Arbitration Agreements Used by Nursing Homes: An Empirical Study and Critique of AT&T Mobility v. Concepcion

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ABSTRACT

Although the health care industry had historically been one of the fields that had not embraced pre-dispute binding arbitration agreements, that reluctance appears to be changing in at least one sector of the health care field. An examination of admission contracts used by North Carolina nursing homes and telephone survey of North Carolina nursing homes revealed that 43 percent of nursing homes now incorporate pre-dispute binding arbitration provisions into their admission contracts. All of the major nursing home chains operating in North Carolina use pre-dispute binding arbitration agreements in at least some of their facilities, while smaller operators use them sporadically.

The terms of these agreements vary considerably. The large chains tend to incorporate some of the provisions in the model arbitration agreement drafted by the American Health Care Association (AHCA), which includes a 30-day rescission period and language that acceptance of the arbitration provision is not a precondition to admission. Some of the large chain facilities also include more dubious provisions like the arbitration will be conducted at the facility if the parties can’t agree on another location. Some of the smaller operators include provisions that limit damages and discovery, prohibit punitive damages, and expressly condition entry to the facility on signing the pre-dispute arbitration agreement.
Although some of these agreements contain language stating that the agreement is voluntary or may rescinded, this language, by itself, provides no guaranteed protection that facilities are enforcing the contracts as written. The telephone survey found incidents where nursing homes were requiring new residents to sign pre-dispute binding arbitration agreements as a condition of admission, even though the language in those facilities’ agreements stated that signing the agreement was voluntary. This study also found evidence of a significant amount of confusion among staff of nursing homes using these agreements about whether their facilities were using them at all and what arbitration agreements really meant.

This is principally an empirical study, however, the United States Supreme Court decided its most recent Federal Arbitration Act case - AT&T Mobility LLC v. Concepcion - just before this paper was finalized. At first glance, Concepcion seems to have significantly impacted the power of state courts to use unconscionability to invalidate arbitration agreements. However, this interpretation may not prove accurate. Concepcion presents a very unique situation in which the opinion of a concurring justice who joined the majority opinion is so contrary to that of the putative majority opinion, that the decision may actually be a plurality and not a majority. If that is the case, Concepcion may have little precedential value beyond its particular facts.

Introduction

The use of pre-dispute binding arbitration agreements has been commonplace in a variety of commercial contexts, such as brokerage agreements, insurance contracts and credit card contracts for many years.¹ Health care had historically been one of the fields

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¹ See Christopher R. Drahozal, Is Arbitration Lawless?, 40 L.O.Y. L.A. L. Rev. 187, 209-10 (2006) ("Almost 90 percent of a sample of international joint venture contracts included arbitration clauses . . . 69.2 percent of consumer financial contracts . . . included an arbitration clause. . . . But certain types of consumer financial contracts (and consumer contracts generally) may include arbitration clauses at an even higher rate than the category as a whole. Certainly that is true for brokerage contracts and may be true for insurance and credit card contracts as well.") citing Linda J. Demaine & Deborah R. Hensler, "Volunteering to Arbitrate Through Pre-dispute Arbitration Clauses: The Average Consumer's Experience, 67 Law & Contemp. Probs. 55, 63-64 (2004).
that had not embraced pre-dispute binding arbitration agreements.  

The reluctance to use pre-dispute binding arbitration agreements appears to be changing in at least one sector of the health care field. An examination of admission contracts used by North Carolina nursing homes and telephone survey of North Carolina nursing homes revealed that 43 percent of nursing homes now incorporate pre-dispute binding arbitration provisions into their admission contracts. All of the major nursing home chains operating in North Carolina use pre-dispute binding arbitration agreements in at least some portion of their admission contracts, while smaller operators use them sporadically.

The terms of these agreements vary considerably. The large chains, defined here as chains with at least ten facilities in North Carolina, tend to incorporate some of the provisions in the model arbitration agreement drafted by the American Health Care Association (AHCA), the nursing home industry trade organization. AHCA’s model language includes a 30-day rescission period and language that acceptance of the arbitration provision is not a precondition to admission.  

Some of the big chains also include a provision that the arbitration will be conducted at the facility if the parties can’t agree on another location. Some of the smaller operators include provisions that limit

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2 See Elizabeth Rolph et al., Arbitration Agreements in Health Care: Myths and Reality, 60 L. & CONTEMP. PROBS. 153, 155 (1997) (A study of California healthcare providers in the mid-1990s found that nine percent of hospitals and nine percent of the physicians that were surveyed used pre-dispute binding arbitration agreements in their practice. Twenty percent of hospitals in the sample used pre-dispute binding arbitration agreements.)

damages and discovery, prohibit punitive damages, and expressly condition entry to the facility on signing the pre-dispute arbitration agreement.

The implications of the rising use of pre-dispute binding arbitration agreements may be significant. There are many counties in North Carolina where 50-100 percent of all of the nursing home operators use these agreements. With so many operators selecting pre-dispute binding arbitration, this may have the effect of forcing some vulnerable elders who suffer serious injury and death from poor care, abuse and neglect in nursing homes, out of the public court system with all of its safeguards, and into private arbitration without those protections.4

Although some of these agreements contain language stating that the agreement is voluntary or may be rescinded, this language, by itself, provides no guaranteed protection that facilities are enforcing the contracts as written. This study found incidents where nursing homes were requiring new residents to sign pre-dispute binding arbitration agreements as a condition of admission, even though the language in those facilities’ agreements stated that signing the agreement was voluntary. This study also found evidence of a significant amount of confusion among staff of nursing homes using these agreements about whether their facilities were using them at all and what arbitration agreements really meant.

Arbitration advocates and nursing home industry representatives contend that arbitration is good for both parties because the process is fair, voluntary and expeditious, and they contend that consumers benefit by the savings generated by arbitration over

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4 See AT&T Mobility LLC v. Concepcion et ux. 563 U. S. ____ (slip op., at 13)(April 27, 2011) (describing arbitration as ill-suited to class litigation because judicial review of arbitral proceedings is limited to review for misconduct, not mistake).
traditional litigation. The use of pre-dispute binding arbitration agreements is a matter of serious concern to nursing home advocates who fear that nursing home residents are not adequately protected in arbitration. They fear that nursing home residents’ awards will be depressed because arbitrators seeking repeat business will consciously or unconsciously keep awards down to improve their chances of being hired by facilities in the future. Nursing home resident advocates are also concerned that there isn’t adequate judicial review of private arbitral awards in light of the often serious claims brought by these plaintiffs – including wrongful death, abuse and neglect. They reject the claim that arbitration is fair by pointing out that there is no way to know if this is true because most arbitration proceedings are private and awards are confidential. They are also concerned about harsh or one-sided terms in arbitration agreements and they are concerned that residents

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5 See Jyotin Hamid and Emily J. Mathieu, *The Arbitration Fairness Act: Performing Surgery with a Hatchet Instead of a Scalpel*, 74 ALBANY L.R. 769 (2011); Paul B. Marrow, *Determining if Mandatory Arbitration is “Fair”: Asymmetrically Held Information and the Role of Mandatory Arbitration in Modulating Uninsurable Contract Risks*, 54 N.Y.L. SCH. L. REV. 187 (2010) (arguing that arbitration is necessary to compensate corporations for risks they cannot avoid that are a consequence of asymmetrical information). See also Fletcher v. Kidder, Peabody & Co., 619 N.E.2d 998, 1004 (1993) (“While the submission of a dispute to arbitration inevitably does involve the loss of some procedural rights, a party who agrees to arbitration ‘trades those procedures and [the] opportunity for review ... for the simplicity, informality, and expedition of arbitration.’”)


7 This is called the “repeat player” effect. Michael A. Satz, *How the Payday Predator Hides Among Us: The Predatory Nature of the Payday Loan Industry and its use of Consumer Arbitration to Further Discriminatory Lending Practices*, 20 TEMP. POL. & CIV. RTS. L. REV. 123, 144 (2010) (“By placing the outcome of an arbitration case in the hands of an arbitrator educated in that field and motivated to be rehired as a future arbitrator, companies reduce the risk of a disproportionately high award to a victorious consumer.”).


9 Id.
are forced to sign arbitration agreements because they lack any meaningful ability to negotiate, given the precariousness of their health and inability to live on their own.\(^{10}\)

While this article cannot address all of these concerns, the findings do shed some light on the terms used in these agreements and whether these agreements are enforced as written from the voluntariness perspective. Further research is needed to address other legitimate concerns.

Parts I and II of this article will discuss the study methods and their limitations. Part III will discuss the findings of the review of arbitration agreements with particular emphasis on the terms used in arbitration agreements in large nursing home chains. Part IV of this article will address the findings of the telephone survey. Although the findings from the review of arbitration agreements and the telephone survey are important and the first of their kind in the nursing home arbitration context, there is much more research to be done to fully understand the ramifications to residents and facilities of the use of pre-dispute binding arbitration agreements in nursing home admission contracts. Part V of this article will discuss some of the findings and the additional types of research needed.

