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WHAT A LONG, STRANGE TRIP IT'S BEEN

Sutherland's Analysis of U.S. Supreme Court Jurisprudence Involving Arbitration Provisions and Class Action Waivers

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INTRODUCTION

The following report reflects Sutherland's in-depth analysis of key U.S. Supreme Court decisions, each of which relate to the enforceability of arbitration provisions and class action waivers in consumer contracts. This retrospective provides clients and practitioners with a unique view into the Court's reasoning and approach to the issues raised in these landmark opinions.

1925

Federal Arbitration Act (FAA) Enacted.

10,000,000+

The number of consumers who have entered into contracts for products or services that include arbitration clauses and class action waivers.

$27,000

Average damages claim sought in arbitration, according to the CFPB.

SUTHERLAND'S EXPERIENCE

Sutherland's report reflects more than a decade of experience and analysis in the arbitration class action area. As the U.S. Supreme Court has issued opinions that collectively have redefined the landscape of consumer contracts and litigation in the United States, Sutherland has been in the trenches with our clients litigating these issues.

Sutherland continues to follow and opine on developments in all areas of class action law in federal and state courts across the country. By staying abreast of those developments, our attorneys are able to offer guidance and counsel to clients, and provide zealous legal defense when litigation arises.

WHY SUTHERLAND?

STRENGTH in representing the country's and world's leading companies.

STRENGTH in knowing our clients' businesses.

STRENGTH in advising and counseling our clients on cutting-edge legal issues.

STRENGTH as trial attorneys in efficiently and zealously representing our clients in class actions filed in state and federal courts across the country.

THE EVOLUTION OF THE LAW ON CLASS ACTION AND CLASS ARBITRATION WAIVERS

In the span of just a few years, the U.S. Supreme Court has issued numerous groundbreaking opinions on the topic of class action and class arbitration waivers. Below is a snapshot of four of those cases.

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.

U.S. Supreme Court reverses arbitration panel's finding, and holds that a party may not be compelled to submit to class arbitration "unless there is a contractual basis for concluding that the party agreed to do so."

AT&T Mobility v. Concepcion

U.S. Supreme Court reverses the decisions of two lower courts, and holds that state laws cannot preempt the Federal Arbitration Act (FAA). Requires parties to enter into arbitration regardless of state law to the contrary.

2010 2011 2012 2013 2014 2015

American Express v. Italian Colors

U.S. Supreme Court again overturns lower courts, holding that courts must "rigorously enforce arbitration agreements according to their terms" even if it would be financially impossible for the individual plaintiff to pursue arbitration alone.

DirecTV v. Imburgia

U.S. Supreme Court emphasizes that state law cannot preempt the FAA, and upholds the class arbitration waiver provision of the consumer contract at issue.

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THE U.S. SUPREME COURT UPHOLDS THE VALIDITY AND ENFORCEABILITY OF MANDATORY ARBITRATION PROVISIONS AND CLASS ACTION WAIVERS

In recent years the inclusion of mandatory arbitration clauses in form contracts has become increasingly common. These provisions typically require the parties, in the event of a dispute, to enter into individual arbitration in lieu of class action litigation or class-wide arbitration. Not surprisingly, putative class action plaintiffs have challenged these class action waivers at the federal and state levels. Many of these disputes have made their way to the U.S. Supreme Court, which has consistently held over the past few years that the Federal Arbitration Act (FAA) preempts state laws and favors contractually agreed-to arbitration clauses, even if such clauses include class action waivers. In its most recent opinion, *DirecTV v. Imburgia*, the Supreme Court overturned a California state court by a 6-3 vote, perhaps finally closing the door on future challenges to mandatory arbitration clauses and class action waivers. This article will trace four of the Court's most important arbitration-related decisions, concluding with *Imburgia*, to provide practitioners and their clients an overview of this important and hopefully no longer controversial area of law.

2010: *STOLT-NIELSEN S.A. V. ANIMALFEEDS INT'L CORP.*

In an opinion that would come to be relied on by those on both sides of the class action waiver debate, the Supreme Court in *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, found that imposing class arbitration on a defendant who has not specifically agreed to participate in class litigation is inconsistent with the FAA.[1] In that case, the parties' contract was silent on the question of class arbitration. The Court held that the arbitration panel's inference that the parties intended to authorize class-wide arbitration exceeded its powers. Individual arbitration was ultimately ordered.

In the underlying case, AnimalFeeds brought an antitrust class action alleging price fixing. The lower court ordered the parties to arbitration pursuant to a mandatory arbitration agreement that was silent on whether arbitration could proceed on a class basis. The parties subsequently agreed to submit to the arbitration panel the question of whether class arbitration was proper. The panel determined that despite the contract's silence on the issue, it implicitly permitted classwide arbitration. Stolt-Nielsen appealed the arbitration panel's decision.

In a 5-3 opinion written by Justice Alito, the Court reversed the panel's finding, holding 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."[2] Noting that while there may be certain situations where it may be appropriate for an arbitrator to interpret parties' silence as implicit authority for the arbitrator to adopt procedures necessary to effectuate the contract, compelling class arbitration was simply going too far. The benefits of single party arbitration, such as lower costs and higher efficiency, are less assured in class arbitration, the Court reasoned, thus changing

1 No. 08-1198 (Apr. 27, 2010).

2 No. 08-1198 (Apr. 27, 2010) at 4 (emphasis in original).

"the nature of arbitration to such a degree" that the parties' consent could not be presumed.[3] While the opinion did not address many of the issues raised in subsequent cases before the Supreme Court, it did signal the Court's willingness to deny plaintiffs an opportunity for class-wide relief.

2011: *AT&T MOBILITY LLC V. CONCEPCION*

The Supreme Court's much heralded opinion in *AT&T Mobility LLC v. Concepcion*, issued the next year, involved a California couple who sued AT&T after they were charged $30 in sales tax on phones that AT&T had advertised as free.[4] The Concepcions' complaint was consolidated with a class action that alleged, among other things, fraud and false advertising claims arising from the same advertisement. AT&T moved to compel individual arbitration with the Concepcions pursuant to their contract's arbitration agreement, which included an express class action waiver. The California courts found the class action waiver unconscionable, based on a state court decision that had previously deemed most mandatory consumer arbitration agreements with class action waivers to be unenforceable.[5]

The Supreme Court, in a 5-4 opinion, reversed the lower courts' decisions, emphasizing that Section 2 of the FAA reflects a "liberal federal policy favoring arbitration" including class action waivers. The Court found that the state laws prohibiting these waivers are preempted by the FAA, because "[r]equiring the availability of class-wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[6] Relying in part on similar reasoning found in *Stolt-Nielsen*, the Concepcion court noted that arbitration clauses ultimately favor low-cost, efficient resolution of disputes.

2013: *AMERICAN EXPRESS V. ITALIAN COLORS*

Amex, decided in 2013, was a putative antitrust class action brought by a group of New York and California merchants and a supermarket trade association. The plaintiffs alleged that Amex improperly required merchants who accepted Amex charge cards to also accept Amex revolving credit cards. The suit, originally filed in 2003 in federal court in California, was ultimately transferred to the Southern District of New York. Amex then moved to compel arbitration under the mandatory arbitration clause (which contained a class action waiver) contained in the parties' service contract. The court found the arbitration clause controlling and dismissed the lawsuit.

On appeal, the Second Circuit reversed. In its 2009 decision, the appeals court relied on expert testimony that showed it would have been financially impossible for each merchant to assert their federal antitrust claims in individual arbitrations. The Second Circuit held that compelling arbitration would have the unwanted effect of preventing the plaintiffs from vindicating their statutory rights. In other words, upholding the arbitration clause would effectively immunize Amex from federal antitrust liability.

Amex appealed the Second Circuit's decision and the Supreme Court directed the appellate court to reconsider its holding in light of its 2010 opinion in *Stolt-Nielsen*. The Second Circuit declined to alter its earlier holding, however, stating that *Stolt-Nielsen* only stood for the proposition 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."[7] According to the Second Circuit, the ramifications of upholding the class action waiver in favor of Amex were more far-reaching (and, presumably, negative) than in *Stolt-Nielsen*.

