Class Arbitrations Under Attack—But Survive

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There are certain indisputable benefits of commercial arbitration: knowledgeable trier of fact, quicker time to get a decision,[1] and private proceedings. There are other attributes of arbitration that some would argue are a benefit compared to litigation,[2] and others would argue are not beneficial: limited right to appeal,[3] costs,[4] limited discovery, no requirement to follow the law, no rules of evidence, limited ability to get all necessary parties in the same case.[5]

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[1]Senter Investments, L.L.C. v. Veerjee, 358 S.W.3d 841 (Tex. App. Dallas 2012); City of Huntington Woods v. Ajax Paving Industries, Inc., 177 Mich. App. 351, 441 N.W.2d 99 (1989), decision clarified on reh'g, 179 Mich. App. 600, 446 N.W.2d 331 (1989).

[2]Sussman, "Why Arbitrate? The Benefits and Savings", NYSBA Journal, October 2009.

[3]Bison Bldg. Materials, Ltd. v. Aldridge, 34 I.E.R. Cas. (BNA) 429, 2012 WL 3870493 (Tex. 2012); City of Huntington Woods v. Ajax Paving Industries, Inc., 177 Mich. App. 351, 441 N.W.2d 99 (1989), decision clarified on reh'g, 179 Mich. App. 600, 446 N.W.2d 331 (1989); Thomas Petroleum, Inc. v. Morris, 355 S.W.3d 94 (Tex. App. Houston 1st Dist. 2011), review denied, (Jan. 27, 2012) and cert. denied, 2012 WL 2116557 (U.S. 2012); Wilson v. V.F.O. Contractors, 1988 WL 94376 (Ohio Ct. App. 11th Dist. Trumbull County 1988). Note however that at least one court would not enforce an agreement for a complete waiver of appeal rights. Baugher v. Dekko Heating Technologies, 202 F. Supp. 2d 847 (N.D. Ind. 2002).

[4]More economical: Lebanon Hangar Associates, Ltd. v. City of Lebanon, 163 N.H. 670, 48 A.3d 842 (2012), as modified on denial of reconsideration, (July 13, 2012); Myer v. Americo Life, Inc., 371 S.W.3d 537 (Tex. App. Dallas 2012), reh'g overruled, (Aug. 7, 2012) and petition for review filed, (Oct. 22, 2012); Babcock v. Wallace, 2012 IL App (1st) 111090, 2012 WL 2018548 (Ill. App. Ct. 1st Dist. 2012); In re BFW Liquidation, LLC, 459 B.R. 757 (Bankr. N.D. Ala. 2011).

[5]Particularly where an affected party does not have an arbitration agreement and will not agree to join. An excellent article on issues with consolidating arbitrations is Stipanowich, Thomas, "Arbitration and the Multiparty Dispute: The Search for Workable Solutions", Vol. 72 Iowa Law Review (1987).

Class arbitrations are a relatively new phenomenon in the United States. The Federal Arbitration Act was enacted in 1925. The Federal Arbitration Act does not specifically address class arbitration.[6] "Indeed, class arbitration was not even envisioned by Congress when it passed the FAA . . ."[7] No state arbitration acts were found that specifically addressed class arbitration. However New Mexico has a statute that addresses consolidation of arbitrations,[8] which was used in a case discussed later[9] to allow a consolidated arbitration, as distinguished from a class arbitration. Virtually all construction contracts involve interstate commerce, so the Federal Arbitration Act has the greatest application to construction disputes, generally preempting state arbitration acts.[10] Rule 23 Federal Rules of Civil Procedure authorizing class actions was first enacted in 1937. It took more than 30 years after adoption of Rule 23 for the concept of class arbitration to begin showing up in reported decisions.

Courts have noted that bilateral arbitration is very different from class arbitration.[11] "Class arbitration is longer and more expensive, requires greater formality, and increases the stakes for defendants, as compared to bilateral arbitration."[12] "[t]he presumption of privacy and confidentiality that applies in many bilateral arbitrations would not apply in class arbitrations."[13] "Class arbitration sacrificed the informality of bilateral arbitration and made arbitration slower, more costly, and more procedurally complex."[14] One court said: "bilateral arbitration is preferred to class arbitration because class arbitration is inef-

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[6]9 U.S.C.A. § 9 includes "procedure" in the heading but makes no mention of class arbitration; Luchini v. Carmax, Inc., 2012 WL 3862150 (E.D. Cal. 2012).

[7]AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 at 1751, 179 L.Ed.2d 742 (2011).

[8]N. M. S. A. 1978, § 44-7A-11

[9]Lyndoe v. D.R. Horton, Inc., 2012-NMCA-103, 287 P.3d 357 (N.M. Ct. App. 2012), cert. denied, (Sept. 24, 2012).

[10]9 U.S.C.A. § 1 applying the FAA to "any other matters in foreign commerce," and then defining "commerce" as including commerce among the several states or with foreign nations.

[11]Reed v. Florida Metropolitan University, Inc., 681 F.3d 630, 280 Ed. Law Rep. 586 (5th Cir. 2012).

[12]Trompeter v. Ally Financial, Inc., 2012 WL 1980894 (N.D. Cal. 2012).

[13]Reed v. Florida Metropolitan University, Inc., 681 F.3d 630, 280 Ed. Law Rep. 586 (5th Cir. 2012). See also Reed Elsevier, Inc. v. Crockett, 2012 WL 604305 (S.D. Ohio 2012).

[14]Kinecta Alternative Financial Solutions, Inc. v. Superior Court, 205 Cal. App. 4th 506, 140 Cal. Rptr. 3d 347 (2d Dist. 2012), as modified, (May 1, 2012)

ficient, overly complex for the arbitration system, and greatly increases risk to defendants."[15] It is clear that class arbitration is more akin to litigation than bilateral arbitration with more complex procedures.

In 1971 a California court decided that it would be inappropriate to allow respondent and the other members of the class he claimed to represent to evade the terms of an agreement to arbitrate simply by bringing the action as a 'class' rather than as individuals.[16]

The first reported case discussing class arbitration found by the author was a 1975 California decision[17] where a group of investors filed a class action against a securities broker for fraud and other claims over losses. There was a margin agreement that called for arbitration of all disputes. The Plaintiffs argued successfully at the trial court that the policy of law pertaining to class actions prevailed over the policy of law favoring arbitration, and that the margin contract was an adhesion contract. On appeal the court said there was no adhesion contract. More importantly the court held that the policy of law favoring arbitration prevails over the policy of law pertaining to class actions. "A class action cannot be used to subvert an otherwise enforceable agreement to arbitrate contained in a valid contract merely because other individuals, who might qualify as members of a class, were subject to the same provision."[18] The court compelled arbitration but did not rule on whether the class action suit could proceed with the nominal plaintiffs.

In a 1977 Georgia case[19] there was no arbitration agreement. Georgia had a law that allowed arbitration of any tax assessment decisions of the tax assessor. A group of property owners sued the assessor claiming that they had a class of properties that were the only ones that were over assessed based on the assessment practices. They sought equitable relief in court rather than seeking arbitration claiming that arbitration did not give them

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and review denied, (July 11, 2012). See also Kaltwasser v. AT & T Mobility LLC, 812 F. Supp. 2d 1042 (N.D. Cal. 2011).

[15]Hawkins v. Hooters of America, Inc., 2011 WL 2648602 (D.D.C. 2011).

[16]Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 20 Cal. App. 3d 668, 97 Cal. Rptr. 811, 1971 Trade Cas. (CCH) ¶ 73748 (1st Dist. 1971).

[17]Vernon v. Drexel Burnham & Co., 52 Cal. App. 3d 706, 125 Cal. Rptr. 147 (2d Dist. 1975).

[18]Vernon v. Drexel Burnham & Co., 52 Cal.App.3d 706 at 708, 125 Cal. Rptr. 147 (Cal. App. 1975).

[19]Boynton v. Carswell, 238 Ga. 417, 233 S.E.2d 185 (1977).

an adequate remedy because they were raising questions of equal protection under the U.S. and Georgia constitutions. Plaintiffs were successful in the trial court, but the assessor board appealed. The Georgia supreme court reversed and said:

> There is no legal or practical reason why this class controversy could not be settled in a class arbitration. The issue between each member of the class in these cases and the Joint Board of Assessors is identical the over-assessment of their properties because of the method of assessment used by the Joint Board, resulting in non-uniform assessments throughout the district. If that result does come about because of the method used, it is the duty of the arbitrators to rectify such non-uniformity. Furthermore, if the taxpayers or the Board are dissatisfied with the arbitrators' decision, they have the right of appeal to the superior court. And such an appeal "shall constitute a de novo action and shall be heard before a jury . . ."[20]

In another Georgia case[21] addressing the tax assessment arbitration procedure a year later, the court declined to allow class arbitration because the Plaintiffs did not make allegations seeking class arbitration in the arbitration.

