rosenow* may be askew, but the principle remains: an arbitration provision may not treat parties differently, whether the difference occurs in their ability to access courts or in some other fashion. And by taking the mutual obligation doctrine beyond the context of previous cases, the court signaled a heightened requirement for finding mutual obligation.

*Rosenow* is notable for two additional reasons. First, it clarified a point that was already implicit in the court’s previous arbitration rulings: that a court may look outside the arbitration clause itself to interpret the clause’s meaning.<sup>165</sup> Second, and perhaps more importantly, the court rejected the argument that Arkansas’s mutual-obligation doctrine runs afoul of the FAA by placing arbitration agreements on different footing from contracts in general.<sup>166</sup> Because mutual obligation is a requirement for the formation of all contracts, and not for the formation of arbitration agreements alone, *Concepcion* did not apply and the FAA did not preempt Arkansas’s mutuality doctrine.<sup>167</sup>

With *Rosenow*, the court has created a robust doctrine that requires arbitration clauses to contain equality in every aspect. Now it is not difficult to imagine an arbitration clause failing the test because only one side gets to

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162. See *Lewallen v. Green Tree Servicing, L.L.C.*, 487 F.3d 1085, 1090 (8th Cir. 2007).

163. See *id.* (alterations in original) (quoting *Ritzel Commc’ns v. Mid-Am. Cellular Tel. Co.*, 989 F.2d 966, 969 (8th Cir. 1993)).

164. See *Rosenow*, 2014 Ark. 375, at 8, 2014 WL 4656609, at \*4. That much is plain from the wording of the clause: “If we do not enforce any right or remedy available under this Agreement, that failure is not a waiver.” *Id.*, 2014 WL 4656609, at \*4. This sentence permits only “we”—i.e., the drafter—to protect itself from the waiver doctrine. Thus, if Alltel has litigated a matter against a customer for a period of time but then decided it would rather arbitrate, the contract gives it that right. However, the waiver doctrine would operate against a consumer in the same situation.

165. See *id.* at 7 n.4, 2014 WL 4656609, at \*4 n.4 (citing *Advance Am. Servicing of Ark., Inc. v. McGinnis*, 375 Ark. 24, 289 S.W.3d 37 (2008)) (“This court has previously rejected an appellant’s assertion that it was error for the circuit court to consider another provision in the contract, that was outside and independent of the arbitration provision, when evaluating the validity of the arbitration provision and determining that it lacked mutuality.”).

166. See *id.* at 9–11, 2014 WL 4656609, at \*5–6.

167. See *id.* at 10–11, 2014 WL 4656609, at \*5–6. Notably, while there was a dissenting opinion in *Rosenow* that split the court four to three, the split had nothing to do with the merits of the court’s analysis. See *id.* at 11–17, 2014 WL 4656609, at \*6–9 (Goodson, J., dissenting). Rather, it had only to do with whether all necessary issues had been decided in the circuit court and whether certain issues had been preserved for appeal. See *id.*, 2014 WL 4656609, at \*6–9.



pick the arbitrator, or because fees are unevenly distributed, or for any number of other reasons. Moreover, because mutuality is a formation issue, it is apparently outside the scope of *Concepcion* and the FAA. Still, questions remain. Could Arkansas's new, more expansive approach survive a federal challenge? And, notwithstanding future legal developments, is Arkansas's new approach good policy? Those questions are the subject of Part IV.

#### IV. ASSESSING THE BENEFITS AND DETRIMENTS OF THE ARKANSAS APPROACH

##### A. Viability of Arkansas's Doctrine

The precedent discussed in Part III is the governing law in any litigation in Arkansas state court concerning arbitration. However, many cases in which arbitration issues arise appear in federal court, not state court. Under the *Erie* doctrine, the forum shouldn't matter to the outcome.<sup>168</sup> Assuming that a choice-of-law analysis dictates the application of Arkansas law in a given dispute, then Arkansas contract law—including its mutual-obligation doctrine—should apply to determine whether the parties agreed to arbitrate. However, as discussed further below, federal courts in Arkansas have been defiant of Arkansas arbitration rules and have held them preempted by the FAA. Moreover, because FAA preemption raises a federal question under the Supremacy Clause, it is possible (though perhaps unlikely) that the U.S. Supreme Court would hear a direct appeal from an Arkansas Supreme Court case applying mutual-obligation doctrine. Does Arkansas's expanded arbitration law overreach in light of *Concepcion*'s more aggressive preemption posture?