The Supreme Court subsequently issued *Concepcion*, but even that opinion did not force the Second Circuit to reconsider its decision. Reviewing its holding once again, the Second Circuit explained that while *Stolt-Nielsen* and *Concepcion* prohibit class-wide arbitration without an express agreement between parties, those decisions did not stand for the broader proposition that all class action waivers are enforceable. The Second Circuit also pointed out that *Concepcion* addressed state and federal law conflicts, but the *Amex* case involved a conflict between the FAA and federal antitrust statutes.

IN ITS MOST RECENT OPINION, *DIRECTV V. IMBURGIA*, THE SUPREME COURT OVERTURNED A CALIFORNIA STATE COURT BY A 6-3 VOTE, PERHAPS FINALLY CLOSING THE DOOR ON FUTURE CHALLENGES TO MANDATORY ARBITRATION CLAUSES AND CLASS ACTION WAIVERS.

3 No. 08-1198 (Apr. 27, 2010) at 21.

4 No. 09-893 (Apr. 27, 2011).

5 See Discover Bank v. Superior Court, Dkt. No. S113725 (June 27, 2005). [36 Cal. 4th 148 (2005)].

6 No. 09-893 (Apr. 27, 2011) at 9.

7 Dkt. No. 06-1871-CV (Feb. 1, 2012). [In re Am. Express Merch. Litig., 667 F. 3d 204, 211 (2012)].

In a 5-3 opinion, the Supreme Court overturned the Second Circuit's decision and upheld the enforceability of Amex's arbitration clause and class action waiver. Justice Scalia, writing for the majority, confirmed that courts must "rigorously enforce arbitration agreements according to their terms" and specifically rejected the argument that a class action waiver is unenforceable merely because the plaintiff's cost of individual arbitration may exceed the potential recovery. The Court reasoned that because the parties agreed to arbitrate on a non-class basis, "it would be remarkable for a court to erase that expectation."[8] The Court also distinguished between a party's right to assert a claim and its ability to prove a claim. Individual plaintiffs could still pursue their statutory remedies, which is all they are guaranteed under the law. The class action mechanism, on the other hand, is a relatively modern legislative creation, and not a right unto itself.

Amex struck another blow against challenges to class action waivers in arbitration provisions. It rejected the "vindication of statutory rights" argument and further closed the door on *per se* challenges to arbitration provisions and class action waivers. *Amex* followed a line of arbitration decisions from the Supreme Court that made it more difficult for plaintiffs to escape arbitration agreements and bring claims through a class action vehicle, but at least one California court did not heed the Supreme Court's message.

2015: *DIRECTV V. IMBURGIA*

In *DirecTV v. Imburgia*, the Supreme Court relied on its prior holdings, particularly *Concepcion*, and reversed a California state court that had found a class arbitration waiver unenforceable. In its 6-3 opinion, the Court once again held that the FAA preempts state laws that prohibit class action or class arbitration waivers. The convoluted procedural history and questions of contractual interpretation aside, *Imburgia* plainly reflects the Supreme Court's willingness to enforce arbitration provisions whenever possible.

The lawsuit originally arose in 2008, with the plaintiffs challenging DirecTV's early termination fees for its satellite television service. The service contract, entered into by the plaintiffs in 2007, included a binding arbitration provision and class arbitration waiver. The provision stated that the waiver was not enforceable, however, "if the law of your state" requires the company to allow class-wide arbitration. At the time, pre-*Concepcion*, California courts applied the *Discover Bank* rule and invalidated class action waivers in consumer contracts. As a result, DirecTV did not move to compel arbitration for the first three years of the lawsuit. Then, after the Supreme Court's *Concepcion* decision, which held that the FAA preempts California's *Discover Bank* rule, DirecTV moved to dismiss in favor of binding arbitration. DirecTV's motion to dismiss was denied.

The trial court, and then a California Court of Appeal, determined that the parties agreed that the contract was governed by the now-invalid California ("your state") *Discover Bank* rule, which was the law of the state at the time the contract was executed, and not California law post-*Concepcion*. According to the Court of Appeal, the class arbitration waiver was not enforceable and the plaintiffs were not precluded from seeking class treatment of their claims. In other words, the plaintiffs had found a way around the preemptive effect of the FAA. The California Supreme Court declined to review the lower court's opinion, and the U.S. Supreme Court granted certiorari.

In the opinion authored by Justice Breyer, the Court noted at the outset—perhaps as a signal to future state court challenges to class waivers—that "[n]o one denies that lower courts must follow this Court's holding in *Concepcion*" but acknowledged that the "point does not resolve the issue in the case."[9] The real question was whether applying the invalid, post-*Concepcion* California law to the contract between the parties was at odds with the FAA. The Court found in the affirmative and overturned the state court's decision.

The Supreme Court acknowledged that parties are free to choose the law that will govern their contracts (even "the law of pre-revolutionary Russia") and that the interpretation of that law should be left to the states. But in this case, the Court found that the interpretation was at odds with the FAA and appeared to be inconsistent with general contract law. The Court was careful to explain that any interpretation of governing law must comport with the FAA's mandate that only generally applicable state law principles can be applied to interpret an arbitration contract. Applying this principle to the facts, the Court found that the lower court's interpretation of the phrase "law of your state" to include invalid California law was not generally applicable to all contracts and the lower court erred in applying it only in the arbitration provision context. Accordingly, the clause "law of your state" was invalid and preempted under the federal policy favoring arbitration as set forth in the FAA. The Supreme Court also gave the California court a slap on the wrist, stating: "The view that

8 No. 12-133 (June 20, 2013) at 5.

9 No. 14-462 (Dec. 14, 2015) at 5.

state law retains independent force even after it has been authoritatively invalidated by this Court is one courts are unlikely to accept as a general matter and to apply in other contexts."[10]

While the majority in *Imburgia* avoided policy discussions, Justice Ginsburg took a different approach in her dissent. Arguing that the recent spate of pro-class action waiver opinions would have been unimaginable when Congress enacted the FAA in 1925 (13 years before the first class action statute), Justice Ginsburg claimed that the majority's opinion will further insulate large businesses against legal challenges arising from contracts with individuals. Justice Ginsburg also took issue with the majority's refusal to defer to the state court's interpretation of California law, using its own rhetoric against it: "Pre-revolutionary Russian law, [perhaps,] but not California's 'home state laws' operative and unquestionably valid in 2007? Makes little sense to me."[11]

Despite its strong language, only Justice Sotomayor joined the dissent.

CONCLUSION

The Supreme Court has been particularly active in the realm of class action law over the last half-decade. Nearly all of its class action decisions, particularly those relating to waiver provisions decided over the past six years, have been decidedly pro-business. In *Imburgia* the Court demonstrated its willingness to review and overturn state court cases that appear to stray from the principles enunciated in cases like *Stolt-Nielsen*, *Amex*, and *Concepcion*. In doing so, it sent a signal to lower courts throughout the country that class action and class arbitration waivers in form contracts will be upheld in nearly any context.

10 No. 14-462 (Dec. 14, 2015) at 9.

11 No. 14-462 (Dec. 14, 2015), dissent at 6.

U.S. SUPREME COURT FORECLOSES VINDICATION OF RIGHTS CHALLENGE TO CLASS ACTION WAIVER IN ARBITRATION PROVISION

A court cannot invalidate a class action waiver in an arbitration agreement on the ground that it may leave a party unable to vindicate its statutory rights economically, even if the plaintiff's cost of individual arbitration would exceed the potential recovery. This was the message of the Supreme Court in a 5-3 decision strongly upholding the enforceability of arbitration agreements. *American Express Co. v. Italian Colors Restaurant*, 12-133 (*Amex*). The decision, authored by Justice Scalia, reconfirmed that courts must "rigorously enforce arbitration agreements according to their terms," and specifically rejected the argument that a class action waiver is unenforceable merely because the plaintiff's cost of individual arbitration would exceed the potential recovery. The Court reasoned that because the parties agreed to arbitrate on a non-class basis, "it would be remarkable for a court to erase that expectation."