In 1981 a New York court was called upon to decide under the New York Arbitration Code[22] whether an arbitration agreement should still be enforced in view of a class action being filed. The New York court followed the reasoning in *Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*[23] holding that the policy of law favoring arbitration takes priority over the policy of law addressing class actions. However this court said that arbitration does not lend itself to the many subsidiary proceedings incident to an ongoing class action, e. g. determination of whether class action status should be granted, definition of the class, determination of the nature and kind of notice and by whom it should be sent, provision for opting out, etc. In sum, if the matter is to proceed in arbitration it must proceed as an individual claim. Class arbitration had not yet been accepted.

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[20]Id. at 419.

[21]North by Northwest Civic Ass'n, Inc. v. Cates, 241 Ga. 39, 243 S.E.2d 32 (1978).

[22]McKinney's CPLR § 7503.

[23]Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 20 Cal. App. 3d 668, 97 Cal. Rptr. 811, 1971 Trade Cas. (CCH) ¶ 73748 (1st Dist. 1971).

Two key California cases opened the door for class arbitration pursuant to agreement. In the first case,[24] a class action was filed by investors against their broker. The broker moved to compel arbitration pursuant to the all disputes arbitration clause in the customer agreements, calling for arbitration pursuant to either AAA or NYSE rules. The Plaintiffs failed to elect which rules applied so the broker chose the NYSE rules. The trial court found state law grounds to render the arbitration agreement unenforceable. The appellate court in reviewing the decision determined that the FAA took precedence over any conflicting state laws and found the agreement enforceable. The court then determined that any arbitrator selected from a NYSE panel would be potentially biased since the claims struck at the heart of universal practices in the securities industry (e.g., interest calculated on 360 day year). The court ultimately decided: "The superior court shall appoint the American Arbitration Association to arbitrate this matter. Further, it shall make such determinations as are necessary to certify the class and provide proper notices. If the class is certified, the court shall retain such supervisory jurisdiction as is necessary to safeguard the interests of the absent class members."[25]

In the second key 1986 California case[26] a class action was filed and the defendants moved to compel arbitration. The agreement called for arbitration of all disputes pursuant to AAA rules. The trial court denied the motion saying: "The Court finds that the Arbitration Clause contained in the excrow [sic] agreement does not apply to the type of action now before the Court. Further the Court is unable to find any cases in which a class action lawsuit was ordered into arbitration. In making this decision the Court is aware of the policy favoring arbitration."[27] Not finding any cases in which a class action lawsuit had been ordered to arbitration appeared to make this court uncomfortable with being a pioneer.

On appeal, arguing against arbitration, the defendants argued that not all of them had signed an agreement calling for arbitration. The court disposed of this argument noting that all

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[24]Lewis v. Prudential-Bache Securities, Inc., 179 Cal. App. 3d 935, 225 Cal. Rptr. 69 (4th Dist. 1986).

[25]Lewis v. Prudential-Bache Securities, Inc., 179 Cal.App.3d 935 at 945, 225 Cal. Rptr. 69 (Cal. App. 1986).

[26]Izzi v. Mesquite Country Club, 186 Cal. App. 3d 1309, 231 Cal. Rptr. 315 (4th Dist. 1986).

[27]Izzi v. Mesquite Country Club, 186 Cal.App.3d 1309 at 1313, 231 Cal. Rptr. 315 at 316 (Cal. App. 1986).

of the defendants joined in the motion to compel arbitration. The court noted that there was a strong public policy in favor of both arbitration and class actions. Both parties argued that class action and arbitration were incompatible. The appellate court said that the present case would appear to be an especially appropriate one for class treatment "because the individual compensatory damages claim per member is relatively small ($3,000) and is based on a standardized document subject to common proof, while the punitive damages claim is quite large ($5 million). Multiple litigation of these damage claims would be inefficient in the extreme and, in respect to individual punitive damage claims, would pose the danger of being both duplicative and cumulative."[28] Because the appellate court felt that the record was "sparse" the court ordered the case remanded to the trial court to determine if class arbitration should proceed. Effectively this court directed the trial court to consider arbitration to balance the policies in favor of arbitration and class procedure because they were aware of no compelling reason why class arbitration should not proceed. They were ready to be pioneers. Class arbitration was beginning to gain traction.

With respect to construction disputes, is class arbitration a viable procedure? The answer to this question is determined by: A) the type of dispute to be resolved, B) whether there is an arbitration agreement that would support class arbitration, and C) whether a waiver of class arbitration, if in the agreement, is enforceable or not. A small amount of damages per individual plaintiff and difficulty in finding counsel to handle an individual small matter are factors to be considered in determining whether a class remedy would be appropriate.

It has been held that the class procedure (class action or class arbitration) is "a procedure for redressing claims—and not a substantive or statutory right in and of itself."[29]

In addition to disputes involving damages the class procedure has been used to effect social reform with respect to employment conditions and discrimination. While these problems are not limited to construction, the construction community is certainly subject to the problems of employment conditions and

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[28]Izzi v. Mesquite Country Club, 186 Cal.App.3d 1309 at 1319, 231 Cal. Rptr. 315 at 322 (Cal. App. 1986).

[29]Kristian v. Comcast Corp., 446 F.3d 25 at 54 (1st Cir. 2006).

discrimination.[30] One of the bases for voiding a class arbitration waiver, as discussed below, is the inability to pursue through class arbitration the same relief that could be had absent an agreement to arbitrate.[31]

TYPE OF DISPUTE TO BE RESOLVED

Clearly the dispute to be resolved in class arbitration would be one that would otherwise be subject to a class action in litigation, i.e., an issue that would involve a large number of persons, common questions of law or fact, and typical claims and defenses. Coupling the foregoing factors with small damage individual claims enhances the desirability of class treatment with regard to damage claims.[32]

Generally in any setting, construction included, no party is anxious to be a defendant in a class action or class arbitration. With respect to construction defect claims, class arbitration has been used to efficiently resolve such disputes.[33]

As a variation to class arbitration a New Mexico court allowed a consolidated arbitration of multiple claims pursuant to its consolidation of arbitrations statute.[34] These are often also called collective arbitrations. In the New Mexico case plaintiffs sued a home builder and other defendants seeking damages and rescission, alleging that they had construction defects in their homes.

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[30]Note that 9 U.S.C.A § 1 expressly does not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." This has been interpreted to mean "transportation workers." See Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234, 85 Fair Empl. Prac. Cas. (BNA) 266, 17 I.E.R. Cas. (BNA) 545, 79 Empl. Prac. Dec. (CCH) P 40401, 143 Lab. Cas. (CCH) P 10939 (2001). However the courts have been interpreting contracts evidencing a transaction involving interstate commerce very broadly. See e.g., Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995); Jenkins v. First American Cash Advance of Georgia, LLC, 400 F.3d 868, R.I.C.O. Bus. Disp. Guide (CCH) P 10843, 13 A.L.R.6th 767 (11th Cir. 2005).

[31]Schatz v. Cellco Partnership, 842 F. Supp. 2d 594 (S.D. N.Y. 2012); Delano v. Mastec, Inc., 2010 WL 4809081 (M.D. Fla. 2010).

[32]Blessing v. Sirius XM Radio Inc., 2011-1 Trade Cas. (CCH) ¶ 77468, 2011 WL 1194707 (S.D. N.Y. 2011); In re Prudential Ins. Co. of America Sales Practices Litigation, 962 F. Supp. 450 (D.N.J. 1997), aff'd, 148 F.3d 283, 41 Fed. R. Serv. 3d 596 (3d Cir. 1998); Blessing v. Sirius XM Radio Inc., 2011-1 Trade Cas. (CCH) ¶ 77468, 2011 WL 1194707 (S.D. N.Y. 2011).

[33]See e.g., AAA Case Arbitration Docket—Wolf v. Lakewood Homes, Inc. Many cases in the AAA Case Arbitration

[34]Lyndoe v. D.R. Horton, Inc., 2012-NMCA-103, 287 P.3d 357 (N.M. Ct. App. 2012), cert. denied, (Sept. 24, 2012).