To fully assess that question, one must first address a couple of the more arcane points of arbitration law. An antecedent question presents itself in any arbitration dispute: Who decides whether a given question should be arbitrated, the court or the arbitrator? This question is shadowed by *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,<sup>169</sup> an early FAA case in which the U.S. Supreme Court held that a court may only address challenges to an arbitration provision itself, not challenges to the entire contract in which the arbitration clause appears.<sup>170</sup> While the court makes the initial

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168. See *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945) (“[I]n all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same.”).

169. 388 U.S. 395 (1967).

170. See *id.* at 403–04.

determination of whether the parties agreed to arbitrate,<sup>171</sup> it must base that determination on reasons specific to the arbitration clause and may not refuse to compel arbitration because of a flaw in the contract as a whole. Put another way, a party may not bootstrap a challenge to the contract as a whole to a challenge to an arbitration provision.<sup>172</sup> Thus, the Court has created a sort of fiction that isolates the arbitration clause from the rest of the contract when determining whether arbitration is required.<sup>173</sup>

Contrast the *Prima Paint* rule to the rule of preemption stated in *Doctor's Associates, Inc. v. Casarotto*.<sup>174</sup> There, the Court reviewed a decision of the Montana Supreme Court holding an arbitration clause unenforceable because, contrary to a state statute, notice of the clause was not “typed in underlined capital letters on the first page of the contract.”<sup>175</sup> The Montana court held that the statute was not preempted because it did not interfere with the purposes of the FAA—it merely ensured conspicuous disclosure of the arbitration clause.<sup>176</sup> The Supreme Court disagreed. The relevant question was not whether the state law interfered with arbitration, but whether the state law targeted arbitration specifically: “Courts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions.”<sup>177</sup> Because the Montana law required only arbitration clauses to be written in a certain way, it was preempted.<sup>178</sup>

At first glance, the *Prima Paint* rule might seem incompatible with *Casarotto*'s preemption rule: the first tells courts to review only the arbitration clause; the second tells courts not to accept contract defenses that are targeted only at the arbitration clause. However, the apparent contradiction

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171. There is an exception to this rule as well: the parties may agree to submit the question of arbitrability to the arbitrator rather than the court if they do so in clear terms. See *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

172. See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006) (“[U]nless the challenge is to the arbitration clause itself, the issue of the contract’s validity is considered by the arbitrator in the first instance.”).

173. As explained further below, the *Prima Paint* rule *does not* say that the arbitration clause must be interpreted without reference to any other provision of the contract. Rather, it means that a party cannot avoid arbitration by challenging the entire contract instead of the arbitration clause itself. Using other portions of the contract to shed light on the meaning of the arbitration clause does not violate *Prima Paint*. To the contrary, it is elementary that specific provisions of a contract are to be interpreted in light of the whole. See *Alexander v. McEwen*, 367 Ark. 241, 244, 239 S.W.3d 519, 522 (2006) (quoting *Coleman v. Regions Bank*, 364 Ark. 59, 65, 216 S.W.3d 569, 574 (2005)) (“It is . . . a well-settled rule in construing a contract that the intention of the parties is to be gathered, not from particular words and phrases, but from the whole context of the agreement.”).

174. 517 U.S. 681 (1996).

175. See *id.* at 683–84 (quoting MONT. CODE ANN. § 27-5-114(4) (1995)).

176. See *id.* at 684–85.

177. See *id.* at 687 (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995); *Perry v. Thomas*, 482 U.S. 483, 492 (1987)).

178. See *id.*

dissolves when it is considered that the first rule is limited to the procedural question of arbitrability while the second regards substantive state law. *Prima Paint* requires the court to address only the arbitration clause.<sup>179</sup> This rule protects the purposes of the FAA: if the arbitration clause is valid, then it would be wrong for the court to address broader contract issues because the parties have an enforceable agreement to arbitrate those questions. However, *Prima Paint* says nothing about the law that is to apply when assessing the validity of the arbitration clause.<sup>180</sup> *Casarotto* says that state contract defenses apply, but only if the defense does not take arbitration as its sole subject.<sup>181</sup> These two rules—requiring the court to focus on the arbitration clause as a matter of procedure but to strike laws that discriminate against arbitration as a matter of substance—are in reality complementary.