The question for the Court was whether a mandatory class action waiver in an arbitration provision was unenforceable where the plaintiffs claimed that enforcement of the waiver would prevent them from vindicating federal statutory rights, specifically antitrust laws. In the proceedings below, the Second Circuit Court of Appeals found that if the class waiver were enforced, "the cost of plaintiffs individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws." *See In re American Express Litigation*, 667 F.3d 204 (February 1, 2012). The Second Circuit held that this fact rendered the arbitration provision and class waiver unenforceable based on language from *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), which stated that where "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." The Second Circuit found that plaintiffs had met that burden, and that the provision was unenforceable because otherwise "[t]he defendant will thus have immunized itself against all such antitrust liability by the expedient of including in its contracts of adhesion an arbitration clause that does not permit class arbitration."

The five-justice majority in *Amex* emphatically rejected this theory. In response to the respondents' arguments that requiring them to litigate individually would contravene

THE COURT REASONED THAT BECAUSE THE PARTIES AGREED TO ARBITRATE ON A NON-CLASS BASIS, "IT WOULD BE REMARKABLE FOR A COURT TO ERASE THAT EXPECTATION."

the policies of the antitrust laws, the Court stated that "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim." The Court distinguished between a party's right to pursue a claim and the ability to prove that claim: "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy." Because the "class-action waiver merely limits arbitration to the two contracting parties," the Court held that "[i]t no more eliminates those parties' right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938."

The majority also rejected the dissent's contention that the class action waiver functioned as an exculpatory clause that

should not be enforced. The dissent, authored by Justice Kagan, characterized the decision as allowing an alleged monopolist "to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse." The majority rejected the connection between vindication of rights and the use of class action procedure: "the individual suit that was considered adequate to assure 'effective vindication' of a federal right before adoption of class-action procedures did not suddenly become 'ineffective vindication' upon their adoption."

Amex strikes another blow against challenges to class action waivers in arbitration provisions. It rejects conclusively the argument that there is a carve out for vindication of statutory rights, and the decision further closes the door on *per se* challenges to arbitration, similar to the Court's 2011 decision in *AT&T Mobility LLC v. Concepcion*. Indeed, Justice Scalia commented in *Amex* that "our decision in *[Concepcion]* all but resolves this case." *Amex* follows in a line of arbitration decisions issued by this Court over the past few years, most notably *Concepcion*, which have made it more difficult for plaintiffs to escape arbitration agreements and bring claims in a class action.

U.S. SUPREME COURT UPHOLDS ARBITRATOR'S AUTHORITY TO INTERPRET AGREEMENT TO PERMIT CLASS PROCEEDINGS

"The arbitrator's construction holds, however good, bad, or ugly." This was the succinct message delivered on June 10, 2013, by a unanimous U.S. Supreme Court in *Oxford Health Plans LLC v. Sutter*, No. 12-135, which challenged an arbitrator's determination that an agreement between two private parties permitted class arbitration. Although the Court expressed doubt about whether the arbitrator's decision was correct, the justices agreed that "the courts have no business overruling him because their interpretation of the contract is different from his."

In *Sutter*, Petitioner Oxford Health Plans LLC entered into an employment agreement with Respondent, Dr. Sutter, that contained an arbitration provision stating: "[n]o civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be subject to final and binding arbitration." When Sutter filed a putative class action, Oxford successfully moved to compel arbitration, relying on the agreement's arbitration provision. The parties disputed whether the agreement permitted class arbitration. The issue was submitted to the arbitrator for resolution. The arbitrator concluded, among other things, that the broad language in the agreement authorized class arbitration because the language "any civil action" includes class actions. Oxford challenged the decision in court, but both the district court and the Third Circuit deferred to the arbitrator's interpretation. The Third Circuit stated: "We are satisfied that the arbitrator endeavored to interpret the parties' agreement within the bounds of the law, and we cannot say that his interpretation was totally irrational." *Sutter v. Oxford Health Plans LLC*, 675 F.3d 215, 225 (3d Cir. 2012).

"THE ARBITRATOR'S CONSTRUCTION HOLDS, HOWEVER GOOD, BAD, OR UGLY."

The Supreme Court's unanimous decision reconfirms the scope of an arbitrator's discretion to interpret contract issues properly subject to arbitration. The Court noted that § 10(a)(4) of the Federal Arbitration Act (FAA) provides for only very limited judicial review, and that a court may reverse only where an arbitrator has exceeded the scope of his or her authority. The "sole question for review," according to the Court, was "whether the arbitrator interpreted the parties' contract, not whether he construed it correctly." Under this standard, "it is not enough . . . to show that the [arbitrator] committed an error—or even a serious error," and an arbitral decision construing a contract "must stand, regardless of a court's view of its (de)merits."

The Court found inapplicable its recent decision in *Stolt-Nielsen v. AnimalFeeds International Corp.*, 130 S. Ct. 1758, 1776 (2010), on which Oxford relied heavily. In *Stolt-Nielsen*, the Court held "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." In *Stolt-Nielsen*, however, the parties entered into a stipulation that they had never reached agreement on class arbitration and, therefore, there was no contractual basis for imposing class arbitration on the defendant. By contrast, in *Sutter*, the parties submitted the contract to the arbitrator on the issue of whether class arbitration was permitted, thereby vesting the arbitrator with authority to interpret the contract and determine whether there was a contractual basis for class arbitration.

Despite affirming the decision, the Court took care to distance itself from the contract interpretation issue. "Nothing we say in this opinion should be taken to reflect any agreement with the arbitrator's contract interpretation, or any quarrel with Oxford's contrary reading. All we say is that convincing a court of an arbitrator's error—even his grave error—is not enough."

The Court also noted that "[w]e would face a different issue if Oxford had argued below that the availability of class arbitration is a so-called 'question of arbitrability.'"

Overall, the decision highlights principally the high standard for judicial review of questions submitted to an arbitrator for decision, and therefore may have limited implications for class action issues more generally. Certainly, however, the case underscores that any party who wishes to avoid class arbitration should *expressly* preclude class arbitration in its agreements. The decision also may prompt some parties to exclude specifically from a delegation of arbitrability provision any issues having to do with the availability of class certification.

THE SUPREME COURT'S UNANIMOUS DECISION RECONFIRMS THE SCOPE OF AN ARBITRATOR'S DISCRETION TO INTERPRET CONTRACT ISSUES PROPERLY SUBJECT TO ARBITRATION.

ARBITRATION AND CLASS ACTION WAIVER ISSUES AGAIN BEFORE THE U.S. SUPREME COURT

The U.S. Supreme Court heard oral argument the first of two cases to be argued this term again raising questions regarding the enforceability of arbitration agreements and class action waivers. These cases continue the Court's recent focus on arbitration and related class action issues. The first case, *American Express Co. v. Italian Colors Restaurant*, 12-133 (*Amex*), follows the Supreme Court's 2011 decision in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (U.S. 2011) which upheld the enforceability of class action waivers contained in arbitration provisions. The Court subsequently heard *Oxford Health Plans LLC v. Sutter*, 12-135, a follow-up to *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758 (U.S. 2010), holding that an arbitrator may not compel class arbitration under the Federal Arbitration Act (FAA) unless the underlying agreement between the parties provides specifically for a class action remedy.

AMERICAN EXPRESS CO. V. ITALIAN COLORS RESTAURANT

In *Amex*, the Court was asked to review a Second Circuit decision holding that a mandatory class action waiver in an arbitration provision was unenforceable where the plaintiffs established that enforcement of the waiver would prevent them from vindicating federal statutory rights, specifically antitrust laws. *See In re American Express Litigation*, 667 F.3d 204 (February 1, 2012). The Second Circuit found that if the class waiver were enforced, "the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws." The court held that this fact rendered the arbitration provision and class waiver unenforceable based on language from *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), which stated that where "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." The Second Circuit found that plaintiffs had met that burden, and that the provision was unenforceable because otherwise "[t]he defendant will thus have immunized itself against all such antitrust liability by the expedient of including in its contracts of adhesion an arbitration clause that does not permit class arbitration."