Plaintiffs also asked the court to compel the home builder to "litigate" their claims in a consolidated arbitration in accordance with Section 44-7A-11 of the New Mexico Uniform Arbitration Act. The home builder acknowledged the arbitration clause in the agreements but argued that there should be separate arbitrations. It further argued that ordering a consolidated arbitration was tantamount to class arbitration without the safeguards of a class procedure. The court noted a significant difference in that the consolidated arbitrations could only adjudicate the rights of the parties to the proceedings, and not absent parties. The case was ordered to consolidated arbitration.[35]

In a New York case a group of more than 700 pilots filed a single demand for arbitration of the alleged breach of the employment contract with the pilots. The airline filed a motion in court to compel individual arbitrations. The court determined that the arbitrator had the jurisdiction to determine whether the arbitration should proceed as a collective or consolidated arbitration. The court did not have jurisdiction to make that procedural determination.[36]

With an arbitration clause that is silent as to class arbitration is there authority to have class arbitration; and if so, who decides that issue?

Generally the question of whether an arbitration agreement forbids consolidated arbitration is a procedural one, and is therefore for the arbitrator to resolve.[37] In a 2012 case from the Federal First Circuit, the court was asked to decide whether the following arbitration clause authorized class arbitration: "any controversy or claim arising out of or relating in any way to this Agreement or with regard to its formation, interpretation or breach shall be settled by arbitration". The appellate court ultimately decided that the arbitrator was empowered to decide whether class arbitration was authorized.[38] "Silence regarding class arbitration generally indicates a prohibition against class arbitration, but the actual determination as to whether class ac-

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[35]Lyndoe v. D.R. Horton, Inc., 2012-NMCA-103, 287 P.3d 357 (N.M. Ct. App. 2012), cert. denied, (Sept. 24, 2012).

[36]JetBlue Airways Corp. v. Stephenson, 88 A.D.3d 567, 931 N.Y.S.2d 284 (1st Dep't 2011).

[37]Employers Ins. Co. of Wausau v. Century Indem. Co., 443 F.3d 573 (7th Cir.2006). See also Sutter v. Oxford Health Plans LLC, 675 F.3d 215 (3d Cir. 2012), as amended, (Apr. 4, 2012) and petition for cert. filed, 81 U.S.L.W. 3070 (U.S. July 27, 2012).

[38]Fantastic Sams Franchise Corp. v. FSRO Ass'n Ltd., 683 F.3d 18 (1st Cir. 2012). See

tion is prohibited is a question of interpretation and procedure for the arbitrator."[39]

However one New York court said: "Even though question of whether an employment agreement forbids class arbitration was generally one properly left to arbitrator, court, rather than arbitrator, would decide issue of whether employment contract between female executive and her investment banking employer forbade class arbitration of gender discrimination claim under Title VII, where both parties were in agreement that court was appropriate forum for resolution of dispute, dispute fit within narrow circumstances where contracting parties would likely have expected court to have decided gateway matter, and balance of dispute was over whether parties had agreed to submit class action claims to arbitration."[40]

WHETHER THE ARBITRATION AGREEMENT SUPPORTS CLASS ARBITRATION

An arbitration agreement or clause that expressly provides for class arbitration would be rare. The author has never seen one. Typically the parties have agreed to an arbitration clause that provides that arbitration will be used to decide either specific, or all, disputes without reference to use of class arbitration. The agreement may provide for arbitration pursuant to JAMS, AAA, or other rules. One case noted that commentators and AAA arbitral tribunals have consistently concluded that consent to any of the AAA's substantive rules also constitutes consent to the Supplementary Rules.[41] However, JAMS procedures Rule 2 says: "In construing the applicable arbitration clause, the Arbitrator shall not consider the existence of these Supplementary Rules to be a factor either in favor of or against permitting the arbitration to proceed on a class basis." The same provision is found in Rule 3 of the AAA Class Arbitration rules. Thus the inclusion of either the AAA or JAMS rules is not a factor in determining the intent of the parties to agree to class arbitration. AAA Class Arbitration Rule 12 a) provides that no judicial proceeding initiated by a party relating to a class arbitration shall be deemed a waiver of the party's right to arbitrate.

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[39]Quilloin v. Tenet HealthSystem Philadelphia, Inc., 673 F.3d 221, 18 Wage & Hour Cas. 2d (BNA) 1563 (3d Cir. 2012). See also Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010)

[40]Chen-Oster v. Goldman, Sachs & Co., 785 F. Supp. 2d 394, 112 Fair Empl. Prac. Cas. (BNA) 382 (S.D. N.Y. 2011).

[41]Reed v. Florida Metropolitan University, Inc., 681 F.3d 630, 280 Ed. Law Rep. 586 (5th Cir. 2012).

Interestingly enough, the attack on class arbitration has come from both the defendants and the class plaintiffs. Defendants seek to compel arbitration on a bilateral basis where a class action is filed. In other cases plaintiffs have attacked the arbitration clause in an attempt to hold the entire arbitration agreement unenforceable so that they may proceed in court with a class action.

One 2012 study[42] addressed the impact of the availability of class procedure and noted that perhaps bad press or public relations may be just as effective as class relief with respect to corporate responsibility in resolving employment and discrimination issues. There was not unanimity of agreement on this issue in the report. It would seem that facing an enforceable class decision may be at least as effective in producing social reform as public opinion and reputation alone.

The AAA Supplementary Rules for Class Arbitration were adopted in 2003. The JAMS Class Action Procedures were adopted in 2009. In some earlier cases (1990's) where class arbitration was sought but the arbitration agreements were silent as to class arbitration, the courts looked to cases that addressed consolidation of arbitration for guidance and generally found that an agreement that was silent as to class arbitration did not authorize class arbitration.[43]

In 2000 the Federal Third Circuit was faced with a motion to compel arbitration in a class action seeking relief under the Truth in Lending and Electronic Fund Transfer Act.[44] The Truth in Lending Act has a provision that addresses recovery of damages in class actions.[45] The Plaintiff, arguing against arbitration and in favor of the class action, took the position that since the statute expressly referred to a limit on damage recovery in class actions that the statute was inconsistent with a duty to arbitrate. The court said "we note our belief that the public interest

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[42]Thomas J. Stipanowich, Nancy Walsh, Lisa Blomgren Bingham, & Lawrence R. Mills, "National Roundtable on Consumer and Employment Dispute Resolution: Consumer Arbitration Roundtable Summary Report", Pepperdine University School of Law Legal Studies Research Paper Series, Paper Number 2012/22 (2012).

[43]Gammaro v. Thorp Consumer Discount Co., 828 F. Supp. 673 (D. Minn. 1993); McCarthy v. Providential Corp., 1994 WL 387852 (N.D. Cal. 1994); Champ v. Siegel Trading Co., Inc., 55 F.3d 269, R.I.C.O. Bus. Disp. Guide (CCH) P 8808, 31 Fed. R. Serv. 3d 1187 (7th Cir. 1995).

[44]Johnson v. West Suburban Bank, 225 F.3d 366, 48 Fed. R. Serv. 3d 168 (3d Cir. 2000).

[45]15 U.S.C.A. § 1640(a)(1)(B).

purposes behind the civil penalty provisions of the statutes are not in conflict with arbitration, even if arbitration clauses may prevent the bringing of class actions."[46] The Plaintiffs did not appear to argue in favor of class arbitration, likely because there was no mention of class arbitration in the agreement, but the court addressed the issue in discussion. The court noted that class arbitration appeared to be impossible "unless the arbitration agreement contemplates such a procedure."

In 2003 the U.S. Supreme Court decided *Green Tree Financial Corp. v. Bazzle.*[47] In that case between a lender and homeowners, the arbitration clause said:

> "ARBITRATION-All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract . . . shall be resolved by binding arbitration by one arbitrator selected by us with consent of you. This arbitration contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. section 1 . . . The parties agree and understand that the arbitrator shall have all powers provided by the law and the contract. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief."[48]

The underlying case went to the South Carolina Supreme Court first, who held that where the arbitration clauses were silent as to whether arbitration might take the form of class arbitration, South Carolina law interpreted the contracts as permitting class arbitration.[49]

At the U.S. Supreme Court the lender took the position that the arbitration clause prohibited class arbitration because the lender did not select the ultimate class arbitrator to arbitrate one dispute with the consent of the one other party. The homeowners took the position that the clause was subject to interpretation by the arbitrator. The arbitrator ruled in favor of class arbitration and the lender appealed. The U.S. Supreme Court ultimately held that 1) The clause was not a clear prohibition against class arbitration, and 2) the interpretation of the clause was an issue

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[46]Johnson v. West Suburban Bank, 225 F.3d 366 at 369 (3rd Cir. 2000)

[47]Green Tree Financial Corp. v. Bazzle, 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414, 91 Fair Empl. Prac. Cas. (BNA) 1832, 148 Lab. Cas. (CCH) P 59739 (2003).