Nevertheless, the apparent tension in these doctrines appears to have affected the Arkansas federal courts, which have steadfastly held that the FAA preempts Arkansas mutual-obligation doctrine. The key case is *Enderlin v. XM Satellite Radio Holdings, Inc.*<sup>182</sup> In that case, the court held Arkansas's mutual-obligation rule preempted by the FAA.<sup>183</sup> The court first explained that “lack of mutual obligations is a generally applicable contract defense.”<sup>184</sup> The court rejected the plaintiff's contention that, per *Prima Paint*, the arbitration clause must be assessed for mutual obligation by itself.<sup>185</sup> Instead, it held that “Arkansas law requiring mutuality within the arbitration paragraph itself is preempted by the FAA because it places the arbitration clause on unequal footing with other contract terms that do not each have to be mutual.”<sup>186</sup> *Enderlin* has since provided the dispositive rule in Arkansas federal courts, which tend to parrot its holding without further analysis.<sup>187</sup>

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179. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967).

180. See *id.*

181. See *Casarotto*, 517 U.S. at 686–87.

182. No. 4:06-CV-0032 GTE, 2008 U.S. Dist. LEXIS 27668 (E.D. Ark. Mar. 25, 2008).

183. See *id.* at \*31.

184. *Id.* at \*24.

185. See *id.* at \*25–31.

186. *Id.* at \*31.

187. See *Clements v. DirecTV, LLC*, No. 4:13-cv-4048, 2014 U.S. Dist. LEXIS 40055, at \*11–12 (W.D. Ark. Mar. 26, 2014); *Weaver v. Edward D. Jones & Co.*, No. 4:10CV00227 BSM, 2010 U.S. Dist. LEXIS 65762, at \*4–5 (E.D. Ark. June 10, 2010). These cases also suggest that an Eighth Circuit case, *Southeastern Stud & Components, Inc. v. American Eagle Design Build Studios, LLC*, 588 F.3d 963 (8th Cir. 2009), held that the FAA preempts the Arkansas mutual-obligation rule. See *Clements*, 2014 U.S. Dist. LEXIS 40055, at \*11–12; *Weaver*, 2010 U.S. Dist. LEXIS 65762, at \*5. That suggestion is incorrect. *Southeastern Stud* held only that the defendant had waived arbitration by failing to request it in a timely fashion. See *Southeastern Stud*, 588 F.3d at 966–69. The defendant's primary argument was that *Enderlin* changed the law and that it could not have been expected to request arbitration before that case came out. See *id.* at 966–68. The Eighth Circuit disagreed and said that the

Further analysis is warranted. A closer look suggests several errors in *Enderlin*'s reasoning that make its conclusion appear untenable. First, *Enderlin* is wrong to state that lack of mutual obligation is a "defense."<sup>188</sup> It is instead an element of contract formation: no agreement exists in the first place because an essential element under Arkansas law is lacking. This distinction is crucial. If the parties never agreed to arbitrate, the FAA plays no role at all. Under the FAA's savings clause, however, defenses are subject to preemption if they are specifically targeted at arbitration.<sup>189</sup> Second, *Enderlin* provides no explanation for its contention that other contractual terms "do not each have to be mutual."<sup>190</sup> Indeed, as discussed above, the Arkansas Supreme Court has repeatedly explained that its mutuality doctrine applies to contracts generally, not just to arbitration clauses.<sup>191</sup>

*Enderlin*'s flaws aside, the Arkansas approach to mutual obligation might still be vulnerable were it to be challenged before the U.S. Supreme Court. First, the willingness of the Arkansas courts to look outside the arbitration clause to determine mutuality might be said to violate *Prima Paint*. If *Prima Paint* requires the challenge to be to the arbitration clause itself, is the court not forbidden from looking outside that clause, as it did when it looked to the waiver clause in *Rosenow*?<sup>192</sup> Even were this question significant enough to merit the attention of the U.S. Supreme Court, the objection appears to be meritless on closer examination. Looking outside the arbitration clause is perfectly permissible if done in order to give meaning to the clause. In *Rosenow*, for example, the court held that the waiver provision gave additional meaning to the arbitration clause by exhibiting that only one party could shield itself from arbitration.<sup>193</sup> It did not hold that the waiver clause itself was invalid.<sup>194</sup> Under *Prima Paint*, only the arbitrator could make that call if the parties agreed to arbitrate.<sup>195</sup> But because formation of an agreement to arbitrate is an antecedent question, and because one portion of a contract may shed light on another portion, it is permissible for a court to interpret an arbitration clause in light of other contractual provisions.