Petitioner Amex has argued that the Second Circuit's decision was contrary to the FAA's "core mandate" that arbitration agreements be enforced according to their terms. Amex also expressly argued that the Second Circuit's decision contravenes the Supreme Court's 2011 decision in *Concepcion*, in which the Court held that the FAA preempted a California state court doctrine under which class action waivers in consumer arbitration agreements in most consumer and employment contracts had been held to be *per se* unconscionable. According to Petitioner, *Concepcion* was not limited to state law claims and foreclosed the "vindication of statutory rights" rationale adopted by the Second Circuit. Amex contended that the statement in *Randolph* regarding vindication of statutory rights was *dicta* (the Court had rejected a cost-related challenge to an arbitration provision in that case), and that *dicta* cannot override the mandate of the FAA and *Concepcion*. The Second Circuit's "labored efforts" to "evade" *Concepcion* were without merit, said Amex, because the Second Circuit ruling would prevent bilateral arbitration and force the Amex to either accept class arbitration or no arbitration at all.

Respondents, a group of merchants who contracted with Amex to accept its credit cards and related products, took the position that an arbitration provision with a class action waiver clause should be unenforceable where a litigant would be unable

to effectively vindicate its federal statutory rights in the arbitral forum. In line with the Second Circuit's opinion, Respondents have relied on the language in *Randolph* to argue that arbitration agreements should not be enforced when prohibitive costs would prevent the effective vindication of federal statutory rights in the arbitral forum, and that the effective vindication rule is consistent with the Supreme Court's prior arbitration decisions. They argued that an effective vindication rule is not inconsistent with *Concepcion* because it does not condition the enforcement of arbitration agreements on the availability of class procedures. Respondents also emphasized that *Concepcion* involved a conflict between the FAA and a competing *state* law, while in *Amex* there is a competing *federal* law, a difference which they contend is fundamental and compels a different result. Respondents pointed out that they are not arguing that the effective vindication doctrine should apply to competing state laws. The Solicitor General filed a brief and argued as amicus curiae in support of Respondents.

IN *AMEX*, THE COURT WAS ASKED TO REVIEW A SECOND CIRCUIT DECISION HOLDING THAT A MANDATORY CLASS ACTION WAIVER IN AN ARBITRATION PROVISION WAS UNENFORCEABLE WHERE THE PLAINTIFFS ESTABLISHED THAT ENFORCEMENT OF THE WAIVER WOULD PREVENT THEM FROM VINDICATING FEDERAL STATUTORY RIGHTS, SPECIFICALLY ANTITRUST LAWS.

At oral argument, Justices Ginsburg and Kagan opened the questioning by challenging Amex's attorney on whether the arbitration provision functioned as an exculpatory clause and should be declared unenforceable. Justice Breyer, along with Justice Kennedy and Chief Justice Roberts, raised a number of issues about the costs of vindicating one's rights in the arbitral forum, and whether there would be a workable standard for striking down class waivers on that basis. Justice Breyer suggested that it would be an "odd doctrine" if the Court were to establish a cost-based standard for application on a case-by-case basis, because plaintiffs could seek to avoid arbitration simply by alleging "far out" theories that are "expensive enough" to prove. Chief Justice Roberts queried whether it would be possible to find ways to fund arbitration of antitrust claims on a non-class basis, such as through a trade association. Justice Scalia seemed to side with Amex, noting that small claims are not always practical to bring and that "[n]obody thought the Sherman Act was a dead letter, that it couldn't be vindicated" in the "years before there was such a thing as [a] class action in Federal Courts." Justice Sotomayor, who was on the Second Circuit panel assigned to the case before her elevation to the Supreme Court, recused herself.

The *American Express* antitrust litigation has been back and forth between the Second Circuit and the Supreme Court for more than two years on the arbitration issue. The litigation began as a consolidated class action, with Plaintiffs alleging that the merchant contract they each signed with Amex violated the Sherman Antitrust Act. *See In re American Express Merchants' Litigation*, No. 03-CV-9592, 2006 WL 662341 (S.D.N.Y. March 16, 2006). The merchant contract contained an arbitration provision that required all claims "arising from or relating to [the] Agreement" to be resolved by arbitration. The contract also contained a class action waiver that purported to preclude merchants from bringing or participating in class actions regarding issues subject to arbitration.

The U.S. District Court for the Southern District of New York granted Amex's motion to compel arbitration, but held that the enforceability of the class action waiver was an issue for the arbitrator to decide. On appeal, the U.S. Court of Appeals for the Second Circuit reversed and held that the class waiver was unenforceable. *See* 554 F.3d 300 (2d Cir. 2009) (*Amex I*). In a May 3, 2010, order vacating the judgment and remanding the case, the Supreme Court instructed the Second Circuit to reconsider the case in light of the Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp*. There the Supreme Court held that imposing class arbitration on parties who have not agreed specifically to class arbitration is inconsistent with the Federal Arbitration Act, 9 U.S.C. § § 1 *et seq*. On remand, the Second Circuit found its original analysis unaffected by *Stolt-Nielsen* (*Amex II*). Then, following the Supreme Court's decision in *Concepcion*, the Second Circuit accepted supplemental briefing from the parties and found the class action wavier unenforceable for a third time. The Second Circuit opined that "what *Concepcion* [does] not do is require that all class-action waivers be deemed *per se* enforceable," and it continued to rest its decision on "a vindication of statutory rights" analysis, holding that a mandatory class action waiver clause is unenforceable if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to bring federal antitrust claims. (*Amex III*).

OXFORD HEALTH PLANS LLC V. SUTTER

The Court took up arbitration again in *Oxford Health Plans LLC v. Sutter*, where the Supreme Court is poised to resolve a circuit split regarding agreements to class arbitration following the Court's decision in *Stolt-Nielsen v. AnimalFeeds International Corp.*, 130 S. Ct. 1758, 1776 (2010).

The Supreme Court declared in *Stolt-Nielsen* that "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to arbitration." Accordingly, the Supreme Court held "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." 130 S. Ct. at 1775 (emphasis in original). The Supreme Court, however, declined "to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration." *Id*. The issue presented in *Sutter* is whether the parties' use of broad contractual language precluding litigation and requiring arbitration of any dispute arising under their contract may be interpreted by an arbitrator, consistent with the FAA, as an agreement to class arbitration.

In *Sutter*, Petitioner Oxford Health Plans LLC (Oxford) entered into an employment agreement with Respondent, Dr. Sutter (Sutter), that contained an arbitration provision stating that "[n]o civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be subject to final and binding arbitration . . ." (emphasis added). When Sutter filed a putative class action against Oxford, Oxford successfully moved to compel arbitration under the agreement. Before the arbitrator, the parties disputed whether their agreement permitted class arbitration. The arbitrator concluded, among other things, that the broad language in the agreement authorized class arbitration because the language "any civil action" would include class action suits. Oxford argued to a district court judge and then to the Third Circuit that the arbitrator's interpretation was wrong because the arbitration agreement did not address or mention class arbitration. Both courts, however, rejected Oxford's argument, and instead deferred to the arbitrator's interpretation, which read into the arbitration provision an intent by the parties to include class arbitration. Specifically, the Third Circuit concluded: "We are satisfied that the arbitrator endeavored to interpret the parties' agreement within the bounds of the law, and we cannot say that his interpretation was totally irrational." *Sutter v. Oxford Health Plans LLC*, 675 F.3d 215, 225 (3d Cir. 2012).