[48]539 U.S. at 448 (2003).

[49]Bazzle v. Green Tree Financial Corp., 351 S.C. 244, 569 S.E.2d 349 (2002), judgment vacated, 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414, 91 Fair Empl. Prac. Cas. (BNA) 1832, 148 Lab. Cas. (CCH) P 59739 (2003).

for the arbitrator.[50] The court noted that this issue was not whether the parties wanted a judge or an arbitrator to decide the matter, the issue was what type of arbitration was to occur. Thus this was a question for the arbitrator.

In 2010 a landmark case on class arbitration came from the U.S. Supreme Court, *Stolt-Nielsen S.A. v. AnimalFeeds International Corp*.[51] In that case the court said: "The differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the Federal Arbitration Act (FAA), that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings."[52]

The case was originally filed in court as an antitrust case, and went on appeal with the conclusion that the antitrust claim was subject to the arbitration agreement. Because the case was consolidated with other cases the parties agreed to submit the question whether their arbitration agreement allowed for class arbitration to a panel of arbitrators, who would be bound by rules (Class Rules) developed by the American Arbitration Association. The parties selected an arbitration panel, and stipulated that their arbitration clause was "silent" on the class arbitration issue. The arbitration panel determined that the arbitration clause allowed for class arbitration, but the District Court vacated the award. It concluded that the arbitrators' award was made in "manifest disregard" of the (maritime) law. The second circuit found no manifest disregard of the law, and the case went to the U.S. Supreme Court, which held that that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. Arbitration is a consensual remedy. The court said in this case that the arbitration panel imposed class arbitration despite the parties' stipulation that they had reached "no agreement" on that issue. "The panel's conclusion is fundamentally at

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[50]See also Brookdale Sr. Living, Inc. v. Dempsey, 2012 WL 1430402 (M.D. Tenn. 2012); Smith v. The Cheesecake Factory Restaurants, Inc., 2010 WL 4789947 (M.D. Tenn. 2010); Guida v. Home Savings of America, Inc., 793 F. Supp. 2d 611 (E.D. N.Y. 2011); Fisher v. General Steel Domestic Sales, LLC, 2010 WL 3791181 (D. Colo. 2010); Hesse v. Sprint Spectrum L.P., 2012 WL 529419 (W.D. Wash. 2012).

[51]Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 130 S. Ct. 1758, 176 L. Ed. 2d 605, 93 Empl. Prac. Dec. (CCH) P 43878, 2010-1 Trade Cas. (CCH) ¶ 76982, 2010 A.M.C. 913 (2010).

[52]Stolt-Nielsen S.A. v. AnimalFeeds International Corp. 130 S.Ct. 1758 at 1760 (2010).

war with the foundational FAA principle that arbitration is a matter of consent. It may be appropriate to presume that parties to an arbitration agreement implicitly authorize the arbitrator to adopt those procedures necessary to give effect to the parties' agreement, but an implicit agreement to authorize class action arbitration is not a term that the arbitrator may infer solely from the fact of an agreement to arbitrate."[53]

The *Stolt-Nielsen* case has been applied differently in subsequent cases. It has been universally concluded that *Stolt-Nielsen* holds that silence about class arbitration in the arbitration clause does not of itself authorize class arbitration. In a later case the U.S. Supreme Court looked at its *Stolt-Nielson* decision and said:[54]

> "[W]e held that an arbitration panel exceeded its power under § 10(a)(4) of the FAA by imposing class procedures based on policy judgments rather than the arbitration agreement itself or some background principle of contract law that would affect its interpretation. We then held that the agreement at issue, which was silent on the question of class procedures, could not be interpreted to allow them because the 'changes brought about by the shift from bilateral arbitration to class-action arbitration' are 'fundamental.' This is obvious as a structural matter: Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties."

Two later California cases found that the language of the arbitration agreement did not support class arbitration. One case said that where the agreement a) was silent as to class arbitration, and b) only covered disputes between the two nominal parties only, that the agreement would not authorize class arbitration.[55] In the second case the arbitration clause said that there would be arbitration only of "any claim, dispute, and/or controversy that either I may have against the Credit Union (or its owners, directors, officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans) or the Credit Union may have against me, arising from, related to,

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[53]130 S.Ct. 1758 at 1763 (2010).

[54]AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740 at 1750, 179 L.Ed.2d 742 (2011).

[55]Nelsen v. Legacy Partners Residential, Inc., 207 Cal. App. 4th 1115, 144 Cal. Rptr. 3d 198 (1st Dist. 2012), as modified on denial of reh'g, (Aug. 14, 2012) and review denied, (Oct. 31, 2012).

or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the Credit Union[.]"[56] The court concluded that the parties did not agree to authorize class arbitration in their arbitration agreements.[57]

However some later cases have held that the arbitrator has the authority to determine that the parties intended by other indicia to agree to class arbitration. "Although the agreement to submit to class arbitration may be implicit, it should not be lightly inferred."[58] "Class arbitration is thus permissible only if both parties agree. Put another way, a party cannot be compelled to arbitrate class claims unless something in the contract indicates, at least implicitly, that it agreed to permit class arbitration."[59] And still other cases described below have held that the arbitrator exceeds his/her authority in ordering class arbitration where the agreement is silent on the issue.[60]

Cases holding that the arbitrator has the authority to decide whether the parties agreed to class arbitration include:

In *Sutter v. Oxford Health Plans LLC*[61] the third circuit held that "*Stolt-Nielsen* did not establish a bright line rule that class arbitration is allowed only under an arbitration agreement that incants 'class arbitration' or otherwise expressly provides for aggregate procedures." In the *Sutter* case the arbitrator determined that the language in the contract that no civil action concerning any dispute arising under this agreement shall be instituted before any court was broad enough to authorize class arbitration.

In a 2011 decision deciding an employment dispute claimants were four current and former employees. The employer and each Claimant were parties to a dispute resolution agreement ("DRA") that provided for binding arbitration of claims between employer

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[56]Kinecta Alternative Financial Solutions, Inc. v. Superior Court, 205 Cal. App. 4th 506, 140 Cal. Rptr. 3d 347 (2d Dist. 2012), as modified, (May 1, 2012) and review denied, (July 11, 2012).

[57]Kinecta Alternative Financial Solutions, Inc. v. Superior Court, 205 Cal. App. 4th 506, 140 Cal. Rptr. 3d 347, 357 (2d Dist. 2012), as modified, (May 1, 2012) and review denied, (July 11, 2012).

[58]Reed v. Florida Metropolitan University, Inc., 681 F.3d 630 at 640, (5th Cir. 2012).

[59]Karp v. CIGNA Healthcare, Inc., 2012 WL 1358652 (D. Mass. 2012).

[60]Reyes v. Liberman Broadcasting, Inc., 208 Cal. App. 4th 1537, 146 Cal. Rptr. 3d 616 (2d Dist. 2012), review filed, (Oct. 11, 2012).

[61]675 F.3d 215 at 222 (3rd Cir. 2012). See also Fantastic Sams Franchise Corp. v. FSRO Ass'n Ltd., 683 F.3d 18 (1st Cir. 2012).

and its employees arising out of their employment. The Claimants filed a demand for arbitration with the AAA. In a document styled "Class Action Complaint," they alleged that the employer violated the Fair Labor Standards Act ("FLSA") and state wage laws. The arbitrator issued a "class construction award" essentially determining that the agreement was broad enough to support class arbitration, although "class arbitration" was not addressed expressly in the agreement. The employer moved to vacate the award arguing *Stolt-Nielsen*. The court said that in *Stolt-Nielsen* "the parties stipulated that there was 'no agreement' on the issue of class-action arbitration." . . . Here, there was no such stipulation and, thus, the arbitrator was authorized "to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration." The arbitrator ruled that the parties intended that class-action claims and relief were contemplated and permitted by the agreement and the appellate court concluded that the language of the agreement supported such a ruling.[62]

In a case submitted to arbitration the plaintiffs asked the arbitrator to "find that the arbitration agreements at issue permit class arbitration. The parties agreed to disagree about whether the arbitration agreement permitted class arbitration. Unlike *Stolt-Nielsen,* the parties did not stipulate that the agreement was "silent" as to class arbitration. Once the arbitrator made the interpretation that the agreement authorized class arbitration the award was not subject to vacatur. The issue was decided by the arbitrator and could not be overturned based on the legal interpretation of the arbitrator.[63]

An Ohio case held that the arbitrator's partial final award construing the arbitration agreement and finding no support for class arbitration was upheld on appeal. The argument to overturn the award was that there was a manifest disregard of the law, which the reviewing court did not find persuasive.[64]

Cases holding that the arbitrator does not have the authority to order class arbitration based on silence in the arbitration clause include:

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[62]Smith & Wollensky Restaurant Group, Inc. v. Passow, 831 F. Supp. 2d 390 (D. Mass. 2011).