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defendant could have made a preemption argument along the lines of *Enderlin* from the outset. See *id.* at 967–68. It did not adopt *Enderlin* or otherwise make its holding precedent within the Eighth Circuit. See *id.* at 966–68.

188. See *Enderlin*, 2008 U.S. Dist. LEXIS 27668, at \*24.

189. See 9 U.S.C. § 2 (2013).

190. See *Enderlin*, 2008 U.S. Dist. LEXIS 27668, at \*31.

191. See, e.g., *Alltel Corp. v. Rosenow*, 2014 Ark. 375, at 10–11, 2014 WL 4656609, at \*5–6.

192. See *id.* at 7–9, 2014 WL 4656609, at \*4.

193. See *id.* at 7–8 & n.4, 2014 WL 4656609, at \*4 & n.4 (citing *Am. Servicing of Ark., Inc. v. McGinnis*, 375 Ark. 24, 289 S.W.3d 37 (2008)).

194. See *id.* at 7–12, 2014 WL 4656609, at \*4–6.

195. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967).

A more serious issue is whether the Arkansas approach is viable in light of *Concepcion*. No federal court in Arkansas has addressed *Concepcion*'s impact on the Arkansas mutuality rule—instead, they have rotely followed *Enderlin*, a case that predates *Concepcion*.<sup>196</sup> Say that *Enderlin* were erased and the Arkansas federal courts began on a fresh slate: would *Concepcion* nevertheless produce the same result?

The Fourth Circuit addressed that question in *Noohi v. Toll Brothers, Inc.*<sup>197</sup> The case involved Maryland's so-called *Cheek* rule—a mutual-obligation requirement strikingly similar to the one reaffirmed in *Rosenow*.<sup>198</sup> The court proceeded in three stages. First, it rejected the argument that the arbitration clause was valid if the entire contract was supported by consideration or a mutual exchange of promises.<sup>199</sup> Maryland law required an assessment of mutuality within the arbitration clause alone, and this was consistent with the rule in *Prima Paint*.<sup>200</sup> Second, the court examined the arbitration clause and held that it lacked mutuality because it “unambiguously binds only the buyer.”<sup>201</sup> Finally, it addressed *Concepcion* and found it inapplicable for three reasons.<sup>202</sup>

First, the *Cheek* rule did not undermine the fundamental attributes of arbitration.<sup>203</sup> It “neither increases formality nor risks to defendants; it merely requires that for an arbitration provision to be valid, both parties [had to] bind themselves to it.”<sup>204</sup> Thus, the *Cheek* rule did not implicate the primary concern of *Concepcion*.<sup>205</sup> Second, though the court recognized the concern that the *Cheek* rule discriminated against arbitration, it concluded that “all *Cheek* does is treat an arbitration provision like any stand-alone contract, requiring consideration.”<sup>206</sup> Finally, and more broadly, the *Cheek* rule did not disfavor arbitration; rather, “*Cheek* can just as readily be viewed as encouraging arbitration by requiring that both parties to an arbitration agreement bind themselves to arbitrate at least some categories of claims.”<sup>207</sup>

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196. See, e.g., *Clements v. DirecTV, LLC*, No. 4:13-cv-4048, 2014 U.S. Dist. LEXIS 40055, at \*11–12 (W.D. Ark. Mar. 26, 2014); *Weaver v. Edward D. Jones & Co.*, No. 4:10CV00227 BSM, 2010 U.S. Dist. LEXIS 65762, at \*4–5 (E.D. Ark. June 10, 2010).

197. 708 F.3d 599 (4th Cir. 2013).