This is principally an empirical study, however, the United States Supreme Court decided its most recent Federal Arbitration Act case - AT&T Mobility LLC v. Concepcion - just before this paper was finalized.\(^{11}\) At first glance, Concepcion seems to have significantly impacted the power of state courts to use


\(^{11}\) AT&T Mobility LLC v. Concepcion et ux. 563 US _____
unconscionability to invalidate arbitration agreements. However, this interpretation may not prove accurate. Concepcion presents a very unique situation in which the opinion of a concurring justice who signed onto the majority opinion is so contrary to that of the putative majority opinion, that the decision may actually be a plurality and not a majority. If that is the case, Concepcion may have little precedential value beyond its particular facts. Part VI of this article will explain this view of Concepcion.

I. Study Methods

This study is based on an analysis of pre-dispute binding arbitration agreements in admission contracts used by nursing homes in North Carolina from 2007-2009 and on the results of a telephone survey in the fall of 2010 of more than 350 nursing homes in North Carolina.

The admission contracts were collected pursuant to an agreement with the North Carolina Division of Health Service Regulation (hereinafter “state survey agency”). The state survey agency is responsible for conducting surveys of long term care facilities to ensure their compliance with federal and state laws. As part of their responsibilities to ensure compliance with federal law, the state survey agency must survey each Medicare-certified facility in the state at least once every 15 months.

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12 The North Carolina Division of Health Service Regulation is a division of the North Carolina Department of Health and Human Services.
13 See 42 C.F.R. Part 483, Chapter 131E, Article 6 Part 1 of the N.C. General Statutes, North Carolina Administrative Code 10A NCAC
14 See 42 U.S.C. § 1395i–3
During annual surveys from October 2007 through February 2009, surveyors collected copies of facilities’ admission packets.\textsuperscript{15} These admission packets were mailed to the study author for review. The admission packets were reviewed and the packets containing pre-dispute binding arbitration agreements were selected for further analysis.\textsuperscript{16}

Because the surveyors did not collect agreements from all facilities, a follow-up telephone survey was conducted. All nursing homes for which no arbitration agreement had been reviewed in the earlier part of this study were contacted as part of the telephone survey. Directors of admissions or other personnel who handle admissions were spoken to and told that the caller was considering a placement in a nursing home for a loved one and was inquiring whether the facility used pre-dispute binding arbitration agreement and whether signing the agreement was required in order to be admitted into the facility.

II. Limitations of the Study Methods

While some states require nursing homes to provide copies of their admission packets to the public upon request, North Carolina is not among them.\textsuperscript{17} Therefore, it is doubtful that this study could have been conducted without the assistance of the state


\textsuperscript{16} The admission packets that did not contain pre-dispute binding arbitration agreements did not receive further scrutiny.

\textsuperscript{17} California requires facilities to make blank complete copies of its admission agreement available to the public and requires a public posting of the admission agreement at the facility. Article 9 California Health and Safety Code § 1569.881(a)-(b) (2005). Minnesota requires facilities to “make complete unsigned copies of its admission contract available to potential applicants and to the state or local long-term care ombudsman immediately upon request.” Minnesota Statutes § 144.6501 (2010).
survey agency, due to the logistical difficulty of obtaining nursing home admission packets from facilities across all of North Carolina.18

As necessary as the state survey agency’s assistance was, it created limitations in the study design. Due to the surveyors’ significant workload and the time constraints involved in surveying, it was not feasible to train surveyors in a precise method to obtain arbitration agreements from the facilities that were using them. Instead, surveyors were asked to obtain copies of facilities’ entire admission packets. The exact phrasing of the request, and to whom it was made, was left to the surveyor making the request for the admission packet. The author could not monitor the collection of admissions packets and had no ability to ensure that admission packets were requested at nursing homes.

The inability to collect admission packets in a more structured format and supervise their collection may have resulted in a loss of data. In some cases, surveyors returned with admission packets that made reference to arbitration agreements, but no

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18 Nursing home residents and facilities have copies of admission packets. Theoretically, it might have been possible to get them from these sources, but the obvious practical problems prevented the author from exploring these options. Another option would have been to try to work with the long term care ombudsmen in North Carolina to obtain copies of admission packets. Department of Health and Human Services, Administration on Aging Elder Rights Protection available at http://www.aoa.gov/aoaroot/AoA_Programs/Elder_Rights/Ombudsman/index.aspx#purpose (last visited June 19, 2011). Long term care ombudsmen advocate for residents of nursing homes when the residents contact them about problems they are having at facilities. Id. The ombudsmen intercede on behalf of the residents directly with the facility when a problem is identified and the ombudsmen will also contact the state survey agency if they believe a regulatory violation has occurred. North Carolina Division of Aging and Adult Services Nursing Homes and Adult Care Homes available at http://www.ncdhhs.gov/aging/ombud/whattodo.htm (last visited June 20, 2011). It might have been possible to work with ombudsmen to see if they retained copies of admission packets or if they had access to them. However, this possibility was not pursued because there are 17 different local ombudsmen on staff, in addition to the state-wide ombudsmen, and dealing with that number of offices was impractical compared to working with one state survey agency office. See North Carolina Division of Aging and Adult Services Long Term Care Ombudsman Program available at http://www.ncdhhs.gov/aging/ombud/ombstaff.htm (last visited June 19, 2011).
arbitration agreement was found in the packet.\textsuperscript{19} It is impossible to tell definitively why arbitration agreements would be referenced, but not included in the admission packets. They could have been lost by the surveyor, inadvertently omitted by the facility or there could be some other explanation for why arbitration agreements would not be present when facility materials suggest they should be.

Another puzzling finding was that admission packets from some locations of large for-profit chains like Britthaven, Inc., contained arbitration agreements while admission packets from other locations of these same chains did not. This could reflect variation in the usage of these agreements by location within the same chain, or it could reflect a data collection problem caused by the study design.\textsuperscript{20}

Because of the limitations of the study design and the problems with what appeared to be missing data, a follow-up telephone survey was conducted in the fall of 2010. A total of 359 nursing homes were contacted by telephone for this survey. These calls resulted in 162 interviews of nursing home admission coordinators, or other personnel responsible for admitting new nursing home residents. These facility officials were asked whether their facilities included arbitration agreements in their nursing home admission packets and if they did use them, they were asked whether they required them to be signed as a condition of entry into the facility or whether they were voluntary.

III. Findings of the Review of Arbitration Agreements

\textsuperscript{19} For example, some nursing home admission packets contained a one-page checklist of items that were included in the packet. Some of these checklists indicated that an arbitration agreement was supposed to be included in the packet, but the arbitration agreement was missing from the packet given to the surveyor.

\textsuperscript{20} It could also, of course, be a function of facility error in not having all required components in each admission packet.
Surveyors obtained admission packets from 204 facilities. Forty percent (n=82) of those packets contained arbitration agreements. The vast majority of the packets containing arbitration agreements came from facilities that were part of large for-profit chains of nursing homes.\textsuperscript{21} Of the 82 facilities that had arbitration agreements in their admission packets, 75% (n=62) of them came from facilities in large chains.\textsuperscript{22}

\textsuperscript{22} For the purposes of this study, a large nursing home chain is defined as any nursing home chain that has 10 or more facilities in North Carolina.
Nursing Home Arbitration: Agreement Terms

- Monetary Threshold Before Arbitration
- Explicit Waiver of Jury Trial
- Cost Sharing at Beginning
- One Proceeding Requirement
- Staff Institutions
- AHLA
- AAA chosen
- Right to Legal Counsel
- Recission
- Check Box Options
- Discovery Limitations
- Potential Cost Sharing
- Damage Limitations
- Arbitration at Facility
- NAF
- Hidden

Mandatory Arbitration: 4%
Voluntary Arbitration: 6%
Response Not Stated: 29%
A. General Findings: The Contents Of The Arbitration Agreements Analyzed

Graph 1 shows an overview of the findings from this study. Many of the more onerous provisions that are complained of by advocates for nursing home residents were observed in the arbitration agreements reviewed for this study, but many of them were not common. There were explicit damages limitations beyond limitations contained in state law in 7.32% of the agreements. Just over 10% of the time, the agreements were buried in the admission packet and were not separate, stand-alone agreements and were in not in bold. Signing the arbitration agreement was an explicit precondition to entry into the nursing home in 3.65 percent of the agreements. A few nursing home operators make arbitration expressly apply only to residents’ claims while a few others (2.44%) attempt to shield themselves from arbitration without stating so explicitly. These operators accomplish this by ostensibly requiring both parties to arbitrate, but limiting the arbitration-eligible claims to only those claims that exceed an amount that would be likely greater than a claim for non-payment that a facility would bring against a resident.