The Third Circuit's decision in *Sutter* is consistent with the Second Circuit's decision in *Jock v. Sterling Jewelers Inc.*, 646 F.3d 114 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 1742 (2012), and in conflict with the Fifth Circuit's decision in *Reed v. Florida Metro. Univ.*, Inc., 681 F.3d 630 (5th Cir. 2012). In *Reed*, the Fifth Circuit held that language in an arbitration provision covering "any dispute" and making available "any remedy" failed to evidence the parties' agreement to authorize class arbitration.

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.

SECOND CIRCUIT HOLDS CLASS ACTION WAIVER UNENFORCEABLE WHERE INDIVIDUAL ARBITRATION WOULD BE PROHIBITIVELY EXPENSIVE

In a shot across the bow of recent Supreme Court precedent in favor of arbitration, the Second Circuit held that a mandatory class action waiver in an arbitration provision is unenforceable where the plaintiffs established that the practical effect of enforcement of the waiver would be to preclude claims under federal antitrust statutes. *In re American Express Litigation*, Slip Op. 06-1871-cv (February 1, 2012). This ruling set up a potential conflict with the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (U.S. 2011), a decision strongly in favor of the enforceability of class action waivers within arbitration provisions.

This is the third time the Second Circuit has decided this issue in the *American Express* antitrust litigation, each time holding that the class action waiver is unenforceable. In each decision, the court has rested its holding on "a vindication of statutory rights" analysis, and defined the issue as "whether a mandatory class action waiver clause is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to bring federal antitrust claims." Slip Op. at 14-15. In this decision, the Second Circuit considered the Supreme Court's *Concepcion* decision, but opined that "what *Concepcion* [does] not do is require that all class-action waivers be deemed *per se* enforceable." *Id*.

Distinguishing *Concepcion*, the Second Circuit relied instead on *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), for the proposition that where "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." Slip Op. at 20. The court found that "[t]he evidence presented by plaintiffs here establishes, as a matter of law, that the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws." Slip Op. 21-22. Accordingly, the Second Circuit found the agreement unenforceable, because otherwise "[t]he defendant will thus have immunized itself against all such antitrust liability by the expedient of including in its contracts of adhesion an arbitration clause that does not permit class arbitration."

The *American Express* antitrust litigation bounced back and forth between the Second Circuit and the Supreme Court for more than two years on the arbitration issue. The litigation began as a consolidated class action brought by merchants who contracted with Amex to accept its corporate, charge and credit cards. *See In re American Express Merchants' Litigation*, No. 03-CV-9592, 2006 WL 662341 (S.D.N.Y. March 16, 2006). Plaintiffs alleged that the merchant contract violated the Sherman Act. The merchant contract contained an arbitration provision that required all claims "arising from or relating to [the] Agreement" to be resolved by arbitration. The contract also contained a class action waiver that purported to preclude merchants from bringing or participating in class actions regarding issues subject to arbitration. Based on the arbitration provision, the U.S. District Court for the Southern District of New York granted Amex's motion to compel arbitration. *Id*. The district court did not resolve the issue of the enforceability of the class action waiver, holding that the issue was for the arbitrator to decide. On appeal, the U.S. Court of Appeals for the Second Circuit reversed and held that

THE SECOND CIRCUIT CONSIDERED THE SUPREME COURT'S *CONCEPCION* DECISION, BUT OPINED THAT "WHAT *CONCEPCION* [DOES] NOT DO IS REQUIRE THAT ALL CLASS-ACTION WAIVERS BE DEEMED *PER SE* ENFORCEABLE."

the class action waiver was unenforceable. *See In re American Express Merchants' Litigation* (*Amex I*), 554 F.3d 300 (2d Cir. 2009).

American Express sought review by the Supreme Court. In a May 3, 2010, order vacating the judgment and remanding the case, the Supreme Court instructed the Second Circuit to reconsider the case in light of the Supreme Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corporation*, 130 S.Ct. 1758 (U.S. 2010). There the Supreme Court had held that imposing class arbitration on parties that have not agreed specifically to class arbitration is inconsistent with the Federal Arbitration Act, 9 U.S.C. § § 1 *et seq*. On remand to the Second Circuit, in *Amex II*, Amex argued that *Stolt-Nielsen* compelled a different result, but the Second Circuit disagreed and reconfirmed its prior ruling. 634. F3d 187 (March 8, 2011). The Second Circuit found its original analysis unaffected by *Stolt-Nielsen* and held that the class action waiver within the arbitration agreement was unenforceable because "the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws." *Id*.

Following the Supreme Court's decision in *Concepcion*, the Second Circuit accepted supplemental briefing from the parties and found the class action waiver unenforceable for a third time. The court relied on an expert affidavit submitted by the plaintiffs stating that "the only economically feasible means for plaintiffs enforcing their statutory rights is via class action." The court found that "Amex has brought no serious challenge to the plaintiffs' demonstration that their claims cannot reasonably be pursued as individual actions." Slip. Op. at 22-23.

Because the decision was based on this specific factual finding, the Second Circuit was careful to qualify its holding by expressly stating that "[w]e do not hold today that class action waivers in arbitration agreements are *per se* unenforceable, or even that they are *per se* unenforceable in the context of antitrust actions." Slip Op. at 24. It also stated that the decision was not based on the status of plaintiffs as "small" merchants, and instead emphasized that the arbitration agreement "must be considered on its own merits." *Id*. There was initially a question as to whether the decision is limited to antitrust claims, because the Second Circuit discusses at length the federal policy allowing private enforcement of antitrust laws.

Although the Second Circuit has not framed its unenforceability holding in terms of unconscionability, the case creates tension with the Supreme Court's decision in *Concepcion*, a case broadly supporting the enforceability of class action waivers within arbitration agreements. In *Concepcion*, the Supreme Court held that the Federal Arbitration Act preempted California state law under which class action waivers in consumer arbitration agreements had been held to be unconscionable in many situations, including most consumer and employment contracts. The Second Circuit's new decision in *Amex III* raises the issue of whether other circuits will follow the Second Circuit in adopting a vindication of statutory rights analysis and whether the Supreme Court will review this case yet again.

U.S. SUPREME COURT OVERTURNS NINTH CIRCUIT IN ANOTHER RULING IN FAVOR OF ARBITRATION

Compucredit Corp. v. Greenwood, decided January 10, 2012, is the latest in a series of U.S. Supreme Court opinions that have come down firmly on the side of the enforceability of consumer arbitration agreements. Lining up 8-1 in favor of Petitioner Compucredit, the justices rejected a determination by the U.S. Court of Appeals for the Ninth Circuit that the provisions of the Credit Repair Organization Act (the CROA or the Act), 15 U.S.C. §§ 1679 *et seq.*, which require that consumers be provided with a disclosure informing them that they "have the right to sue" and prohibit the waiver of "any right of [a] consumer under" the Act, make CROA claims nonarbitrable.

Section 2 of the Federal Arbitration Act (the FAA), 9 U.S.C. §§ 1 *et seq.*, has been cited consistently by the Court in arbitration-related decisions issued over the past several years for the proposition that the FAA establishes "a liberal policy favoring arbitration agreements." This section was cited again by the Court as the basis for its holding in *Compucredit*. Justice Scalia explained that the federal policy favoring arbitration "requires courts to enforce agreements to arbitrate according to their terms . . . even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by contrary congressional command.'"

Greenwood, the plaintiff in the underlying action, argued that the CROA's disclosure and nonwaiver provisions constitute just such a congressional command. The disclosure provision—Section 1679c(a)—sets forth a disclosure statement that a credit repair organization is required to provide to a consumer before a contract for credit repair services is signed, which includes a sentence that reads, "You have a right to sue a credit repair organization that violates the [CROA]." The Act's nonwaiver provision—Section 1679f(a)—states that "[a]ny waiver by any consumer of any protection provided by or any right of the consumer under [the CROA]—(1) shall be treated as void; and (2) may not be enforced by any Federal or State court or any other person." Greenwood argued that Section 1679f(a) and the disclosure statement together create a nonwaivable right to sue in court.