198. See *id.* at 609. The Fourth Circuit characterized the rule this way: “[A]n arbitration provision must be supported by consideration independent of the contract underlying it, namely, mutual obligation.” See *id.*

199. See *id.* at 607–09.

200. See *id.*

201. See *id.* at 609–11.

202. See *id.* at 611–13.

203. See *id.* at 612.

204. *Id.*

205. *Id.*

206. See *id.*

207. *Id.* at 612–13.

The Fourth Circuit's holding in *Noohi* brings a welcome clear-headedness to the analysis of FAA preemption. In a world where arbitration has become a ubiquitous topic of litigation, it can certainly seem like doctrines such as the *Cheek* rule are targeted at arbitration. Yet if those doctrines are applied to contracts in general—as the Arkansas Supreme Court has insisted its mutual-obligation doctrine is—then what looks like discrimination may actually be an illusion born of aggressive arbitration practices. Moreover, *Noohi* reminds us that *Concepcion* has limits. If a state-law rule has the overall effect of ensuring that *both* parties are able to arbitrate, then where is the offense to the pro-arbitration policies of the FAA? Permitting only one party to be bound to an arbitration clause may be consistent with *forced* arbitration, but there is nothing in the rule of mutuality that is hostile to arbitration *per se*.

## B. Practical Benefits

Outside of the legal arguments addressed above, there is another question about the approach Arkansas has taken to arbitration: Does it make good policy? Anything beyond a brief discussion of that issue—at the crux of much of the debate over arbitration today—exceeds the scope of this Article. However, the following suggests four areas where the Arkansas approach has produced salutary results: (1) federalism, (2) ensuring consent to waiver of rights, (3) evening the playing field between consumers and corporate drafters of contracts, and (4) ensuring adequate development of consumer law.

### 1. Federalism

Contract law is undoubtedly a matter of state concern and is traditionally within the domain of state law.<sup>208</sup> Of course, the federal government can regulate contracts if it has constitutional authority to do so, which it does frequently under the broad reach of the commerce power.<sup>209</sup> In this sense, the FAA is an unremarkable statute—it regulates contracts under a legitimate constitutional power to do so (again, the Commerce Clause).<sup>210</sup> However, *Concepcion* has gone further to remove state authority over contracts

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208. See *Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) (“[T]he interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review.”).

209. See *United States v. Darby*, 312 U.S. 100, 114 (1941). The Fair Labor Standards Act, for example, comprehensively regulates employment contracts under the commerce power. See *id.* at 109–10.

210. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 276–77 (1995) (stating that Congress intended to use its “commerce power to the full” when it passed the FAA).

than any other case interpreting the FAA. And the breadth of its language puts courts at liberty to defang state law.

Take for instance *Murphy v. DirectTV, Inc.*, a Ninth Circuit case discussed above.<sup>211</sup> *Murphy* is not simply a straightforward application of *Concepcion*; it does not hold that California's *Discover* rule is preempted because it conflicts with the FAA.<sup>212</sup> Rather, it holds that the FAA "nullifies" the *Discover Bank* rule.<sup>213</sup> But surely that statement is too broad. If the parties entered a contract that did not implicate interstate commerce, for example, and one party tried to enforce an arbitration provision within that contract, then the FAA would by its terms not apply and a California court would be free to impose the *Discover Bank* rule. Simply put, the Ninth Circuit held that *Concepcion* destroys an area of traditional state regulation, when in fact it merely precludes it. What's more, *Murphy* presented a fairly straightforward case because it involved the very rule of state law that *Concepcion* dealt with. When it is considered that *Concepcion* preempts any state law that might interfere with the fundamental attributes of arbitration, its intrusion into areas of traditional state regulation could be very thorough indeed.

The Arkansas approach permissibly escapes this problem by emphasizing formation issues. Arkansas courts thereby preserve for themselves a sizable sphere of regulation—one in which they can both maintain a healthy state/federal balance and protect Arkansas citizens from unfair arbitration practices.

## 2. Consent

The Arkansas approach to mutual agreement contends with the problem of consent discussed in the opening of this Article. By closely scrutinizing the parties' interactions for mutual agreement, cases such as *Newby* ensure that parties to an arbitration clause knew of its terms and in fact wanted to be bound by them. Indeed, the mutual-agreement rule is consistent with the many U.S. Supreme Court cases repeating the principle that arbitration is a matter of consent.<sup>214</sup>

However, the limitations of the Arkansas approach in this regard should be noted. In many instances there will be evidence showing that a party indeed clicked on the box agreeing to terms, or that the consumer did receive notice of the terms in the product packaging, and in the legal sense

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211. 724 F.3d 1218 (9th Cir. 2013); see *supra* Part II.B.1.