23 See Nursing Home Arbitration Act of 2008: Hearing on S. 2838 Before the Subcommittee on Antitrust, Competition and Consumer Rights of the S. Comm. on the Judiciary, 110th Cong. (2008) (testimony of Linda Stewart R.N.), available at http://judiciary.house.gov/hearings/pdf/Stewart080610.pdf Ms. Stewart testified that the nursing home representative “never once mentioned that the many documents contained something that would limit our family’s legal rights. In fact, when the nursing home administrator presented the document that contained the arbitration clause, my sister asked her, “What’s this?” The administrator replied, “Oh that’s nothing. We just need you to sign all of these documents.” At no time did the administrator explain the mandatory arbitration clause. It turns out that the nursing home did not even comply with current Texas law which says that this type of clause has to also be signed by our attorney in order for it to be valid.” See also Supra Fn 1.

24 Some courts have found such limitations unconscionable. See Trinity Mission of Clinton, LLC v. Barber, 988 So. 2nd 910 (Ct. App. Miss. 2007) and Altera Healthcare Corp v. Estate of Jeanette Kelley, 953 So. 2nd 574 (Ct. App. Fla. 2007). Some courts have concluded that when arbitration documents were presented with admission paperwork and the resident’s representative was not given sufficient time to read or review the documents resulted in procedural unconscionability and voided the agreement. Woebse v. Healthcare and Retirement Corp., 977 So. 2nd 630 (Ct. App. Fla. 2008).
Other complained-of provisions were more common. For example, almost half of the arbitration agreements contained provisions requiring nursing home residents to pay a percentage of the arbitration costs, including arbitrators’ fees. Of the agreements requiring cost sharing, 41.46% required the cost sharing after the facility had met a threshold expenditure on the costs of arbitration, while 7.32% of the arbitration agreements required residents to split the costs of arbitration from the beginning. Explicit limitations on discovery were found in 13.41% of the agreements.27

One of the surprising findings of this study was that a significant number of nursing home operators are using a provision that requires the arbitration to be conducted at the facility if the parties could not agree on another location. More than 20% of the arbitration agreements obtained in this study utilized this provision.

In half of the agreements, the facility chose the arbitration service that was to perform the arbitration. The most popular choice was the National Arbitration Forum (NAF), with 36.59%. The next most popular selection was the American Health Lawyers Association (AHLA) with 10.98%, while the American Arbitration Association was selected 2.44% of the time.

The popularity of NAF deserves particular attention. Until it was sued by the Minnesota attorney general for fraud and agreed to quit all consumer arbitrations rather than litigate the charges, NAF was the largest consumer arbitration provider in the

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27 The vast majority of the discovery limitations were observed in arbitration agreements that were used by small nursing home operators.
country.\textsuperscript{28} An expose on NAF by BusinessWeek found that NAF was far from a neutral dispute resolution provider:

NAF is nothing more than an arm of the collection industry hiding behind a veneer of impartiality," says Richard Neely, a former justice of the West Virginia Supreme Court who as part of his private practice arbitrated several cases for NAF in 2004 and 2005.

... Some current and former NAF arbitrators say they make decisions in haste—sometimes in just a few minutes—based on scant information and rarely with debtor participation. Consumers who have been through the process complain that NAF spews baffling paperwork and fails to provide the hearings that it promises. Corporations seldom lose. In California, the one state where arbitration results are made public, creditors win 99.8\% of the time in NAF cases that are decided by arbitrators on the merits, according to a lawsuit filed by the San Francisco city attorney against NAF.\textsuperscript{29}

Other provisions in the agreements reviewed were ostensibly more consumer-friendly. Almost 70\% of the agreements included an express right for the resident to rescind the agreement, typically within 30 days of signing. Just over 70\% of the agreements stated that the resident had the right to seek counsel regarding the arbitration agreement. Almost 65\% of the agreements contained language that stated signing the agreement was not a condition of admission. Less common were provisions explaining that the arbitration agreement amounted to a waiver of the right to trial by jury. Just over 40\% of the agreements had that provision.

\textsuperscript{28} State of Minnesota v. National Arbitration Forum, Consent Order, case no. 27-CV-09-18550 (Minnesota 4th Judicial Circuit) available at \url{http://pubcit.typepad.com/clpblog/2009/07/consent-decree-in-minnesota-v-naf.html} Under the settlement, the National Arbitration Forum will stop accepting any new consumer arbitrations or in any manner participate in the processing or administering of new consumer arbitrations. The company will permanently stop administering arbitrations involving consumer debt, including credit cards, consumer loans, telecommunications, utilities, health care, and consumer leases.

\textsuperscript{29} Robert Brenner and Brian Grow, \textit{Banks v. Consumers (Guess Who Wins)} \textsc{Bloomberg Businessweek}, June 5, 2008, available at \url{http://www.businessweek.com/magazine/content/08_24/b4088072611398.htm}
B. Selected Characteristics of Arbitration Agreements Used by Large Nursing Home Chains

Because seventy-five percent of all of the arbitration agreements were from large for-profit nursing home chains, an analysis of the content of those agreements as a group was conducted. There were some interesting similarities and differences found both among and within nursing home chains. Some provisions were common, but not used uniformly. Other provisions were used by about half of the facilities, while others were uncommon for this group.

1. Cost Sharing After A Certain Amount Has Been Spent By The Facility

One of the areas where there was the most variation was in whether large for-profit nursing homes required residents to pay the costs of arbitration once the facility had met a certain threshold.
This provision was common, but not used uniformly. As graph 2 shows, all of the large chains use this provision, except for Golden Living Center and Sava Senior Care (“Brian Center”). All of the other chains use them, but only Autumn Care had these provisions in all of their agreements. The other chains used this provision, but did so only in some of their facilities. Britthaven, Inc. included this provision in 53% of the agreements obtained from their facilities. UHS Pruitt used this provision in 4 of the 5 agreements obtained from their facilities (80%). Kindred used this provision in 75% of the agreements obtained from their facilities, Life Care Services used this provision in half of the agreements obtained from their facilities and Long Term Care Management Services used this language only 25% of the time in the agreements that were reviewed for this study.
2. **Right of Rescission**

Another common, but variable feature of the large for-profit chains’ arbitration agreements was the use of language indicating a right of rescission. Graph 3 shows this variation. The only large chain to not include right of rescission language in their arbitration agreement was Kinston, North Carolina-based Britthaven. Three of the chains, Autumn Care, Golden Living Center and Long Term Care Management Services, included this language in all of the arbitration agreements reviewed for their facilities. The right of rescission language was common in Kindred facilities’ arbitration agreements (75%), but it was rare in Life Care Services facilities (25%) and Brian Center facilities’ arbitration agreements (18%).

3. **Right to Legal Counsel**

GRAPH BELOW NEEDS TO BE REVISED: BRIAN CTR AND LONG TERM CARE MANAGEMENT ARE NOT ZERO
Another common, but not uniformly present feature is the express provision that the resident has the right to have an attorney review the arbitration agreement. Graph 4 shows that the only large chain to not include an express right of attorney review was Life Care Centers. The same three chains that included language concerning a right of rescission in all of the arbitration agreements reviewed for their facilities, Autumn Care, Golden Living Center and Long Term Care Management Services, included an express right to have an attorney review the arbitration agreement. The right to a lawyer’s review was in 75% of the Kindred facilities’ arbitration agreements reviewed for this study and was present in 53% of the Britthaven facilities’ arbitration agreements that were reviewed. Only 18% of the Brian Center agreements reviewed for this study contained this provision.

3. **Arbitrations At The Facility Unless The Parties Agree To Another Location**
Almost half of the large chains designate the facility as the location where the arbitration will be held unless the parties can agree to another location. As shown in Graph 5, Autumn Care, Britthaven and Golden Living Center use this provision, while the other five large chain operators do not use the facility where the injury occurred as the default location for the adjudication of the dispute. All of the arbitration agreements reviewed from Autumn Care and Golden Living Center contained this provision. It was present in 53% of the Britthaven arbitration agreements reviewed.

4. NAF Selected As The Arbitration Service Provider
As graph 6 shows, a slight majority of large nursing home chains selected NAF as the provider of arbitration services for all or most of their facilities. Autumn Care and Golden Living Center chose NAF for all of their facilities that had arbitration agreements. UHS Pruitt used them in 80% of the arbitration agreements reviewed for this study and Kindred used them 75% of the time. Britthaven required NAF to be selected as the arbitration service in just over half of the Britthaven owned or operated facilities that used arbitration agreements that were reviewed for this study. Life Care Services, Long Term Care Management Services and Brian Centers did not require NAF to conduct the arbitrations for any of their facilities.

C. Other Notable Provisions
Although rare, a number of facilities include unusual terms in their arbitration agreements that are particularly troublesome. Cypress Glen Retirement Community, is a United Methodist community in Greenville, N.C. that is managed by Life Care Services, Inc. This community includes a skilled nursing facility and it requires all of its residents to pay its costs of arbitration should the facility be required to arbitrate a claim. The exact language says: "Any direct arbitration costs incurred by you will be borne by you. Costs of arbitration, including our legal costs and attorney’s fees, arbitrators’ fees and similar costs, will be borne by all residents of the Village.” Agreeing to this is mandatory. However, the agreement may be rescinded within 30 days, but the agreement is valid for all disputes arising during the time it was in effect.