[63]Jock v. Sterling Jewelers Inc., 646 F.3d 113, 112 Fair Empl. Prac. Cas. (BNA) 1137, 94 Empl. Prac. Dec. (CCH) P 44222 (2d Cir. 2011), cert. denied, 132 S. Ct. 1742, 182 L. Ed. 2d 529, 114 Fair Empl. Prac. Cas. (BNA) 960 (2012).

[64]Webster v. Freedom Debt Relief, LLC, 2012 WL 4461522 (N.D. Ohio 2012).

A case in which the defendant moved to strike the class arbitration allegations, where the reviewing court said: "Given the Supreme Court's subsequent determination in *Stolt-Nielsen* that a party may not be compelled to submit a dispute to class arbitration where there is no agreement to do so, the Court recommends that the motion to strike class allegations be GRANTED."[65]

In one case a franchisor had agreements with franchisees, some of which had a prohibition against class arbitration and some of which did not. The court allowed class arbitration as to only those franchisees whose agreements did not contain a prohibition against class arbitration.[66]

WAIVER OF CLASS ACTION ARBITRATION IN THE ARBITRATION AGREEMENT

Remember the *Stolt-Nielson* case discussed above? Remember that arbitration is a matter of agreement and consent? Well, agreement and consent is apparently the guiding polestar with respect to the issue of whether there is agreement to arbitrate or litigate. Consent to class arbitration has not been considered as important in some cases as it is with the issue of whether there is an agreement to arbitrate rather than litigate. As we will see in most of the following cases, where there is a clear expression in the arbitration agreement that class arbitration is prohibited, courts have found that if class arbitration is a more effective method to resolve disputes the court may choose to avoid the class arbitration prohibition as being in contravention of the Federal Arbitration Act,[67] or as being unconscionable as applied.

In 2005 the California Supreme Court decided *Discover Bank v. Superior Court*,[68] which held: (1) waiver of class arbitration in a consumer contract of adhesion is unconscionable under certain circumstances and should not be enforced, and (2) prohibition of class action waivers in arbitration agreements is not preempted by the Federal Arbitration Act (FAA). Several cases have

[65]Eshagh v. Terminix Intern. Co. L.P., 2012 WL 1669416 (E.D. Cal. 2012).

[66]Fantastic Sams Franchise Corp. v. FSRO Ass'n Ltd., 683 F.3d 18 (1st Cir. 2012).

[67]Truly Nolen of America v. Superior Court, 208 Cal. App. 4th 487, 145 Cal. Rptr. 3d 432, 162 Lab. Cas. (CCH) P 61278 (4th Dist. 2012).

[68]Discover Bank v. Superior Court, 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 (2005) (abrogated by, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 179 L. Ed. 2d 742, 161 Lab. Cas. (CCH) P 10368 (2011)).

advanced the unconscionability argument but failed in proof.[69] The determination of unconscionability of an arbitration clause is a matter of the governing state law except to the extent the state law conflicts with the FAA.[70] It has been held that an arbitration clause that precluded class arbitration was not ipso facto unconscionable.[71] However with proof that it is economically unfeasible to process small claims, and/or to hire counsel to handle such individual claims, a waiver of class arbitration may be found to be unconscionable.[72]

While unconscionability is not limited by simple definition, a federal ninth circuit case[73] applying California law has described procedural and substantive unconscionability in rather simple terms: "When assessing procedural unconscionability of a contract

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[69]Hill v. Wackenhut Services Intern., 865 F. Supp. 2d 84 (D.D.C. 2012); Quilloin v. Tenet HealthSystem Philadelphia, Inc., 673 F.3d 221, 18 Wage & Hour Cas. 2d (BNA) 1563 (3d Cir. 2012); In re Sprint Premium Data Plan Marketing and Sales Practices Litigation, 2012 WL 847431 (D.N.J. 2012); Vernon v. Qwest Communications Intern., Inc., 857 F. Supp. 2d 1135 (D. Colo. 2012); Hayes v. County Bank, 26 A.D.3d 465, 811 N.Y.S.2d 741 (2d Dep't 2006); Cottonwood Financial, Ltd. v. Estes, 2012 WI App 12, 339 Wis. 2d 472, 810 N.W.2d 852 (Ct. App. 2012).

[70]Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996); Hafer v. Vanderbilt Mortg. and Finance, Inc., 793 F. Supp. 2d 987 (S.D. Tex. 2011); Continental Petroleum Corp., Inc. v. Corporation Funding Partners, LLC, R.I.C.O. Bus. Disp. Guide (CCH) P 12219, 2012 WL 1231775 n.5 (S.D. N.Y. 2012); Schatt v. Aventura Limousine & Transp. Service, Inc., 2010 WL 4942654 (S.D. Fla. 2010); Beachum v. Phillips, 2009 WL 3269047 (S.D. W. Va. 2009).

[71]Vernon v. Qwest Communications Intern., Inc., 857 F. Supp. 2d 1135 (D. Colo. 2012); Enderlin v. XM Satellite Radio Holdings, Inc., 2008 WL 830262, *13 (E.D. Ark. 2008); Hayes v. County Bank, 26 A.D.3d 465, 811 N.Y.S.2d 741 (2d Dep't 2006).

[72]Tillman v. Commercial Credit Loans, Inc., 362 N.C. 93, 655 S.E.2d 362 (2008); Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 161, 94 S. Ct. 2140, 40 L. Ed. 2d 732, 9 Fair Empl. Prac. Cas. (BNA) 1302, 7 Empl. Prac. Dec. (CCH) P 9374A, Fed. Sec. L. Rep. (CCH) P 94570, 1974-1 Trade Cas. (CCH) ¶ 75082, 18 Fed. R. Serv. 2d 877, 4 Envtl. L. Rep. 20513 (1974); Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617, 117 S. Ct. 2231, 138 L. Ed. 2d 689, 37 Fed. R. Serv. 3d 1017, 28 Envtl. L. Rep. 20173 (1997); Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper, 445 U.S. 326, 338, 100 S. Ct. 1166, 63 L. Ed. 2d 427, 29 Fed. R. Serv. 2d 1 (1980); Carnegie v. Household Intern., Inc., 376 F.3d 656, 661, R.I.C.O. Bus. Disp. Guide (CCH) P 10706 (7th Cir. 2004); Goodridge v. KDF Automotive Group, Inc., 209 Cal. App. 4th 325, 147 Cal. Rptr. 3d 16 (4th Dist. 2012), review filed, (Oct. 23, 2012).

[73]Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 87 Fair Empl. Prac. Cas. (BNA) 1509, 18 I.E.R. Cas. (BNA) 773, 82 Empl. Prac. Dec. (CCH) P 40936 (9th Cir. 2002).

under California law, a court will consider the equilibrium of bargaining power between the parties and the extent to which the contract clearly discloses its terms." "A determination of substantive unconscionability of a contract under California law involves whether the terms of the contract are unduly harsh or oppressive."[74] Where the court finds a provision unconscionable the court may refuse to enforce the contract, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.[75] Some courts have held that the key inquiry in determining whether to sever or restrict unconscionable contract terms, rather than voiding the entire contract, is whether the interests of justice would be furthered by severance.[76]

In California where there is an arbitration provision containing an express class action waiver, the opponent of the waiver has the evidentiary burden to make a factual showing of four factors to invalidate the class action waiver provision. The factors include the modest size of the potential individual recovery, the potential for retaliation against members of the class, the fact that absent members of the class may be ill informed about their rights, and other real world obstacles to the vindication of class members' rights to overtime pay through individual arbitration.[77]

In a 2012 Missouri case where the court found a class arbitration clause unconscionable the court found that a) the arbitration clause was non-negotiable and difficult for the average consumer to understand, b) the terms of the agreement were extremely one-sided and the lender did not waive its right to seek attorney's fees, c) no borrower had ever arbitrated a claim against the lender under such terms, d) expert testimony established that it was unlikely a borrower could retain counsel to pursue individual claims, e) the clause bound the borrower to individual arbitration for all claims but reserved the lender's right to forego arbitration

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[74]Ibid.