212. See *Murphy*, 724 F.3d at 1225–26.

213. See *id.* at 1226.

214. See, e.g., *Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) ("Arbitration under the Act is a matter of consent, not coercion.").

this can create consent.<sup>215</sup> In these situations, the only way to ensure consent in a meaningful way is a legal rule that moves the moment of choice from the time of entering the initial contract to the time at which the arbitration is actually requested. But such a rule would be targeted at arbitration specifically and is therefore unsustainable.

### 3. *Even Playing Field Between Contract Drafters and Consumers*

The Arkansas approach is more likely to be effective with its mutual-obligation doctrine. Mutual obligation is the Golden Rule: provide arbitration (or litigation) as you would have another provide it to you. This requirement is especially important in the consumer context, where in many cases contracts give the corporation the right to unilaterally amend the contract post-formation. Such amendments may, of course, include the addition of an arbitration provision.<sup>216</sup> Assuming that a consumer can, in fact, be deemed to have agreed to an arbitration provision that the corporate drafter added unilaterally, then the mutual obligation doctrine is a powerful protection from abuse of adhesive contracts. Without the doctrine, corporations can easily insert unbalanced terms that favor themselves and that permit themselves alone to access courts where they deem it convenient. The mutual obligation doctrine puts a check on that practice.

The doctrine also requires a corporation to think hard about whether it really wants to arbitrate its own claims. Traditional litigation, after all, has special benefits that the corporation may wish to avail itself of, such as effective appeal procedures and free access to courts (as opposed to costly arbitrator fees).<sup>217</sup> Because of the mutual-obligation doctrine, a corporation is less likely to insert an arbitration clause into its contract as a knee-jerk reaction and more likely to give thoughtful consideration to the costs and benefits of arbitration—including the costs to its customers.

### 4. *Law Development*

Arbitrators may be competent at dispute resolution, but they lack one power that judges unquestionably have: the power to interpret law with binding authority. Arbitrators do not always issue reasoned opinions. Even

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215. See, e.g., *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148–49 (7th Cir. 1997).

216. The use of the unilateral amendment has arisen alongside the doctrine of FAA preemption. See *Horton*, *supra* note 5, at 619–30. Courts tend to enforce the terms of such amendments, although not all will. See *id.* at 626–29. Enforcement depends on a number of factors, such as whether the consumer has an opportunity to opt out of the terms and whether applicable state law permits unilateral amendment. See *id.* For a thorough discussion of this issue, see *id.* at 623–36.

217. For more on this idea, see Rutledge & Drahozal, *supra* note 44.



where they do, it is unlikely that their decisions will influence other arbitrators in future cases or provide guidance for future conduct.<sup>218</sup> Moreover, in the consumer context, obtaining arbitral precedent would at the very least require consumers to actually conduct the arbitration when a court compels it to do so. However, without class procedures, there is often little incentive for consumers to arbitrate small claims. Either way, an order compelling arbitration ensures that a court will not provide an authoritative interpretation of the consumer law at issue. When arbitration is the rule, development of the law suffers.<sup>219</sup>

## V. CONCLUSION

Arkansas has always been jealous of its prerogatives when regulating contracts that include arbitration clauses, but with a series of cases in the 2014 term, it staked itself a unique position in the post-*Concepcion* landscape. Some may question whether that position is legally sustainable in light of what appears to be an all-engulfing Federal Arbitration Act. However, *Concepcion* has its limits, and the Arkansas approach does not transgress them. Moreover, that approach helps ensure that the principles of federalism, true consent, and fair dealing are honored. Unless the U.S. Supreme Court expands the FAA even further, Arkansas law will continue to provide a bulwark against unbalanced arbitration provisions.

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218. The debate over the precedential impact of arbitral decisions—an issue beyond the scope of this Article except for the brief suggestion made here—is engaged in W. Mark. C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895 (2010).

219. Thanks to Hank Bates for suggesting this point.