This audacious provision likely violates federal law. Federal law provides that, “[i]n cases involving Medicaid, [facilities] must not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the state plan, any gift, money, donation, or other consideration as a precondition of admitting, or expediting the admission of, the individual to the facility or as a requirement for the individual's continued stay in the facility.”30 Requiring residents to pay for the nursing home’s attorney’s fees and arbitration costs would constitute a “charge” of “money” that is “accept[ed]” if such expenses occur and if there is an off-set applied to the residents. Even if there is no charge the contract language is in the nature of a solicitation of money and that is also prohibited.

The Twin Lakes Community is a Lutheran Retirement Ministries of

Alamance Co. managed facility and it includes a provision that says cost and expenses of the arbitration "shall be allocated" as the arbitrator sees fit and the parties agree decision is not appealable - but if it is appealed the appealing party must pay other side's appeal costs, including attorneys' fees. This provision is unusual in that it is the only one that allows the arbitrator to allocate costs and expenses as the arbitrator sees fit. It is unclear if this applies to attorneys’ fees, but it seems that an arbitrator could include attorneys’ fees as expenses of arbitration if desired. This provision creates an incentive for arbitrators to give favorable allocations of expenses and costs to the facility, because the facility will be the “repeat player” and the arbitrator may consciously or unconsciously act in a manner to increase the likelihood he or she will be selected by the facility to arbitrate disputes in the future.

The fee shifting on appeal provision is odd. It states that appeals are not allowed and then provides for mandatory fee shifting if they occur. The provision is ostensibly fair in the sense that the requirement to pay attorney’s fees and costs of the appeal applies to any appealing party. However, given likely resource disparities between the resident and the facility, this provision would likely deter resident appeals more than facility appeals because residents, who generally sue on a contingency fee basis, are probably less able to pay attorneys’ fees and costs out of pocket.

Another notable provision involves discovery limitations. The Magnolia Living Center in Dunn, North Carolina allows only 3 depositions of non-expert witnesses for each party. This provision applies equally to both parties, so on its face, it seems reasonable. It is highly problematic however. In complicated cases, there will be many fact witnesses who provide critical information. The nursing home will have access to
virtually all of the important fact witnesses, because it is the facility employees who will be the main fact witnesses in the case. Not allowing depositions of more than three fact witnesses could create significant information asymmetry that would likely only have an adverse effect on the plaintiff bringing the case.

IV. Findings of the Telephone Survey

The purpose of the telephone survey was to try to get data from the facilities that were not confirmed users of pre-dispute binding arbitration agreements. Thus, the telephone survey was targeted to facilities from which no admissions packets were obtained and the facilities that did not include arbitration agreements in the admission packets that were reviewed for this study.

A total of 359 nursing homes were contacted by telephone for this survey. These calls resulted in 162 interviews of nursing home admission coordinators and 109 of those coordinators (62.78%) indicated that there facilities were now using pre-dispute binding arbitration agreements in their admission contracts.

Because of resource constraints, the only other data concerning arbitration that was collected was whether signing the arbitration agreement was a precondition to entry into the facility. The data on that question are very interesting. Of the 109 admission coordinators who were spoken to, 21% (n=23) reported that it was mandatory for residents who wanted to enter their facility to sign the arbitration agreement. This stands in marked contrast to data from the review of admission agreements. In those agreements, only 3% were expressly mandatory.
Another important finding happened by mistake. The research assistant who conducted the telephone surveys inadvertently called five facilities that had arbitration agreements that had already been reviewed. All five admissions’ personnel were interviewed for the telephone survey.\(^{31}\) Two of the five admissions coordinators/personnel said that they required would-be residents to agree to arbitration in order to get into the facility, however, when the arbitration agreements for these same facilities were reviewed, not only did they not state it was mandatory that they be signed, these agreements made signing the arbitration provision expressly voluntary.

It is possible that the agreements could have been changed to make agreeing to arbitration a precondition for admission during the time period between the collection of the agreements and the telephone survey. However, another explanation is that these facilities’ practices do not mirror the actual language in the agreement itself. They may be inconsistent as a matter of policy, or simply a matter of confusion on the part of the facilities.

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\(^{31}\) The information from these facilities was not included in the results of the telephone survey to avoid double counting.
admissions coordinator. In any event, these findings, limited though they are, suggest that the presence of language making the signing of an agreement to arbitrate voluntary does not guarantee that facilities treat the arbitration agreement as voluntary.

Although resource constraints made it impossible to quantify how often there was confusion on the part of the admissions personnel systematically, the experience of the research assistant who conducted the survey is also revealing. Generally, the research assistant encountered one of two scenarios when calling. First, the admissions coordinator knew immediately whether there is an arbitration agreement and whether it is mandatory. When the agreement was not mandatory, most of the admissions coordinators explained that the facility offers the resident the opportunity to sign it but that the resident does not have to sign it. However, some admissions coordinators did not accurately characterize the significance of agreeing to arbitrate. The mischaracterizations tended to report the arbitration agreement in more benign terms than is true. As one admissions coordinator put it, signing the arbitration agreement “means that if there is a problem, we will all sit down and discuss it together to try to resolve it.”

The other common scenario was that the admissions coordinator was confused about what an arbitration agreement was and didn’t know if the facility used them or not. When this happened the telephone surveyor would describe an arbitration agreement and the admissions coordinator would read through the packet to see if there was one or ask someone else at that facility whether they used these agreements. About half of the time that the admissions coordinator was confused about what an arbitration agreement was, the facility was using pre-dispute binding arbitration agreements in their admission contracts.
These findings are important, but there was no way to systemically capture how often that was occurring or probe the understanding of the admissions coordinators more fully, because the budget did not allow for that type of enhanced analysis. Certainly this is an area where additional research would be helpful.

When the telephone survey and the review of arbitration agreements are combined, approximately 43% of North Carolina’s nursing homes (n=190) were found to be using pre-dispute binding arbitration agreements in their admission contracts. As Graphs 7 and 8 show, facilities using these agreements are spread throughout North Carolina. There are many counties in North Carolina with low concentrations of these agreements (25% or less of facilities use them). There are also many counties with high concentrations (75% to 100%) of these agreements.

Cumulative Arbitration Agreements: North Carolina County
V. Discussion of Findings and Further Research Needed

The findings of this study must be interpreted with caution. The findings reveal the prevalence of certain provisions used in the arbitration agreements reviewed for this study, but the results cannot be extrapolated beyond the nursing home admission contracts reviewed for this study. Even if they could be extrapolated to a broader population, they tell us little about the experiences of any given plaintiff subject to one of these agreements. To take just one example, most arbitration agreements examined in this study do not expressly prohibit the awarding of punitive damages. However, this doesn’t reveal anything about actual practices of arbitrators in awarding or refusing to award punitive damages. The confidentiality of most arbitrations, lack of meaningful judicial review, lack of written explanations for most decisions and the absence of award tracking, forms a veritable black hole for this information.
Put another way, a small percentage of arbitrators in this study must not award punitive damages, but all of them may not award them. Similarly, the arbitration must be held at the facility if the parties cannot agree on another location in just over 20% of the facilities in this study, but the other almost 80% may require the arbitration to be held at the facility if the parties cannot agree on a location.

Another type of indeterminancy was revealed by the telephone survey. This type of indeterminacy goes to whether the language of the agreement is actually abided by as written. The telephone survey, as discussed above, found that 22% of the facilities required residents to agree to arbitration as a precondition to admission, but only 3% of the agreements made signing the agreement a precondition to admission. The telephone survey also confirmed that two of the facilities that used agreements that were expressly voluntary were treating them as mandatory. These findings suggest that some critical terms may not be followed as written. The amount of confusion about whether facilities were using arbitration agreements and the confusion around the significance of arbitration also suggest that residents may not be given accurate information about arbitration.

Given the fact that so many nursing homes are including pre-dispute binding arbitration agreements in their admission contracts, and how little is known or easily knowable about the impact of moving serious tort claims of a uniquely vulnerable population out of the public domain, more studies are needed to understand the significance of pre-dispute binding arbitration agreements. We know in the aggregate
that the presence of arbitration agreements reduces damages awards for nursing homes.\textsuperscript{32}

It would also be helpful to measure the reduction in recovery by type of claim (pressure sore cases, neglect cases, abuse cases, substandard care cases, falls, etc.) to get a more nuanced appreciation of the impact of arbitration. It would also be helpful to study whether the presence of a pre-dispute binding arbitration agreement reduces access to plaintiffs’ lawyers because of the prospect of diminished recovery. Anecdotal evidence suggests it does.\textsuperscript{33} Another interesting question is whether there is a correlation between poor care in nursing homes and pre-dispute binding agreements. Similarly, it would be helpful to determine if facilities respond to the prospect of diminished tort liability by cutting staff. An investigation by the New York Times found that when private equity firms bought nursing home chains and then restructured their ownership to make them virtually judgment-proof, the private equity firms cut staff afterwards to increase their profits.\textsuperscript{34} Finally, it would also be helpful to know if, as arbitration advocates suggest, the presence of arbitration agreements helps consumers by lowering the costs they pay for nursing home care.