The majority rejected Greenwood's argument, finding that the only consumer right created by the CROA's disclosure provision was the right to receive the disclosure. The Court explained that the "right to sue" language contained in the CROA disclosure is merely "a colloquial method of communicating to consumers that they have the legal right, enforceable in court, to recover damages from credit repair organizations that violate the CROA," and that "[w]hen [Congress] has restricted the use of arbitration in other contexts, it has done so with a clarity that far exceeds" that language.

SECTION 2 OF THE FEDERAL ARBITRATION ACT, 9 U.S.C. §§ 1 *ET SEQ.*, HAS BEEN CITED CONSISTENTLY BY THE COURT IN ARBITRATION-RELATED DECISIONS ISSUED OVER THE PAST SEVERAL YEARS FOR THE PROPOSITION THAT THE FAA ESTABLISHES "A LIBERAL POLICY FAVORING ARBITRATION AGREEMENTS."

In a concurring opinion, Justices Sotomayor and Kagan expressed their belief that, if Respondent's argument had been supported by the legislative history or purpose of the CROA, it would have been more persuasive. "[T]he Act's text is not dispositive, and respondents identify nothing in the legislative history or purpose of the Act that would tip the balance of the scale in favor of their interpretation," Sotomayor wrote.

Justice Ginsburg authored the lone dissenting opinion. Quoting from the text of the Act, she pointed out that the CROA was enacted "to protect consumers 'who have experienced credit problems'—'particularly those of limited economic means'—against the unfair and deceptive practices of credit repair organizations." Given that fact, she expressed her misgivings regarding the majority's holding that, as she put it, "credit repair organizations can escape suit by providing in their take-it-or-leave-it contracts that arbitration will serve as the parties' sole dispute-resolution mechanism."

THE IMPACT OF *AT&T MOBILITY V. CONCEPCION* ON FINANCIAL SERVICES COMPANIES:

INCLUSION OF ARBITRATION CLAUSES IN CUSTOMER CONTRACTS AND THE IMPACT OF DODD-FRANK

On April 27, 2011, the U.S. Supreme Court held in a 5-4 decision that the Federal Arbitration Act (FAA) preempted California's *Discover Bank* rule, which deemed unenforceable most mandatory consumer arbitration agreements that include class-action waivers. The decision is seen by many as a victory for companies, especially those that rely on standardized contracts, and paves the way for the use of arbitration clauses as a means of avoiding class litigation. However, questions remain as to how the Consumer Financial Protection Bureau (CFPB) may attempt to regulate the use of arbitration clauses in consumer contracts and whether this may have the effect of limiting the impact of the *Concepcion* decision. Given the CFPB's focus on consumer contracts, commercial contracts face less uncertainty, making adoption of arbitration agreements with express class-action waivers worthy of consideration by providers of business services.

AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), involved a California couple who sued AT&T after they were charged $30 in sales tax on phones that AT&T had advertised as free. The Concepcions' complaint was consolidated with a class action that alleged, among other things, claims for fraud and false advertising based on the same facts. AT&T moved to compel individual arbitration with the Concepcions based on their contract's arbitration agreement, which included an express class-action waiver. The California courts found the class-action waiver unconscionable under the *Discover Bank* rule. The Supreme Court reversed on FAA preemption grounds because "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id*. at 1748.

While *Concepcion* does seem to expand significantly the enforceability of arbitration agreements and class-action waivers, financial services companies should consider the impact of possible rulemaking by the CFPB before engaging in wholesale amendments of their standard consumer contracts to include arbitration agreements and class-action waivers. The CFPB, created under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), has the authority to impose limitations on the use of mandatory arbitration agreements and prohibit their use entirely if it finds that it is "in the public interest and for the protection of consumers" to do so. Pub. Law 111-203 1028(b). Before taking any action, the CFPB is required to conduct a study on the use of

THE DECISION IS SEEN BY MANY AS A VICTORY FOR COMPANIES, ESPECIALLY THOSE THAT RELY ON STANDARDIZED CONTRACTS, AND PAVES THE WAY FOR THE USE OF ARBITRATION CLAUSES AS A MEANS OF AVOIDING CLASS LITIGATION.

mandatory arbitration agreements in connection with consumer financial products and services, and must present its findings to Congress before it can impose limitations or prohibitions on their use. *Id*. § 1028(a). The Dodd-Frank Act does not state a deadline by which the study must be conducted. Yet, in the wake of the Supreme Court's ruling in *Concepcion*, it appears likely that consumer advocates will pressure the CFPB to conduct the study sooner rather than later. Any regulation ultimately adopted will apply only to agreements entered into starting 180 days after the regulation's effective date. *Id*. § 1028(d). Companies wishing to amend their financial services contracts in light of *Concepcion* should also take note of this grace period.

The CFPB's authority extends only to arbitration agreements between offerors or providers of consumer financial products and services (and certain of their affiliates) and consumers. *Id.; see also id*. § 1002(6). The CFPB does not have the authority to regulate mandatory arbitration agreements in financial services contracts entered into between and among business entities. *See id*. § 1028(b); *see also id*. § 1002(4) (defining consumer as "an individual or an agent, trustee, or representative acting on behalf of an individual"). It also cannot prohibit or restrict the use of voluntary arbitration agreements entered into after a dispute has arisen. *Id*. § 1028(c).

Concepcion emphasizes that Section 2 of the FAA reflects a "liberal policy favoring arbitration" and notes that "[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute." 131 S. Ct. at 1749. A 2010 Supreme Court decision involving the FAA previously highlighted the Supreme Court's emphasis on freedom of contract with respect to arbitration agreements. In *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), the Court held that class arbitration cannot be imposed on parties whose contracts are silent on the issue. Given the Supreme Court's continued emphasis on freedom of contract in *Concepcion*, and the fact that the CFPB's authority does not extend to business-to-business contracts, financial services companies may find it appealing to amend their standard agreements for commercial customers to eliminate the possibility of becoming embroiled in class litigation, even if they decide to take a wait-and-see approach with respect to consumer contracts. Where a financial services company executes large numbers of non-negotiated form contracts with its commercial customers, inclusion of an arbitration agreement with an express class-action waiver should, in the wake of *Concepcion*, provide an effective tool for reducing, and possibly eliminating, any potential class litigation exposure.

U.S. SUPREME COURT HOLDS THAT THE FEDERAL ARBITRATION ACT PREEMPTS STATE LAW LIMITATIONS ON ARBITRATION AGREEMENTS

In a much-anticipated decision regarding class actions and arbitration, the U.S. Supreme Court held on April 27, 2011, that the Federal Arbitration Act (FAA) preempts state contract law limitations on the enforceability of arbitration agreements. In a 5-4 opinion by Justice Scalia in *AT&T Mobility v. Concepcion*, No. 09-893, 563 U.S. (April 27, 2011), the Court held that California's *Discover Bank* rule, which classified most collective-arbitration waivers in consumer contracts as unconscionable, stood as "an obstacle" to Congressional purpose and is, therefore, preempted by the FAA.

The decision represents a significant victory for businesses seeking to enforce individual arbitration agreements in contracts with consumers, employees, and others. The sweeping language of the Court's opinion is likely to expand significantly the enforceability of arbitration provisions and class action waivers in consumer and employment contracts.

In *Concepcion*, a husband and wife filed a class action against AT&T Mobility LLC alleging various violations of California's consumer protection statutes. AT&T moved to compel individual arbitration pursuant to the wireless service contract's arbitration agreement, which contained an express class action waiver. The district court and the Ninth Circuit held that the class action waiver was unconscionable under California's *Discover Bank* rule because: (1) it was contained within a contract of adhesion; (2) the dispute involved small amounts of damages; and (3) the plaintiffs alleged a scheme to deliberately cheat large numbers of consumers out of small amounts of money. *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 854-55 (9th Cir. 2009). Like the district court, the Ninth Circuit held that "[t]he FAA does not bar federal or state courts from applying generally applicable state contract law principles and refusing to enforce an unconscionable class action waiver in an arbitration clause." *Id*. at 856-57 (internal quotation omitted).