[75]Armendariz v. Foundation Health Psychcare Services, Inc., 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669, 83 Fair Empl. Prac. Cas. (BNA) 1172, 78 Empl. Prac. Dec. (CCH) P 40202 (2000).

[76]Ibid.

[77]Brown v. Ralphs Grocery Co., 197 Cal. App. 4th 489, 128 Cal. Rptr. 3d 854, 18 Wage & Hour Cas. 2d (BNA) 1812 (2d Dist. 2011), as modified, (July 20, 2011) and review denied, (Oct. 19, 2011) and cert. denied, 132 S. Ct. 1910, 182 L. Ed. 2d 771, 18 Wage & Hour Cas. 2d (BNA) 1920 (2012); Kinecta Alternative Financial Solutions, Inc. v. Superior Court, 205 Cal.App.4th 506 at 510, 140 Cal.Rptr.3d 347 (Cal. App. 2012); See also Gentry v. Superior Court, 42 Cal. 4th 443, 64 Cal. Rptr. 3d 773, 165 P.3d 556, 13 Wage & Hour Cas. 2d (BNA) 722, 154 Lab. Cas. (CCH) P 60475 (2007), which was decided prior to *Concepcion*.

to seek possession of collateral in event of default, and f) the agreement did not provide for informal complaint resolution.[78]

The federal ninth circuit interpreting Washington law found a waiver of class arbitration clause unconscionable in a consumer contract for denying any meaningful remedy, since it unilaterally and severely limited remedies of only one side. The agreement was particularly one sided in that it did not require arbitration of claims to collect unpaid charges but required arbitration of all other disputes, and prohibited both punitive damages and class arbitration.[79] In most cases mentioned herein where the courts found the only basis for substantive unconscionability to be the waiver of class arbitration, that provision was severed and the case was permitted to proceed on the individual claim.

In 2010 the U.S. Supreme Court decided *AT&T Mobility LLC v. Concepcion.*[80] While both the *Discover Bank* case and the *Concepcion* case found waiver of class arbitration clauses avoidable, *Concepcion* effectively overruled *Discover* Bank with regard to the issue of federal preemption, holding that a waiver of class arbitration in an arbitration agreement is unenforceable as being in contravention of the Federal Arbitration Act (in preference to any state law grounds).[81] Further, *Concepcion* held that a waiver of class arbitration is an issue that may be addressed by the court rather than the arbitrator.[82]

In the *Concepcion* case Justice Scalia wrote that the Federal Arbitration Act preempts California's judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts. The court said: "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."

On the other hand, where enforcement of the arbitration clause with a class action waiver would run afoul of federal law, e.g., ef-

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[78]Brewer v. Missouri Title Loans, 364 S.W.3d 486 (Mo. 2012), cert. denied, 2012 WL 2028610 (U.S. 2012). See also Robinson v. Title Lenders, Inc., 364 S.W.3d 505 (Mo. 2012).

[79]Lowden v. T-Mobile USA, Inc., 512 F.3d 1213 (9th Cir. 2008).

[80]AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 179 L. Ed. 2d 742, 161 Lab. Cas. (CCH) P 10368 (2011).

[81]In re American Exp. Merchants' Litigation, 667 F.3d 204 (2d Cir. 2012), cert. granted, 2012 WL 3096737 (U.S. 2012); In re American Exp. Merchants' Litigation, 681 F.3d 139, 2012-1 Trade Cas. (CCH) ¶ 77910 (2d Cir. 2012); Coneff v. AT & T Corp., 673 F.3d 1155 (9th Cir. 2012).

[82]AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 179 L. Ed. 2d 742, 161 Lab. Cas. (CCH) P 10368 (2011); Reed Elsevier, Inc. v. Crockett, 2012 WL 604305 (S.D. Ohio 2012).

fectively precluding federal anti-trust relief, the arbitration clause with class action waiver has not been enforced.[1] The Second Circuit said in 2012: "Thus, as the class action waiver in this case precludes plaintiffs from enforcing their statutory rights,[2] we find the arbitration provision unenforceable."[3] The court concluded with "if plaintiffs cannot pursue their allegations of antitrust law violations as a class, it is financially impossible for the plaintiffs to seek to vindicate their federal statutory rights. Since the plaintiffs cannot pursue these claims as class arbitration, either they can pursue them as judicial class action or not at all." The U.S. Supreme Court accepted certiorari review of this case in November, 2012.[4]

In New Jersey a federal court has applied the *Concepcion* in the converse holding that: a state law that seeks to impose class arbitration despite a contractual agreement for individualized arbitration is inconsistent with, and therefore preempted by, the FAA, irrespective of whether class arbitration is desirable for unrelated reasons. The court held that the arbitration clause must be enforced according to its terms, which requires individual arbitration and forecloses class arbitration.[83]

Some have argued successfully that the *Concepcion* case was the death knell for waivers of class arbitration.[84] Other courts have not found *Concepcion* conclusive on avoiding class action waivers. Effectively the courts have interpreted *Concepcion* along the lines that it if class arbitration is a more effective way to resolve the dispute, then the class action waiver must give deference to the Federal Arbitration Act, "ensuring the enforcement of

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[1]In re American Exp. Merchants' Litigation, 681 F.3d 139, 2012-1 Trade Cas. (CCH) ¶ 77910 (2d Cir. 2012); In re American Exp. Merchants' Litigation, 667 F.3d 204 (2d Cir. 2012), cert. granted, 2012 WL 3096737 (U.S. 2012)

[2]Under the Clayton Act, 15 U.S.C. § 1 et seq.

[3]In re American Exp. Merchants' Litigation, 667 F.3d 204, 218 (2d Cir. 2012), cert. granted, 2012 WL 3096737 (U.S. 2012).

[4]American Exp. Co. v. Italian Colors Restaurant, 2012 WL 3096737 (U.S. 2012).

[83]Litman v. Cellco Partnership, 655 F.3d 225 (3d Cir. 2011), cert. denied, 132 S. Ct. 1046, 181 L. Ed. 2d 741 (2012).

[84]Arellano v. T-Mobile USA, Inc., 2011 WL 1842712 (N.D. Cal. 2011). See also Link and Bales, "Waving Rights Goodbye: Class Action Arbitration Waivers after Stolt-Nielson v. Animalfeeds International", Pepperdine Dispute Resolution Law Journal, Volume 11, 2011.

arbitration agreements according to their terms so as to facilitate streamlined proceedings."[85]

Going a little farther with the *AT&T* case a California court has said "Based on *AT&T*'s reasoning, we conclude the FAA likewise precludes a state law that disfavors arbitration of a particular type of claim (e.g., consumer contract dispute) when arbitration of other types of disputes is not so disfavored."[86] The Ninth Circuit has also used the Federal Arbitration Act to preempt state law.[87]

In a later case interpreting *Concepcion*, the Missouri Supreme Court said:[88]

> *Concepcion*, however, does not require that courts simply must declare that an arbitration agreement containing a class waiver is enforceable. Concepcion reiterates that courts assessing the enforceability of an arbitration agreement must continue to consider the enforceability of an arbitration agreement in light of the (FAA) section 2 "saving clause." Such, arbitration agreements are tested through a lens of ordinary state-law principles that govern contracts, and consideration is given to whether the arbitration agreement is improper in light of generally applicable contract defenses. . . . An arbitration agreement could be declared unenforceable if a generally applicable contract defense, such as fraud, duress, or unconscionability, applied to concerns raised about the agreement.

In *Baldwin v. Regions Financial Corp.*[89] an agreement contained an arbitration clause and a class arbitration waiver. The arbitration clause also provided: If any part of the arbitration clause, other than waivers of class action rights, is deemed or found to be unenforceable for any reason, the remainder shall be enforceable. A party brought a class action for violation of the state's collection practices law. The defendant moved to compel bilateral (rather than class) arbitration based on the agreement. The Florida court noted that holding a contractual provision unenforceable because it defeats the remedial provisions of a statute, and is thus contrary to public policy (which is what the

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[85]AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 179 L. Ed. 2d 742, 161 Lab. Cas. (CCH) P 10368 (2011).

[86]Goodridge v. KDF Automotive Group, Inc., 209 Cal. App. 4th 325, 147 Cal. Rptr. 3d 16 (4th Dist. 2012), review filed, (Oct. 23, 2012).