\textsuperscript{32} Aon Risk Consultants, \textit{2011 Long Term Care General Liability and Professional Liability Actuarial Analysis}, available at http://aon.com/attachments/risk-services/2011_Long_Term_Care_Actuarial_Analysis_FINAL.pdf. “In recent years, operators have increasingly cited arbitration . . . as an effective tool to resolve claims. This report supports that the use of ADR is associated with lower liability costs. While claims are rarely actually arbitrated, when a valid ADR agreement is in place, the claims are 25\% less costly than claims that are closed without a valid ADR agreement in place. When the validity of ADR agreements is challenged, ADR agreements are found unenforceable less than 15\% of the time.”


\textsuperscript{34} Charles Duhigg, \textit{At Many Homes, More Profit and Less Nursing}, N.Y. TIMES, Sept. 23, 2007, at 6.
VI. AT&T Mobility LLC v. Concepcion – the Curious Concurrence that May Undue a Majority

As this article was being finalized, the Supreme Court decided AT&T Mobility LLC v. Concepcion. This marks the first time the Supreme Court accepted certioriori in a case where a federal court had voided an agreement to arbitrate on the grounds that a term in the arbitration agreement was unconscionable under state law. An exhaustive examination of Concepcion is beyond the scope of this empirical study. However, because unconscionability is a frequent basis of attack against the enforcement of arbitration agreements in nursing home litigation, the impact of Concepcion must be considered here. 35

The Federal Arbitration Act (FAA) was enacted in 1925 in response to what is often described as widespread judicial hostility to enforcing arbitration agreements, but in reality the reception given these agreements prior to the adoption of the FAA was more variable than that description suggests. 36 In any event, Congress saw fit to enact the FAA and under section 2 of the FAA, agreements to arbitrate involving commerce are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 37 This savings clause has been interpreted to mean the only

35 Doctor’s Assoc., Inc. v. Casarotto, 517 U.S. 681, 687 (1996); See also Shroyer v. New Cingular Wireless Services Inc., 498 F.3d 976, 988, (9th Cir. 2007)., AT&T v. Concepcion at 563 U.S. ____, _____.
37 9 U.S.C. §2 (2010), “A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”
defenses to an otherwise valid arbitration agreement are the common law contract defenses of fraud, duress, unconscionability, and mutual mistake.\textsuperscript{38}

The Concepcions signed a cellular telephone service contract with AT&T and then were charged sales tax on two phones that were supposed to be free for new customers.\textsuperscript{39} They sued AT&T in federal court and they became part of a class action lawsuit claiming that AT&T committed fraud and false advertising for representing that the phones were free, but charging sales tax on them.\textsuperscript{40} The service contract contained a pre-dispute binding arbitration clause which prohibited the Concepcions from bringing any claims against them as part of class.\textsuperscript{41} The District Court ruled that the prohibition on seeking class relief was unconscionable under Discover Bank, and denied AT&T’s motion to compel arbitration.\textsuperscript{42} In Discover Bank, the California Supreme Court held it was unconscionable to prohibit consumers from seeking class-based relief if “the agreement is in an adhesion contract, disputes between the parties are likely to involve small amounts of damages, and the party with inferior bargaining power alleges a deliberate scheme to de-fraud.”\textsuperscript{43} The Ninth Circuit affirmed the District Court’s ruling in favor of the Concepcions.\textsuperscript{44}

The United States Supreme Court reversed.\textsuperscript{45} The Supreme Court, in a 5-4 ruling, held that Discover Bank was preempted by the FAA, because the “FAA’s overarching purpose . . . is to ensure the enforcement of arbitration agreements according to their

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\item \textsuperscript{38} Doctor’s Associates, Inc. v. Casarotto,  517 U. S. 681, 687 (1996); See also  Perry v. Thomas, 482 U. S. 483, 492–493, n. 9 (1987)
\item \textsuperscript{39} AT&T Mobility LLC v. Concepcion et ux.  563 US _____
\item \textsuperscript{40} AT&T Mobility LLC v. Concepcion et ux.  563 U. S. ____ (slip op., at 3)(April 27, 2011).
\item Id at ____ (slip op., at 1-2)
\item Id at ____ (slip op., at 3)
\item Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. Supreme Court 2005).
\item AT&T Mobility LLC v. Concepcion et ux.  563 U. S. ____ (slip op., at 3)(April 27, 2011).
\item Id at ____ (slip op., at 18).
\end{itemize}
\end{footnotesize}
terms so as to facilitate streamlined proceedings. Requiring the availability of class-wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” The “fundamental attributes of arbitration” include informality and efficiency. Because the Discover Bank rule frustrates the purposes of the FAA by forcing defendants to accept terms they did not want and imposes procedures that are more formal, complicated and slower than bilateral arbitration, the Discover Bank rule was preempted by the FAA.

The evolution of the Supreme Court’s interpretation of the FAA is quite remarkable and well-documented by scholars. The early decisions of the Court suggested the FAA might be a rather modest procedural statute limited to the federal courts and without preemptive force. Starting in the 1980s, however, the Supreme Court’s decisions reveal a very different statute. In 1983, the Court decided the Moses H. Cone Memorial Hospital v. Mercury Construction Corp., case which, although decided almost 60 years after the FAA’s passage, marked the birth of the mantra that the FAA embodies a “federal policy favoring arbitration.” The Court followed that decision with Southland Corp. v. Keating, in 1984 and in that case the Court held for the

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46 Id. at ____ (slip op., at 9).
47 Id.
48 Id. at ____ (slip op., at 10).
49 Id. at ____ (slip op., at 11).
first time that the FAA was federal substantive law that preempts conflicting state law. In 1995, the Court decided Allied-Bruce Terminix v. Dobson and held that the language in section 2 making the FAA applicable to written agreements “evidencing a transaction involving commerce” means the FAA’s power to preempt is coextensive with Congress’s power to regulate under the Commerce Clause. The Supreme Court has been very active in interpreting the FAA since the 1980s, and has handed down many other important rulings. But together, these three rulings turned a modest statute into a behemoth. The FAA embodies a federal policy favoring arbitration, it reaches virtually every commercial contract, and it preempts any state law incongruous with the federal policy favoring arbitration. Practically speaking, unconscionability is the only means left to the states to exert any influence over arbitration agreements. The question now is, what is left of unconscionability after Concepcion?

It is difficult to predict how Concepcion will affect lower courts application of the unconscionability doctrine to invalidate arbitration agreements. It is quite possible that Concepcion may only be given effect in federal courts, because Justice Thomas, who

55 The FAA is also described as standing for the proposition that arbitration is a matter of contract, and that the FAA requires arbitration agreements to be on equal footing with other contracts and enforced according to their terms. Rent–A–Center, West, Inc. v. Jackson, 561 U.S. _______, ___ (2010); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006); (Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989); See also AT&T Mobility LLC v. Concepcion et ux., 563 U. S. ___ (slip op., at 4)(April 27, 2011).
56 Although the states are preempted from disfavoring arbitration, Congress has decided in recent years that there are some contexts where the federal government does not favor arbitration. For example, the Dodd-Frank Act regulating the financial industry instructs the new Consumer Financial Protection Bureau to study and report to Congress regarding the use of arbitration clauses in contracts governing the provision of consumer financial products or services. Pub. L. 111-203, § 1028(a). The Bureau may prohibit or limit the use of such arbitration clauses if it decides that doing so would be “in the public interest and for the protection of consumers.” Pub. L. 111-203, § 1028(b). If Concepcion’s rationale is binding precedent, it is questionable whether any regulation by the Bureau attempting to prohibit arbitration in this context would be preempted by the FAA.
provided the fifth vote, has consistently maintained the view in his dissenting opinions that the FAA does not bind state courts.\textsuperscript{57}

The more interesting question, however, centers on whether Justice Scalia’s opinion for the Court, despite being joined by 4 other Justices, is really a plurality opinion. “Plurality decisions occur when a majority of Justices agree upon the result or judgment in a case but fail to agree upon a single rationale in support of the judgment.”\textsuperscript{58} While it is rare for a 5 to 4 decision where five justices join in the lead opinion in full to be considered a plurality, it is not unheard of. \textit{Branzburg v. Hayes}, the Court’s only decision concerning whether reporters have qualified testimonial immunity under the First Amendment, is such a decision.\textsuperscript{59} Since a putative majority opinion can be considered a plurality when one of the Justices signs onto the lead opinion, but authors a concurring opinion that undermines the holding of the lead opinion, \textit{Concepcion} may be construed by lower courts as a plurality decision with limited precedential force.\textsuperscript{60}

Justice Thomas wrote the concurring opinion in \textit{Concepcion}. In spite of it not being denominated a concurrence in the result or a concurrence in the judgment, that is the only seemingly plausible way to interpret that opinion. This is so for three reasons. Justice Thomas not only offers a completely different method of analyzing preemption under the FAA, and applies that method to this case, but he also explicitly rejects the rationale and methodology used by the putative majority opinion. Justice Thomas reaches the same conclusion as the putative majority – that the Discover Bank rule is preempted by the FAA – but rejects every aspect of the putative majority’s opinion.