The Supreme Court reversed, holding that a state may not condition the enforceability of arbitration agreements on the availability of classwide arbitration procedures. Although generally applicable contract defenses are preserved under the FAA, the Court held that the FAA preempted California's *Discover Bank* unconscionability rule because "nothing in [the FAA] suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." Slip Opinion at 9.

The decision reinforces that "[t]he overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements *according to their terms*" and that "the FAA was designed to promote arbitration." *Id*. at 9, 11 (emphasis added). "Arbitration is a matter of contract," the Court stated, "and the FAA requires courts to honor parties' expectations." *Id*. at 17. The California *Discover Bank* rule interfered with the purpose of the FAA, because it essentially allowed any party to a consumer contract to demand a right to class arbitration as a prerequisite for an enforceable arbitration provision. The Court stated that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id*. It was inconsistent with the FAA, the majority stated, for class arbitration to be "manufactured" by state law rather than brought about through a consensual agreement.

THE SWEEPING LANGUAGE OF THE COURT'S OPINION IS LIKELY TO EXPAND SIGNIFICANTLY THE ENFORCEABILITY OF ARBITRATION PROVISIONS AND CLASS ACTION WAIVERS IN CONSUMER AND EMPLOYMENT CONTRACTS.

Of particular interest, the majority brushed aside the concerns of the dissent and of consumer advocates that class proceedings are necessary to prosecute small-dollar claims. The majority stated only that "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id*. at 17.

SECOND CIRCUIT HOLDS CLASS ACTION WAIVER UNENFORCEABLE IN AMERICAN EXPRESS ARBITRATION AGREEMENT DESPITE THE U.S. SUPREME COURT'S DECISION IN *STOLT-NIELSEN*

In May 2010, the Supreme Court directed the Second Circuit to reconsider its decision in *In re American Express Litigation* regarding the unenforceability of a class action waiver in light of the Supreme Court's decision in *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010). *See American Express Company v. Italian Colors Restaurant*, 130 S. Ct. 2401 (Mem.) (May 3, 2010) (vacating 554 F.3d 300 (2d Cir. 2009)). On remand, the Second Circuit found its original analysis unaffected by *Stolt-Nielsen* and held that the class action waiver within the arbitration agreement was unenforceable because "the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws." *In re American Express*, No. 06-1871 at 3, 18 (2d Cir. March 8, 2011).

The *American Express* antitrust litigation began as a consolidated class action brought by merchants who contracted with American Express (Amex) to accept its corporate, charge, and credit cards. *See In re American Express Merchants' Litigation*, No. 03-CV-9592, 2006 WL 662341 (S.D.N.Y. March 16, 2006). Plaintiffs alleged that the merchant contract violated the Sherman Act. The merchant contract contained an arbitration provision that required all claims "arising from or relating to [the] Agreement" to be resolved by arbitration. The contract also contained a class action waiver that purported to preclude merchants from bringing or participating in class actions regarding issues subject to arbitration. Based on the arbitration provision, the U.S. District Court for the Southern District of New York granted Amex's motion to compel arbitration. *Id*. The district court did not resolve the issue of the enforceability of the class action waiver, holding that the issue was for the arbitrator to decide. On appeal, the U.S. Court of Appeals for the Second Circuit reversed. *See In re American Express Merchants' Litigation*, 554 F.3d 300 (2d Cir. 2009). First, the Second Circuit held that the issue of the class action waiver's enforceability was a matter for the court, not the arbitrator. Second, the Second Circuit held "that the class action waiver in the [agreement] cannot be enforced in this case because to do so would grant Amex de facto immunity from antitrust liability by removing the plaintiffs' only reasonably feasible means of recovery." *Id*. at 320.

American Express sought review by the Supreme Court. In a May 3, 2010, order vacating the judgment and remanding the case, the Supreme Court instructed the Second Circuit to reconsider the case in light of the Supreme Court's decision in *Stolt-Nielsen*. 130 S.Ct. 1758. In *Stolt-Nielsen*, the Supreme Court had held that imposing class arbitration on parties who have not agreed specifically to class arbitration is inconsistent with the Federal Arbitration Act, 9 U.S.C. § § 1 *et seq*. The Court stated 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." *Id*. at 1775 (emphasis in original).

On remand to the Second Circuit, Amex argued that *Stolt-Nielsen* compelled a different result and that the class action waiver should be enforced. The Second Circuit disagreed. The court stated that *Stolt-Nielsen* did not bar a court from using public policy to find contractual language void, and agreed with plaintiffs that *Stolt-Nielsen* did not overrule or drastically limit prior precedent regarding the enforceability of class action waivers. *In re American Express Merchants Litigation*, No. 06-1871 at 21 (2d Cir. March 8, 2011). The Second Circuit acknowledged the holding in *Stolt-Nielsen* that parties cannot be forced to engage in a class arbitration absent a contractual agreement to do so, but stated that it did not follow that a contractual clause barring class arbitration is *per se* enforceable. *Id*. at 11.

Instead, the Second Circuit reconfirmed its prior holding that the class action waiver within the arbitration provision was unenforceable. The class action waiver was unenforceable, the court found, because "the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws." *Id*. at 18. The court stated that plaintiffs, as the party seeking to invalidate the agreement, bore the burden of proof to establish that arbitration would be prohibitively expensive, and found that plaintiffs had met that burden with an expert affidavit estimating the costs of individual litigation when compared with the amount of a potential individual recovery. *Id*. at 18-21. Based on the record, the court found that "the size of any potential recovery by an individual plaintiff will be too small to justify the expense of bringing an individual action," and the fee shifting provisions of the antitrust statutes were "inadequate" to alleviate these concerns. *Id*. at 20-21. The court also stated that it was relying on "a firm principle of antitrust law that an agreement which in practice acts as a waiver of future liability under the federal antitrust statutes is void as a matter of public policy." *Id*. at 17. Accordingly, the court held that the class action waiver was unenforceable because "enforcement of the class action waiver in the Card Acceptance Agreement 'flatly ensures that no small merchant may challenge American Express's tying arrangement under the federal antitrust laws.'" *Id*. at 20 (quoting 554 F.3d at 319).

THE SECOND CIRCUIT RECONFIRMED ITS PRIOR HOLDING THAT THE CLASS ACTION WAIVER WITHIN THE ARBITRATION PROVISION WAS UNENFORCEABLE.

The Second Circuit was careful to qualify its holding by expressly stating that "we do not conclude here that class action waivers in arbitration agreements are *per se* unenforceable" or that they are *per se* unenforceable in the context of antitrust actions. *Id*. at 21. It also stated that the decision was not based on the status of plaintiffs as "small" merchants. *Id*. Instead, "each case which presents a question of the enforceability of a class action waiver in an arbitration agreement must be considered on its own merits." *Id*.

Although the Second Circuit did not frame its decision in terms of unconscionability, the Supreme Court is currently considering a potentially significant case regarding the enforceability of class action waivers held to be unconscionable under state law. In *AT&T Mobility LLC v. Concepcion*, No. 09-893, the Court will address whether the Federal Arbitration Act preempts California state law under which class action waivers in consumer arbitration agreements have been held to be unconscionable. Because courts in many states have held that class action waivers may be found unconscionable under state contract law principles using a similar analysis that the Second Circuit employed, the Supreme Court's decision may have a significant impact on consumer arbitration, as well as arbitration in similar contexts such as employment.

THIRD CIRCUIT HOLDS THAT ARBITRATOR MUST DECIDE WHETHER PARTIES AGREED TO CLASS ARBITRATION

The U.S. Court of Appeals for the Third Circuit has issued its latest in a line of decisions addressing the role of the court and the arbitrator in determining whether class arbitration may be compelled. In *Vilches v. Travelers Cos., Inc.*, No. 10-2888 (3d Cir. Feb. 9, 2011) (unpublished), the Third Circuit held that the issue of whether the parties agreed to class arbitration (or conversely agreed to a class action waiver) was a question of contract interpretation for the arbitrator to decide, while a challenge to the enforceability of a class action waiver would be an issue of arbitrability for the court to decide.