[87]Kilgore v. KeyBank, Nat. Ass'n, 673 F.3d 947 (9th Cir. 2012), reh'g en banc ordered, 697 F.3d 1191 (9th Cir. 2012).

[88]Robinson v. Title Lenders, Inc., 364 S.W.3d 505 at 515 (Mo. 2012).

[89]Baldwin v. Regions Financial Corp., 2012 WL 4094147 (Fla. 3d DCA 2012).

plaintiff pleaded), is distinct from finding unconscionability.[90] The plaintiff did not claim unconscionability. The court found that the class action waiver did not defeat the remedial provisions of the statute. The trial court's ruling of ordering the case to bilateral arbitration was upheld on appeal.

In another 2012 case an arbitration clause said: "any arbitration between FSFC and [the regional licensee] shall be of [regional licensee's] individual claim only" and "[n]o arbitration shall be conducted on a class-wide basis." The Federal First Circuit said that the waiver of class arbitration clause demonstrated no agreement to have class arbitration and thus did not order class arbitration of disputes arising under those agreements.[91]

In a case arising out of New Jersey where claims were made on title insurance policies, the court was faced with reconsideration of an earlier order that it had made ordering the parties to bilateral arbitration. On reconsideration, while noting that the court had found nothing to support an intention to allow class arbitration in making its initial decision, the court receded on rehearing and while still ordering the case to arbitration, decided that it should be the arbitrator to interpret the agreement to see if class arbitration should be permitted.[92] Of course it would take a very brave arbitrator to permit class arbitration where the court had already announced how it would view the matter.[93]

In a 2012 New York case[94] plaintiffs sued under the Sherman Antitrust Act, as well as making claims of state law antitrust and restraint of trade. The defendant sought to compel arbitration of the claims of those plaintiffs (not all) whose purchase agreements had an arbitration clause. The arbitration agreements all provided for waiver of class arbitration. The reviewing court analyzed the issue of whether the waiver should be enforced or not, looking at arguments of class arbitration being the only "rational economic alternative," showing that plaintiffs can expect at most a median recovery of $540 in treble damages, and face

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[90]Ibid.

[91]Fantastic Sams Franchise Corp. v. FSRO Ass'n Ltd., 683 F.3d 18 (1st Cir. 2012).

[92]Chassen v. Fidelity Nat. Financial, Inc., 2012 WL 4120902 (D.N.J. 2012).

[93]See also Lowry v. JP Morgan Chase Bank, N.A., 2012 WL 3988997 (N.D. Ohio 2012), where the court noted that the arbitrator should interpret the contract as to whether class arbitration was intended.

[94]In re Electronic Books Antitrust Litigation, 2012-1 Trade Cas. (CCH) ¶ 77960, 2012 WL 2478462 (S.D. N.Y. 2012).

several hundred thousand dollars to millions of dollars in expert expenses alone. Plaintiffs have also demonstrated that they are likely to incur significant expenses in securing, organizing, and maintaining documents, deposing witnesses, and in attorneys' fees, and that they face no guarantee of recovering any or all of these expenses. Plaintiffs had already expended $45,000 in expert expenses evaluating the claims and drafting the complaint. Plaintiffs' affidavits demonstrated that it would be economically irrational for any plaintiff to pursue his or her claims through an individual arbitration. However the court did not compel arbitration finding first that the plaintiffs could not get complete relief by arbitration under the Sherman Act. Secondarily, the court was not persuaded by the arguments of class arbitration being the only rational economic alternative.

WAIVER OF CLASS ACTION ARBITRATION BY STATE LAW

"Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements."[95] The United States Supreme Court explained:

> In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration . . . We discern only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act: they must be part of a written maritime contract or a contract "evidencing a transaction involving commerce and such clauses may be revoked upon "grounds as exist at law or in equity for the revocation of any contract. We see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under State law."

In *Perry v. Thomas*[96] the U.S. Supreme Court said that where clear federal policy requiring the enforcement of an agreement to arbitrate under 9 U.S.C.A. § 2 is in conflict with a state law, the state law must give way under the Supremacy Clause of the U.S. Constitution.

In a case arising out of Florida, the agreement contained an arbitration clause that said: Arbitration of disputes was "manda-

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[95]Southland Corp. v. Keating, 465 U.S. 1, 16, 104 S.Ct. 852 at 853, 79 L.Ed.2d 1 (1984).

[96]Perry v. Thomas, 482 U.S. 483, 107 S. Ct. 2520, 96 L. Ed. 2d 426, 28 Wage & Hour Cas. (BNA) 137, 106 Lab. Cas. (CCH) P 55735 (1987).

tory"[97] and that the Federal Arbitration Act applied. The clause went on to say that the arbitration clause did not prevent either party from bringing appropriate claims in state court. It said that there would be no joinder of claims with other parties and there would be no class arbitration. If for any reason any court or arbitrator holds that this restriction is unconscionable or unenforceable, then our agreement to arbitrate doesn't apply and the dispute must be brought in court."[98] The clause concluded with a provision that if any portion of this "Mandatory Arbitration of Disputes" section is determined to be invalid or unenforceable, the remainder of the Section remains in full force and effect.

A customer brought a class action and the service provider defendant moved to compel arbitration. The Plaintiff argued that the class action waiver was unconscionable and unenforceable under Florida law, and therefore the arbitration provision did not apply.

The court first certified questions to the Florida Supreme Court (prior to the decision being entered in the *Concepcion* case) to answer whether courts should evaluate both prongs (procedural and substantive unconscionability) simultaneously in a balancing exercise; or whether courts may stop the unconscionability analysis after finding either procedural or substantive unconscionability to be independently lacking. The certification was effectively withdrawn after *Concepcion* decision. The court concluded that it did not need to decide whether Florida law would invalidate the class action waiver because even if it did, the law would be preempted by the FAA.[99]

Thus any state authority, case law or statute, is preempted where in conflict with the Federal Arbitration Act.

WITH AN ARBITRATION CLAUSE, IF THERE CAN BE NO CLASS ARBITRATION CAN THERE BE A CLASS ACTION?

Of course where it is determined that the arbitration clause is not enforceable, there is no prohibition from proceeding with a class action in court, subject to proving the class action requirements. A more difficult issue is the case where the class

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[97]The language is curious, stating that the arbitration clause was mandatory but that parties could still sue in court.

[98]Pendergast v. Sprint Nextel Corp., 691 F.3d 1224 at 1227 (11th Cir. 2012).

[99]Pendergast v. Sprint Nextel Corp., 691 F.3d 1224 at 1233 (11th Cir. 2012). See also Cruz v. Cingular Wireless, LLC, 648 F.3d 1205 (11th Cir. 2011).

arbitration is not permitted to proceed, but the plaintiff is required to proceed with its individual claim in arbitration.

This issue was discussed in the case of *Karp v. CIGNA Healthcare, Inc.*[100] In this gender discrimination case plaintiff filed a class action in court. The Defendant moved to compel arbitration. In 1998 the plaintiff signed a receipt for the employee dispute policies, which called for bilateral arbitration but was silent as to class arbitration. In 2005 the Defendant sent an e-mail to all employees and requested them to acknowledge receipt of the e-mail addressing an updated employee handbook including dispute resolution procedures that called for arbitration but prohibited class arbitration. Plaintiff filed a class action and the Defendant moved to compel arbitration. Arbitration was compelled. The dispute resolution procedures adopted in the employee handbook made clear that the employer did not intend to agree to class arbitration, which the court enforced. Thus the issue became whether Plaintiff could proceed with a class action in court based on a "pattern and practice" basis for a class action.[101] In a pattern-or-practice claim, a plaintiff need not establish individual injury to establish liability and obtain injunctive relief.[102] However, the court concluded that it would not be prudent to permit the plaintiff to proceed with a class action when the plaintiff's substantive claim was required to be arbitrated.[103]

WHAT ARE THE PROCEDURAL ISSUES WITH CLASS ARBITRATION?

A good place to start examining issues with class arbitration is to look at the rules published by the professional and experienced arbitration services: AAA and JAMS. As a preliminary matter

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[100]Karp v. CIGNA Healthcare, Inc., 2012 WL 1358652 (D. Mass. 2012).