\textsuperscript{57} AT&T Mobility LLC v. Concepcion et ux., 563 U. S. ____ (slip concurrence, at 3)(April 27, 2011).
\textsuperscript{59} Branzburg v. Hayes, 408 U.S. 665 (1972)
\textsuperscript{60} See Infra note 85
Substantively, this is a classic concurrence in the judgment only, irrespective of its designation as a simple concurrence.

A. Justice Thomas’s Textualist Approach to the FAA and Its Application in Concepcion

Although Justice Thomas joined the lead opinion in Concepcion, he interprets the FAA differently than the other Justices on the Court. Justice Thomas is the only Justice who interprets the FAA’s savings clause in section 2 to preserve only those contract defenses that go to the making of the agreement to arbitrate.61 These defenses, fraud, duress, and mutual mistake are available under the FAA, because they entitle a party to the remedy of revocation of a contract, as opposed to the invalidation or nonenforcement of a contract.62 According to Justice Thomas in Concepcion:

[section 2 provides that ‘[a] writ-ten provision [to arbitrate a dispute] . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.’ . . . The use of only “revocation” and the conspicuous omission of “invalidation” and “nonenforcement” suggest that the exception does not include all defenses applicable to any contract but rather some subset of those defenses.63

Because unconscionability – or at least substantive unconscionability, which is at issue in Concepcion – does not go to the making of the contract, but rather its terms, Justice Thomas does not believe it can ever be used as an applicable defense under section 2 of the FAA to void an agreement to arbitrate. In contrast, the four other Justices in the putative majority do not categorically reject substantive unconscionability as a defense to arbitration like Justice Thomas does, they just reject its application in Concepcion.

62 Id at ____ (slip concurrence at 4)
63 Id at ____ (slip concurrence at 2)
More importantly, although Justice Thomas joined the lead opinion in Concepcion, he provided a completely different analysis for why the Discover Bank rule should be preempted and he expressly disavowed the rationale used by the putative majority to reach the same end. Justice Thomas takes a textual approach to the preemption question and under his reasoning, because the Discovery Bank rule exceeds what is allowable under the text of the FAA, it is preempted by the FAA:

I write separately to explain how I would find that limit in the FAA’s text. As I would read it, the FAA requires that an agreement to arbitrate be enforced unless a party successfully challenges the formation of the arbitration agreement, such as by proving fraud or duress. 9 U. S. C. §§2, 4. Under this reading, I would reverse the Court of Appeals because a district court cannot follow both the FAA and the Discover Bank rule, which does not relate to defects in the making of an agreement.64

B. Justice Scalia and the Putative Majority’s Purposes and Objectives Preemption.

The rationale for finding the Discovery Rule preempted by the FAA in the Scalia opinion is completely different from that used by Justice Thomas. Under Justice Scalia’s rationale, substantive unconscionability may be a valid defense to an agreement to arbitrate, but not when the unconscionability rule frustrates the purposes of the FAA and stands “as an obstacle to the accomplishment of the FAA’s objectives.”65 Under Justice Scalia’s reasoning, the Discover Bank unconscionability rule frustrates the FAA’s purpose of promoting efficient and informal dispute resolution by not respecting bans on class wide arbitrations in arbitration agreements.66

According to Justice Scalia for the putative majority, class arbitration sacrifices “the principal advantage of arbitration—its informality—and makes the process slower,

64 Id at ____ (slip concurrence at 1-2)
65 Id at ____ (slip opinion at 9)
66 Id at ____ (slip op., at 11)
more costly, and more likely to generate procedural morass than final judgment.”

Among the putative majority’s criticisms of class arbitration are the need for different procedures necessitated by absent class members, more difficulty maintaining confidentiality, and the lack of arbitrator expertise in class certification. Citing a study by the American Arbitration Association (AAA), the putative majority noted that the “average consumer arbitration between January and August 2007 resulted in a disposition on the merits in six months, four months if the arbitration was conducted by documents only.” However, as of September 2009 of a reported 283 class arbitration cases 121 remained active and 162 had been settled, withdrawn, or dismissed, none had resulted in a final award on the merits of the claim.

Finally, Justice Scalia writing for the putative majority argued that class arbitration greatly increases risks to defendants. Admitting that the informal procedures of arbitration and the absence of multi-layered review makes it more likely that errors will go uncorrected, defendants, Justice Scalia writes, defendants “are willing to accept the costs of these errors in arbitration, since their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding the courts.” However, the cost of errors is magnified when the claims of tens of thousands of claimants are aggregated. Because 9 U. S. C. §10 allows arbitral awards to be vacated only where the award “was procured by corruption, fraud, or undue means”; or the

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67 Concepcion supra note 38 at ____ (slip op., at 14).
68 Id.
69 Id citing AAA, Analysis of the AAA’s Consumer Arbitration Caseload, available online at http://www.adr.org/si.asp?id=5027.
70 Id citing Brief for AAA as Amicus Curiae in Stolt-Nielsen, O. T. 2009, No. 08–1198, pp. 22–24.
71 Id at. ____ (slip op., at 15).
72 Id at. ____ (slip op..., at 15-16).
73 Id at ____ (slip op., at 16).
arbitrators showed “evident partiality or corruption” or “were guilty of misconduct in refusing to postpone the hearing . . . or in refusing to hear evidence pertinent and material to the controversy[,] or of any other misbehavior by which the rights of any party have been prejudiced”; or if the “arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award . . . was not made,” it is extremely unlikely judicial review would have much of an effect. The putative majority found it difficult to believe that defendants would engage in, or Congress would condone such a high stakes process absent any effective review.

These concerns support the ultimate holding that “[b]ecause it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” . . . California’s Discover Bank rule is preempted by the FAA.”

C. Irreconcilable Rationales: The Putative Majority and Concurring Opinion

The putative majority opinion and Justice Thomas’s concurrence arrive at the same result, but the similarities end there. Justice Thomas doesn’t merely set forth an alternate ground for finding the Discover Bank rule preempted that is completely different from the lead opinion, (the textual argument) he explicitly rejects the “purposes-and-objectives” preemption rationale that forms the basis for the lead opinion’s conclusion that the Discover Bank rule is preempted by the FAA. Although he joins the putative majority opinion, he says he “adhere[s] to my views on purposes-and-objectives pre-emption” announced in Wyeth. In Wyeth, Justice Thomas stated:

74 Id.
75 Id at ____ (slip op., at 17).
“I write separately, however, because I cannot join the majority's implicit endorsement of far-reaching implied pre-emption doctrines. In particular, I have become increasingly skeptical of this Court's "purposes and objectives" pre-emption jurisprudence. Under this approach, the Court routinely invalidates state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law. Because implied pre-emption doctrines that wander far from the statutory text are inconsistent with the Constitution, I concur only in the judgment.” 77

If Justice Thomas’s opinion shares no common ground with Justice Scalia’s lead opinion, the question remains whether Justice Thomas can create a majority rationale anyway by simply joining the opinion of the Court, when he unequivocally rejects that rationale in his concurrence? Can Justice Thomas “reluctantly join the opinion of the Court” because it is “important . . . to give lower courts guidance from a majority of the Court,” and at the same time expressly reject the “purpose-and objectives preemption” approach that is the core of the lead opinion’s rationale or does doing so create a plurality decision?

Concurring opinions, although commonplace now, remain controversial to some extent because of the fear that “[c]ontinuous fragmentation could well diminish not only the influence of the Court but the ideal of the rule of law.” 78 Concurrences tend to serve one of a variety of functions. 79 They may attempt to narrow the Court’s ruling (limiting concurrence), or broaden it (expansive concurrence). 80 Concurrence sometimes expound

77 Id at 1205 (Thomas, J. concurring in the judgment)
80 Id at 780-81.
upon a particular aspect of the majority opinion to give it more emphasis (emphatic concurrence) or disagree with the rationale but join in the judgment (doctrinal concurrence). Concurrences can also have a tremendous impact on the precedential value of the majority decision.

The Supreme Court has not directly addressed the problem posed by the type of concurrence filed by Justice Thomas in Concepcion. But in cases where the fifth vote in a putative majority opinion writes a concurrence that is inconsistent with the majority opinion, some scholars and courts have declared these to be plurality decisions. This was the case most notably in Branzburg v. Hayes.  