At the time they commenced employment, the plaintiffs in *Vilches* agreed to a provision requiring that all employment disputes be submitted to arbitration. The agreement allowed the employer to amend the arbitration policy with appropriate notice to employees. Travelers later gave notice that it was amending the arbitration policy to add a class action waiver. When the plaintiffs subsequently filed a wage and hour putative class action in court, Travelers moved for summary judgment, seeking dismissal of the complaint and an order compelling individual arbitration. In response, plaintiffs argued: (1) that the amendment adding the class action waiver did not bind them because they never assented to its terms; and (2) that even if they did assent, the waiver was unconscionable. While barely touching on the question of unconscionability, the district court ruled in Travelers' favor on the first issue and ordered the parties into individual arbitration. On appeal, the Third Circuit vacated the district court's order. Given that the original arbitration provision applied to all employment-related disputes, the Third Circuit held that it was for the arbitrator to determine whether there was assent to the amendment adding the class action waiver before the enforceability of the waiver could be addressed. However, "for the sake of judicial efficiency, and because it d[id] concern 'arbitrability,'" the court went ahead to address the unconscionability issue, concluding that, if the waiver had been assented to, it was not unconscionable.

In reaching its conclusion, the Third Circuit cited to its observation in *Puleo v. Chase Bank USA, N.A.*, 605 F.3d 172 (3d Cir. 2010), that "the Supreme Court has made clear that questions of 'contract interpretation' aimed at discerning whether a particular procedural mechanism is authorized by a given arbitration agreement are matters for the arbitrator to decide."

However, if the Supreme Court's much discussed decision in *Stolt-Nielsen* stands for the proposition that an arbitration agreement's silence on the issue of class arbitration precludes an arbitrator from imposing class proceedings (as many practitioners believe it does), the Third Circuit's rejection of Plaintiffs' unconscionability argument seems to have left the

THE THIRD CIRCUIT HELD THAT THE ISSUE OF WHETHER THE PARTIES AGREED TO CLASS ARBITRATION (OR CONVERSELY AGREED TO A CLASS ACTION WAIVER) WAS A QUESTION OF CONTRACT INTERPRETATION FOR THE ARBITRATOR TO DECIDE, WHILE A CHALLENGE TO THE ENFORCEABILITY OF A CLASS ACTION WAIVER WOULD BE AN ISSUE OF ARBITRABILITY FOR THE COURT TO DECIDE.

arbitrator with nothing to decide. If it is determined in arbitration that plaintiffs were bound by the amendment containing the class action waiver, then the arbitrator will have no choice but to order arbitration on an individual basis because the Third Circuit has already rejected plaintiffs' unconscionability argument. If, on the other hand, the arbitrator finds that plaintiffs were not bound by the amendment, it seems that *Stolt-Nielsen* would nonetheless require individual arbitration because the unamended arbitration agreement was silent on the issue of class proceedings.

STOLT-NIELSEN V. ANIMALFEEDS: U.S. SUPREME COURT HOLDS THAT CLASS ARBITRATION CANNOT BE IMPOSED ON PARTIES WHOSE AGREEMENTS ARE SILENT ON THE ISSUE

In a 5-3 majority decision issued on April 27, 2010, the U.S. Supreme Court held in *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, No. 08-1198, that imposing class arbitration on parties who have not agreed specifically to class arbitration is inconsistent with the Federal Arbitration Act (FAA), 9 U.S.C. § § 1 *et seq.* Because the parties in *Stolt-Nielsen* stipulated that the arbitration clause was silent on class arbitration, the Supreme Court held that the arbitration panel's inference that the parties' intended to authorize class-wide arbitration exceeded its powers. The holding answers the question left open by *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2002), on the proper standard to be applied in deciding whether class arbitration is permitted.

AnimalFeeds brought an anti-trust class action in federal court against Stolt-Nielsen for price fixing. The parties had entered into an arbitration agreement, but it was silent on the issue of class arbitration. The action was ordered to arbitration, and the parties agreed to submit the question of whether their arbitration agreement allowed for class arbitration to a panel of arbitrators. The panel determined that the arbitration clause allowed for class-wide arbitration. The U.S. District Court for the Southern District of New York vacated that determination on the ground that it was made in manifest disregard of the law.

435 F. Supp. 2d 382 (S.D.N.Y. 2006). On appeal, the U.S. Court of Appeals for the Second Circuit reversed, upholding the arbitrators' ruling compelling class arbitration and rejecting Stolt-Nielsen's argument that the FAA precludes the imposition of class arbitration unless it is expressly provided for in the arbitration agreement. 548 F.3d 85, 100-01 (2d Cir. 2008). The U.S. Supreme Court granted Stolt-Nielsen's petition for a writ of certiorari on June 15, 2009.

In the majority opinion, authored by Justice Alito, the Court noted that the arbitration panel exceeded its powers by imposing its own policy preference instead of identifying and applying a rule of decision derived from the FAA or from maritime or New York law. "[T]he task of an arbitrator is to interpret and enforce a contract, not to make public policy." Slip. Op. at 7. "Because the parties agreed their agreement was 'silent' in the sense that they had not reached any agreement on the issue of class arbitration, the arbitrators' proper task was to identify the rule of law that governs in that situation." *Id.* at 8. Instead, the arbitration panel made a policy decision based on its view that there existed consensus in post-*Bazzle* arbitral decisions declaring class arbitration beneficial. The Court pointed out, however, that *Bazzle* does not control because it left open the question of the standard to be applied when determining whether and under what circumstances class-wide arbitration may be permitted.

THIS DECISION WILL LIMIT A GROWING PRACTICE AMONG ARBITRATORS OF PERMITTING CLASS-WIDE ARBITRATION DESPITE "SILENT" ARBITRATION AGREEMENTS BASED ON THE PRESUMED INTENT OF THE PARTIES.

The Court then turned to the mandate of the FAA, which is to "give effect to the contractual rights and expectations of the parties." *Id.* at 18 (citation omitted). From this principle, the Court stated, "it follows 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." Slip. Op. at 20 (emphasis in original). The Court noted that

while there may be certain contexts in which it is appropriate to presume that parties entering into arbitration agreements implicitly authorize the arbitrator to adopt necessary procedures to give effect to the parties' agreement, class arbitration does not fall in this category. This is because "class arbitration changes the nature of the arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Id*. at 21. The Court noted that the presumed benefits of arbitration—including lower costs, quickness, and efficiency—are less assured in class arbitration, which includes hundreds or thousands of parties, does not include the same presumption of privacy and confidentiality, and adjudicates the rights of absent parties. The Court concluded, therefore, that, in the absence of explicit language, there is good reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration.

Justice Ginsburg authored a dissenting opinion, which was joined by Justices Stevens and Breyer. The dissent argued that the case was not ripe for review because the arbitration panel made a threshold decision that did not justify judicial intervention. The dissent further noted that, even if the case were ripe, the parties gave the arbitration panel the discretion to decide whether class arbitration was permitted. The majority discounted this argument, stating that the dissent was minimizing the substantive implications of class arbitration.

This decision will limit a growing practice among arbitrators of permitting class-wide arbitration despite "silent" arbitration agreements based on the presumed intent of the parties. Moreover, the post-*Bazzle* concern with severability of class action waivers may now be superseded, since *Stolt-Nielsen* seems to hold that unless an agreement can be read to permit class arbitration, it is not permissible under the FAA. *Stolt-Nielsen* did not specifically address unconscionability arguments that are frequently raised in opposition to enforcement of class action waivers in arbitration agreements. Nonetheless, *Stolt-Nielsen* is likely to be argued to preempt state law decisions refusing to enforce arbitration agreements with class action waivers according to their terms pursuant to the FAA. Parties wishing to avoid class arbitration should continue to include provisions explicitly stating that class arbitration is not part of the agreement to arbitrate.

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