[101]Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 876 n.9, 104 S. Ct. 2794, 81 L. Ed. 2d 718, 35 Fair Empl. Prac. Cas. (BNA) 1, 34 Empl. Prac. Dec. (CCH) P 34445, 39 Fed. R. Serv. 2d 301 (1984); Davis v. Coca-Cola Bottling Co. Consol., 516 F.3d 955, 965, 102 Fair Empl. Prac. Cas. (BNA) 865, 90 Empl. Prac. Dec. (CCH) P 43096 (11th Cir. 2008); Lowery v. Circuit City Stores, Inc., 158 F.3d 742, 761, 77 Fair Empl. Prac. Cas. (BNA) 1319, 74 Empl. Prac. Dec. (CCH) P 45605, 41 Fed. R. Serv. 3d 1116 (4th Cir. 1998), cert. granted, judgment vacated on other grounds, 527 U.S. 1031, 119 S. Ct. 2388, 144 L. Ed. 2d 790, 80 Fair Empl. Prac. Cas. (BNA) 64 (1999).

[102]Diaz v. Ashcroft, 301 F. Supp. 2d 112, 115–16 (D.P.R. 2004) (quoting Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 876, 104 S. Ct. 2794, 81 L. Ed. 2d 718, 35 Fair Empl. Prac. Cas. (BNA) 1, 34 Empl. Prac. Dec. (CCH) P 34445, 39 Fed. R. Serv. 2d 301 (1984).

[103]Karp v. CIGNA Healthcare, Inc., 2012 WL 1358652 (D. Mass. 2012).

JAMS Class Action Procedure Rule 1 a) states: "JAMS will not administer a demand for class action arbitration when the underlying agreement contains a class preclusion clause, or its equivalent, unless a court orders the matter or claim to arbitration as a class action." Thus if an agreement includes JAMS rules and the agreement has a class action waiver, it will be the court and not the arbitrator who decides whether the class arbitration waiver should be enforced or waived. Under the AAA Class Arbitration Rule 4 a) it is up to the arbitrator to decide whether class arbitration may proceed, unless otherwise ordered by the court.

Under the JAMS rules there are no specific qualifications for the arbitrator to conduct a class arbitration. The selection of the arbitrator is left to the discretion of the parties, in accordance with their agreement. Under AAA Class Procedures Rule 2, at least one of the arbitrators must be "appointed from the AAA's national roster of class arbitration arbitrators." JAMS rules also have no requirements as to the number of arbitrators for a class arbitration. Under AAA Class Procedures Rule 2, the parties may agree on the number of class arbitrators, but absent agreement there will be one arbitrator unless the AAA in its discretion decides to appoint three arbitrators. Thus if one party wished to have only one arbitrator and this was not agreed, the default decision absent the exercise of the AAA's discretion, would be to have one arbitrator.

As addressed in the JAMS and AAA rules for class arbitration, a fundamental process is to have a determination made by an arbitration award determining class status. Under JAMS Rule 3 c) the arbitrator's determination of class certification should be made in a partial final award. Under JAMS Rule 3 c) the class determination award is subject to immediate court review.

Under the AAA Class Procedure Rules there are two awards to be made before the class arbitration may proceed. Under AAA Class Procedure Rule 3 the arbitrator shall make a "Clause Construction Award" deciding whether the arbitration may proceed as a class arbitration. The arbitrator must stay the arbitration for a period of 30 days to allow a party to confirm or vacate the Clause Construction Award. Once all parties inform the arbitrator in writing during the period of the stay that they do not intend to seek judicial review of the Clause Construction Award, or once the requisite time period expires without any party having informed the arbitrator that it has sought judicial review, the arbitrator may proceed with the arbitration on the basis stated in the Clause Construction Award. If any party

informs the arbitrator within the period provided that it has sought judicial review, the arbitrator may stay further proceedings, or some part of them, until the arbitrator is informed of the ruling of the court.

The second award to be made in a class arbitration by the arbitrator under the AAA Class Procedure rules is a Class Certification award. This is analogous to the class determination award under JAMS Rule 3 a). Under AAA Class Procedure Rules 4 and 5 the arbitrator shall make a Class Certification award (after the Clause Construction Award). The Class Certification award must be a reasoned partial award making the determinations of class status (numerosity, commonality, typicality, adequate class representative, and adequate class counsel) and deciding that the class arbitration is superior to other available methods for the fair and efficient adjudication of the controversy. The Class Certification Award must also address: the interest of members of the class in individually controlling the prosecution or defense of separate arbitrations; the extent and nature of any other proceedings concerning the controversy already commenced by or against members of the class; the desirability or undesirability of concentrating the determination of the claims in a single arbitral forum; the difficulties likely to be encountered in the management of a class arbitration; when and how members of the class may be excluded from the class. Once again the class arbitration proceedings are to be stayed to permit judicial review after entry of the Class Certification Award.

Under JAMS Rule 5 and AAA Rule 5 e) a partial final award dealing with class certification may be altered or amended by the Arbitrator before a final award is rendered."

The next issue would be the giving of notice of class determination. Under both JAMS Rule 4 and AAA Rule 6 the Notice of Class Determination shall be given to all members who can be identified through reasonable effort. There are also seven specific items of information required to be included in the notice under JAMS Rule 4 and AAA Rule 6:

(1) the nature of the action;

(2) the definition of the class certified;

(3) the class claims, issues, or defenses;

(4) that a class member may enter an appearance through counsel if the member so desires, and may attend the hearings;

(5) that the Arbitrator will exclude from the class any member who requests exclusion, with information about when and how members may elect to be excluded;

(6) the binding effect of a class award on class members; and

(7) the identities of, and biographical information about, the Arbitrator, and the class representative(s) and class counsel that have been approved by the Arbitrator to represent the class.

AAA Rule 6 additionally requires the notice to identify how and to whom a class member may communicate about the class arbitration, including information about the AAA Class Arbitration Docket. JAMS does not maintain a class arbitration docket. Since AAA maintains a public class arbitration docket AAA Rule 9 addresses the lack of privacy that is normally a tenet of bilateral arbitration

Both the JAMS and AAA rules are silent as to the party required to send the notice, the form of transmission, and the cost of sending the notice. These are discretionary decisions to be made by the arbitrator.

JAMS Rule 6 and AAA Rule 8 set forth requirements in connection with settlement of a class arbitration and provide that the arbitrator must approve a settlement.

JAMS Rule 5 and AAA Rule 7 address the final award. Both rules require a reasoned award, a specific definition of the class, an identification of those to whom the notice of class certification was directed; those whom the Arbitrator finds to be members of the class, and those who have elected to opt out of the class. AAA Rule 10 b) provides that all awards rendered under the Supplementary Rules shall be publicly available, on a cost basis.

AAA Class Procedure Rule 11 sets forth the filing fee and provides that if an invoice for arbitrator compensation or administrative charges has not been paid in full, the AAA may so inform the parties in order that one of them may advance the required deposit. If such payments are not made, the arbitrator may order the suspension or termination of the proceedings. If no arbitrator has yet been appointed, the AAA may suspend the proceedings. If a class arbitration is suspended for nonpayment, a notice that the case has been suspended shall be published on the AAA's Class Arbitration Docket.

AAA Class Procedure Rule 12 d) is a waiver providing that parties to an arbitration under the Supplementary Rules have consented that neither the AAA nor any arbitrator is liable to any party in any action seeking damages or injunctive relief for any act or omission in connection with any arbitration under these Supplementary Rules.

Both the JAMS Class Procedures and the AAA Supplementary Class Arbitration Procedures do not address many issues that may come up at the hearing, which are left to the wisdom and discretion of the arbitrator. Thus while arbitrator selection is

always important in arbitration, the need to address legal and procedural issues in class arbitrator selection is particularly important. Then there are issues that are not addressed in the rules, should the rules apply, that could be addressed in the arbitration agreement (in the perfect world) such as:

1) If there are multiple class representatives and possibly multiple lawyers, how will the procedure in selecting the arbitrator work?

2) Should bifurcation of liability and damage issues be encouraged or required?

3) Should discovery or information exchange rules be different in class arbitration?

CONCLUSION

Class arbitration is relatively new in American jurisprudence. Courts have found that class arbitration may be used as an effective way to address multiple instances of the same types of smaller claims where there is an arbitration clause. Just as arbitrators are empowered to address claims of large magnitude, prescribed statutory relief, and other significant issues, the courts have recognized that class procedure is within the potential jurisdiction of private arbitrators and not within the exclusive jurisdiction of the courts. The use of class arbitration must involve an agreement to arbitrate with all members of the class (and such members of the class who do not have an agreement to arbitrate but have consented to arbitrate). While parties may attempt to prohibit class arbitration in the agreement, such prohibitions may be avoided pursuant to a conflict with the FAA, or pursuant to a finding of unconscionability of the waiver. Given the frequency of cases addressing class arbitration since 2010, there is likely to be more guidance from the courts in decisions to come.