81 Id.  
82 Id.  
84 Branzburg v. Hayes, 408 U.S. 665 (1972); accord United States v. Verdugo-Urquidez, 494 U.S. 259 (1990). Jesse Merriam, Establishment Clause-Trophobia: Building a Framework for Escaping the Confines of Domestic Church-State Jurisprudence, 41 COLUM. HUM. RTS. L. REV. 699 (2010). “Some scholars have argued that Chief Justice Rehnquist’s opinion is a plurality opinion, and that Justice Kennedy’s concurrence more faithfully follows Supreme Court precedents. Most notably, Gerald L. Neuman has argued that Rehnquist’s opinion is a plurality and not a majority opinion because although Kennedy joined that opinion, Kennedy’s focus on the “impracticable and anomalous” standard suggests he did not agree with Rehnquist’s basis for ruling against Mr. Verdugo-Urquidez, thus leaving Rehnquist’s opinion with only four votes. If Neuman is correct that Rehnquist’s opinion is actually a plurality opinion, then Kennedy’s concurring opinion is likely binding law under the Supreme Court’s holding in Marks v. United States, which provides that, when there is no majority opinion, the binding law is “that position taken by those Members who concurred in the judgments on the narrowest grounds.” However, even though some advocates have taken Neuman’s approach and interpreted Kennedy’s concurrence as the binding opinion, most courts and scholars view Chief Justice Rehnquist’s opinion as the majority opinion, and thus binding precedent.  
85 See also Bartnicki v. Vopper, 532 U.S. 514 (2001)– discussed in Rodney A. Smolla, Information as Contraband: The First Amendment and Liability for Trafficking in Speech, 96 NW. U.L. REV. 1099, 1116 (2002). “The Supreme Court asserted review in Bartnicki following a decision by the United States Court of Appeals for the Third Circuit holding the federal and state statutes unconstitutional. Justice Stevens wrote the opinion of the Court, which was nominally joined by Justices Kennedy, Souter, Ginsburg, Breyer, and O’Connor. However, these appearances are deceiving. Although decided by a six-to-three majority, two of the Justices in the majority--Breyer and O’Connor--conurred in an opinion written by Justice Breyer that appeared to dramatically trim the reach and rationale of the majority opinion. The holding in Bartnicki, that broadcast of the intercepted cell phone conversation was protected by the First Amendment, was thus narrowed in two ways: first, by the numerous explicit limitations placed on the reach of the decision in Justice Stevens's opinion for the Court, and second, by the substantial and important additional limitations articulated in Justice Breyer's concurring opinion. Indeed, the nominal “opinion of the
Branzburg is, to date, the Supreme Court’s only foray into whether there is a constitutional privilege that protects reporters from being forced to reveal confidential information and confidential sources in a grand jury investigation.\(^8_6\) The Branzburg case, which was consolidated with two others, In re Pappas and United States v. Caldwell, involved efforts by state prosecutors to force reporters to testify about drug use (Branzburg) and allegedly criminal activities of the Black Panthers (Pappas and Caldwell) in grand jury proceedings.\(^8_7\) The reporters refused, on the grounds that the 1\(^{st}\) Amendment protected them from compelled disclosure.\(^8_8\)

Five members of the Court joined Justice Byron White’s opinion which held the First Amendment provided no special protection to journalists and that journalists had the same obligations as other citizens to testify and provide documents unless a subpoena was issued in bad faith.\(^8_9\) Justice Potter Stewart, joined by Justices William Brennan and Thurgood Marshall, dissented and adopted a three-part test that the government would have to meet before enforcing a grand jury subpoena against a journalist.\(^9_0\) Justice William O. Douglas also dissented, but he viewed the First Amendment as providing blanket protection for the press from compelled disclosure of confidential information unless the reporter was involved in a crime.\(^9_1\)

\(^{8_5}\) Branzburg v. Hayes, 408 U.S. 665 (1972)  
\(^{8_6}\) Id at 670-682  
\(^{8_7}\) Id at 672  
\(^{8_8}\) Id at 668-670  
\(^{8_9}\) Id at 707  
\(^{9_0}\) Id at 743 (Stewart, J. dissenting)  
\(^{9_1}\) Id at 713 (Douglas, J. dissenting)
Justice Lewis Powell was the fifth Justice joining the majority. He also filed a concurring opinion that advocated the courts balance First Amendment concerns with the state’s interest in prosecuting criminal behavior on a case-by-case basis. Although he expressly rejected the three-part test in Justice Stewart's dissenting opinion, “it must be said, [Justice Powell] implicitly rejected the majority opinion that he had signed.”

Because of the conflict between the putative majority opinion authored by Justice White and Justice Powell’s concurrence, many commentators and courts have interpreted Branzburg as a plurality opinion and there is a federal circuit court split on the issue.

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93 408 U.S. at 709-10 (Powell, J. concurring)
95 James Thomas Tucker & Stephen Wermiel, Enacting a Reasonable Federal Shield Law: A Reply to Professors Clymer and Eliason, 57 AM. U. L. REV. 1291, 1299 “Writing for a plurality in Branzburg, Justice White disagreed.”; Lucy A. Dalglish & Casey Murray, Déjà Vu All over Again: How a Generation of Gains in Federal Reporter's Privilege Law Is Being Reversed, 29 U. ARK. LITTLE ROCK L. REV. 13, 19-20 (2006). “Since Branzburg was a plurality decision with a final vote in the court of five to four, it was possible to craft some wiggle room. And, that is exactly what creative First Amendment lawyers did. They pointed out that the decision was actually a four-one-four ruling. In other words, four justices found absolutely no reporter's privilege under the First Amendment, while four clearly found one under the First Amendment. Justice Powell, however, tried to go right down the middle. In a concurring opinion, he said the decision should not be read to suggest that there is never a privilege for journalists—just that the facts presented in the combined cases under Branzburg did not provide for a privilege. The argument was that without Powell's limiting concurrence, the Supreme Court would not have found any constitutional reporter's privilege. So, for thirty-two years, many subpoenaed reporters and their lawyers convinced courts all over the country that Justice Powell's concurrence represented the true majority view. Bernard W. Bell, Byron R. White, Kennedy Justice, 51 Stan. L. Rev. 1373, 1400 (1999). “Nevertheless, Justice White, writing for a plurality of the Court in Branzburg, refused to accord journalists any special First Amendment privilege to refuse to identify sources or turn over confidentially obtained information.”
96 Eric B. Easton, Two Wrongs Mock a Right: Overcoming the Cohen Maledicta that Bar First Amendment Protection for Newsgathering, 58 OHIO ST. L.J. 1135, 1162 (1997) “Justice White wrote a plurality opinion in Branzburg expressing the view that the First Amendment afforded journalists no special privilege to protect the identity of confidential sources or information received in confidence by refusing to testify before a grand jury.”; James E. Beaver and Eric A. Aaserud, The Reporter's Privilege: Protecting the Fourth Estate, 30 WILAMETTE L. REV. 73, 81 (1994) “The Branzburg plurality was concerned about the difficulty of deciding just who “the press” is: . . . .”
 urged courts to recognize a privilege based on Justice Powell's concurrence. . . Whatever Justice Powell intended by his brief concurrence, it is beyond dispute that he fully joined Justice White's opinion, and that it was the opinion of a five-Judge majority, not a plurality.” Mary-Rose Papandrea, Citizen Journalism and the Reporter's Privilege, 91 MINN. L. REV. 515, n. 223 (2007) “Indeed, some courts and commentators erroneously interpreted Justice White's opinion to be a plurality opinion.” Karl H. Schmid, Journalist's Privilege in Criminal Proceedings: An Analysis of United States Courts of Appeals' Decisions from 1973 to 1999, 39 AM. CRIM. L. REV. 1441, n. 60 (2002). “Although many courts and commentators characterize Branzburg v. Hayes as a plurality decision, it was actually a majority decision.”

Cases interpreting Branzburg as a plurality include: In re Grand Jury Matter, Gronowicz, 764 F.2d 983, 990 n.2 (3d Cir. 1985) “To the extent that Justice Powell's concurring opinion in the Supreme Court's plurality decision in Branzburg v. Hayes, 408 U.S. 665 (1972) leaves open the possibility that a first amendment privilege might protect a newsman called to testify before a grand jury whose investigation was not undertaken in good faith, Branzburg is also inapposite.”; In re Grand Jury 87-3 Subpoena Duces Tecum, 955 F.2d 229, 234 (4th Cir. 1992) “While we have found that Branzburg controls here, that opinion leaves a paradox. On one hand, the Branzburg plurality stated that the First Amendment applies to grand jury proceedings. Branzburg, 408 U.S. at 708, 92 S.Ct. at 2670. On the other hand, the plurality's only example of First Amendment applicability was as protection against an investigation instituted or conducted in bad faith. Id. at 707, 92 S.Ct. at 2670. . . In light of those two Supreme Court cases and the facts of this case, we must decline to apply the substantial relationship test. Under Justice Powell's analysis in Branzburg, the district court should balance the possible constitutional infringement and the government's need for documents when it rules on the motion to quash, on a case-by-case basis and without putting any special burden on the government. The district court below satisfied that standard in finding that the subpoenas were properly "tailored" and that the documents were relevant.” United States v. Smith, 135 F.3d 963, 968-69 (5th Cir. 1998) “Although the opinion of the Branzburg Court was joined by five justices, one of those five, Justice Powell, added a brief concurrence. For this reason, we have previously construed Branzburg as a plurality opinion.”; Farr v. Pitchess, 522 F.2d 464, 467 (9th Cir. 1975) “Justice White wrote for four justices and the short concurrence of Justice Powell was needed to obtain a plurality.” However – the Ninth Circuit has been inconsistent about whether Branzburg is a plurality decision, see In Re Grand Jury Subpoenas 438 F.Supp.2d 1111 N.D.Cal., 2006. “The Ninth Circuit's views on the opinion have not been entirely consistent. Compare Scarce, 5 F.3d at 400 (“It is important to note that Justice White's opinion is not a plurality opinion.”) (emphasis in original), with Farr v. Pitchess, 522 F.2d 464, 467 (stating that “Justice Powell was needed to obtain a plurality”). Cases treating Branzburg as a majority decision include In re Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 971 (D.C.Cir. 2005) (“Justice White's opinion is not a plurality opinion of four justices joined by a separate Justice Powell to create a majority, it is the opinion of the majority of the Court.”); In re Special Proceedings, 373 F.3d 37, 44 (1st Cir. 2004) (noting that in Branzburg Justice Powell “wrote separately but joined in the majority opinion as the necessary fifth vote”); McKevitt v. Pallasch, 339 F.3d 530, 532 (7th Cir. 2003) “Some of the cases . . . treat the “majority” opinion in Branzburg as actually just a plurality opinion, . . . some audaciously declare that Branzburg actually created a reporter's privilege . . . [t]he approaches that these decisions take to the issue of privilege can certainly be questioned.” United States v. Smith, 135 F.3d 963, 969 (5th Cir. 1998) (“Justice Powell's separate writing only emphasizes that at a certain point, the First Amendment must protect the press from government intrusion”); U.S. v. Wuterich, 68 M.J. 511, N.M.Ct.Crim.App., August 31, 2009 (NO. NMCCA 200800183. “CBS also contends that, given his presence in the 5–4 majority, Justice Powell's concurrence in Branzburg should be seen as important in limiting the effect of the holding. CBS Brief at 22. However, “Justice Powell's concurring opinion was not an opinion of a justice who refused to join the majority” and “Justice White's opinion is not a plurality opinion of four justices joined by a separate Justice Powell to create a majority, it is the opinion of the majority of the Court” and carries the authority of such.

96 Sonja R. West, Concurring in Part & Concurring in the Confusion, 104 MICH. L. REV. 1951, (2006) citing In re Grand Jury Matter, Gronowicz, 764 F.2d 983, 990 n.2 (3d Cir. 1985) (referring to Branzburg opinion as a “plurality”); United States v. Model Magazine Distrbs., Inc. (In re Grand Jury 87-3 Subpoena Duces Tecum), 955 F.2d 229, 234 (4th Cir. 1992) (same); i. 135 F.3d 963, 968-69 (5th Cir. 1998) (same); Farr v. Pitchess, 522 F.2d 464, 467 (9th Cir. 1975) (stating that Justice White “wrote for four justices” and referring to opinion as a “plurality”). But see Scarce, 5 F.3d at 400 (“It is important to note that Justice White's opinion is not a plurality opinion.”)
If, like Branzburg, Concepcion is considered a plurality opinion, it may have very limited impact. The precedential value of a plurality opinion is determined by employing the “narrowest grounds” test announced in Marks v. United States.\(^\text{97}\) “When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.…’”\(^\text{98}\) At times, the Marks test can be applied straightforwardly, such as when four justices agree that a statute should be upheld on two different grounds and the fifth justice only believes one of those grounds is appropriate to uphold the statute.\(^\text{99}\) In that case, the ground for upholding the statute shared by the five justices constitutes the “narrowest grounds” and the precedent lower courts should follow. However, the Marks test is often difficult to apply when the rationale of the concurring opinion is not “a logical subset” of the other opinion.\(^\text{100}\)

If Justice Thomas had simply concurred without joining the putative majority opinion or if he had concurred in the judgment or concurred in the result, this would be a

\(^\text{97}\) 430 U.S. 188 (1977)
\(^\text{98}\) Id. at 193
\(^\text{99}\) See W. Jesse Weins, Note, A Problematic Precedent: Why The Supreme Court Should Leave Marks Over Van Orden v. Perry, 85 Neb. L. Rev. 830, n 39 (2007). This analysis is based on Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991), in which the plurality opinion upheld a public indecency statute because of the state’s interest in either (i) public morality or (ii) societal order (combating negative “secondary effects” like crime, disease, and urban blight). Id. at 569 (“[T]he public indecency statute furthers a substantial government interest in protecting order and morality.”). Justice Souter concurred in the judgment only, however, and concluded that the public indecency statute should be upheld only because of the state’s interest in societal order, not public morality. See id. at 582. Thus, “the opinion of Justice Souter presented the narrowest resolution of the issues in Barnes, as the plurality opinion is broad enough to encompass the standard he articulated.” Farkas v. Miller, 151 F.3d 900, 904 (8th Cir. 1998).
\(^\text{100}\) See United States v. Kratt, 579 F.3d 558, 562 (6th Cir., 2009) (Applying Marks is “easier said than done. Sometimes it is possible to identify the concurring opinion that ‘is a logical subset’ of the other opinion (or opinions). [] And sometimes it is not, making Marks an exercise in chasing the wind.”). “When … a concurrence that provides the fifth vote necessary to reach a majority does not provide a ‘common denominator’ for the judgment, the Marks rule does not help to resolve the ultimate question.” See United States v. Heron, 564 F.3d 879, 884 (7th Cir. 2009).
rather straightforward analysis under Marks. As discussed, supra, Justice Thomas expressly rejects the “purposes-and-effects” rationale that is the core of the Scalia opinion and he endorses a textual approach, which no other Justice joins. Therefore, there simply is no overlap between these opinions, let alone a “narrowest ground.”

Perhaps Branzburg provides the best guidance to this confounding situation, since it is structurally analogous (both are a 5 to 4 putative majority with one of the five necessary votes filing a simple concurrence). The courts and commentators interpreting Branzburg as a plurality did so because of Justice Powell’s “implicit” rejection of the putative majority opinion he signed. The precedent value of an opinion that lacks majority support for a controlling rationale was announced by the Supreme Court over 100 years ago.

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In Hertz v. Woodman, the Court held:

under the precedents of this court, and, as seems justified by reason as well as by authority, an affirmance by an equally divided court is, as between the parties, a conclusive determination and adjudication of the matter adjudged; but the principles of law involved not having been agreed upon by a majority of the court sitting prevents the case from becoming an authority for the determination of other cases, either in this or in inferior courts.

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Courts have married Marks and Hertz and held that “[w]hen it is not possible to discover a single standard that legitimately constitutes the narrowest ground for a decision on that issue, there is then no law of the land because no one standard commands the support of a majority of the Supreme Court.”\textsuperscript{104} The Supreme Court has actually applied this reasoning in a recent decision interpreting the FAA. In Stolt-Nielsen, the court refused to accord any precedential value to its decision in Green Tree Financial Corp. v. Bazzle because “Justice Stevens concurred in the judgment vacating and remanding because otherwise there would have been “no controlling judgment of the Court,” but he did not endorse the plurality's rationale” (emphasis added).\textsuperscript{105}

If Concepcion is not considered a plurality, and the rationale of the majority opinion is binding, this creates a form over substance conundrum. It would also be fundamentally inconsistent with Hertz and Marks and their progeny inasmuch as these decisions stand for the proposition that it takes a majority to agree on a rationale to produce binding precedent. Although Justice Thomas was clearly trying to produce settled law for lower courts to apply, his unequivocal repudiation of the majority’s

\footnotesize{\textsuperscript{104} United States v. Alcan Aluminum Corp., 315 F.3d 179, 189 (2d Cir. 2003).} \textsuperscript{105}Stolt-Nielsen v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1772 (2010) See also Ass'n of Bituminous Contractors, Inc. v. Apfel, 156 F.3d 1246, 1254-55 (D.C.Cir.1998) “We also agree with the government that Justice Kennedy's concurrence in the judgment is of no help in appellant's efforts to cobble together a due process holding from Eastern Enterprises ’ fragmented parts. We have previously held that the rule of Marks v. United States, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), under which the opinion of the Justices concurring in the judgment on the “narrowest grounds” is to be regarded as the Court's holding, does not apply unless the narrowest opinion represents a “common denominator of the Court's reasoning” and “embod[ies] a position implicitly approved by at least five Justices who support the judgment.” King v. Palmer, 950 F.2d 771, 781 (D.C.Cir.1991). Justice Kennedy's due process analysis clearly does not meet this standard because he alone was willing to invalidate economic legislation on the ground that it violated the Due Process Clause. And, as should be obvious, Justice Kennedy's due process reasoning can in no sense be thought a logical subset of the plurality's takings analysis. In short, the government is correct in stating that the only binding aspect of Eastern Enterprises is its specific result-holding the Coal Act unconstitutional as applied to Eastern Enterprises.” Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 100, (1996) (J. Souter Dissenting)"“The fault I find with the majority today is not in its decision to reexamine Union Gas, for the Court in that case produced no majority for a single rationale supporting congressional authority. Instead, I part company from the Court because I am convinced that its decision is fundamentally mistaken, and for that reason I respectfully dissent.”}
reasoning renders the putative majority rationale in Concepcion without precedential value.