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Recent Second Circuit Decision Invalidating Class Action Waiver Highlights Actions by Lower Courts to Limit and Distinguish ***AT&T Mobility, LLC v. Concepcion***

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The Supreme Court's decision in *AT&T Mobility, LLC v. Concepcion*,[1] which upheld the validity of class arbitration waivers in consumer contracts, was initially viewed as a serious blow to the continued viability of consumer class actions. Inevitably, lower court decisions blunting *Concepcion*'s impact soon followed. Although *Concepcion* does indeed provide a robust defense against class action liability, subsequent decisions have begun to limit *Concepcion*'s reach, with some finding the rule in *Concepcion* inapplicable even when dealing with substantively identical contractual provisions. Most recently, *In Re American Express Merchants' Litigation*, (*Amex III*),[2] a Second Circuit decision, held that *Concepcion* does not mandate enforcement of class action waivers when plaintiffs' federal rights are at stake. The issuance of the *Amex III* decision provides an opportune moment to look back at how, and in what circumstances, lower courts have determined, notwithstanding *Concepcion*, that a class action waiver in an arbitration agreement does not preclude the assertion of class action claims in a court of law.

Concepcion establishes principles of broad applicability concerning the scope of the Federal Arbitration Act (FAA)[3] that would not seem to admit of any serious exceptions. Specifically, the Supreme Court considered whether the FAA preempted California's so-called "*Discover Bank*" rule, which deemed class arbitration waivers in certain consumer contracts to be per se unconscionable.[4] The FAA requires judges to enforce contractual arbitration provisions as written "save upon such grounds as exist at law or in equity for the revocation of any contract." [5] The Concepcions argued that the *Discover Bank* rule, an application of California's unconscionability doctrine, was such a basis for invalidation under section 2. The Court rejected this argument, stating that to do otherwise would be to hold "the [FAA] … to destroy itself." [6] The Court noted that Congress enacted the FAA to promote arbitration, and to underscore that arbitration is a creature of contract. Allowing parties to control the scope of arbitration in their contracts encourages efficiency in the resolution of disputes. A common law rule ensuring that class proceedings, with their accompanying complexity and delay, are available regardless of any preexisting agreement is incompatible with those statutory goals. Accordingly, *Concepcion* found that the FAA preempted California's *Discover Bank* rule.

Concepcion's holding that the FAA requires courts to respect parties' agreements to limit their respective remedies to individual arbitration facially provides little room for courts to strike down a class action waiver. But the Second Circuit's decision in *Amex III* illustrates one of the grounds on which *Concepcion* has been distinguished so as to invalidate an arbitration agreement containing a class action waiver. Specifically, the court concluded that enforcing the class action waiver in

agreements between merchants and American Express would effectively deprive the merchants of important federal rights. The merchants in *Amex III* were alleging anticompetitive behavior under the federal Sherman and Clayton Acts. *Concepcion*, however, addressed the preemption of state contract law by a federal statute and not, as in *Amex III*, the question of whether arbitration would afford plaintiffs an adequate opportunity to vindicate federal statutory rights. Further, the court stated, *Concepcion* did not require judges to enforce all class waivers as a matter of course. Rather, the panel's analysis of prior Supreme Court cases suggested that a party alleging a violation of federal rights could seek to invalidate arbitration agreements where arbitration would be so expensive as to foreclose bringing any claims. In *Amex III*, the court found that denying the plaintiffs the benefit of class proceedings would bar them from asserting their individual antitrust claims which, standing alone, were too small to justify the cost of proceeding individually, whether in arbitration or otherwise. Given the antitrust statutes' vigorous promotion of private enforcement actions, the Second Circuit concluded that it could not have been Congress's intent to allow a defendant to "immunize … itself against all such antitrust liability" by inserting an arbitration clause into an agreement.[7]

Another significant distinction between *Concepcion* and *Amex III* was the presence in *Concepcion* of an arbitration procedure that would make it feasible for consumers to bring small dollar value claims in arbitration, including provisions which (1) required AT&T to pay all costs of non-frivolous claims; (2) venued arbitration in the county in which the customer was billed; (3) precluded AT&T from seeking reimbursement of its attorney's fees; and (4) guaranteed a prevailing customer a minimum recovery of $7,500 (later increased to $10,000) if the consumer's arbitration award was greater than AT&T's last written settlement offer (if any).[8] The Supreme Court, while noting the presence of these consumer protections in the AT&T arbitration agreement, did not rely on them as a basis for its ruling. Likewise, the Second Circuit's decision in *Amex III* does not cite the absence of such provisions in the American Express merchant agreement as a basis to distinguish *Concepcion*. Nonetheless, had such protections been available to merchants in *Amex III*, it is possible that the Second Circuit could have reached a different conclusion on the question of whether the class action waiver effectively deprived merchants of the ability to vindicate their rights under the Clayton Act and Sherman Act.

One case that did explicitly cite the many pro-consumer features of the AT&T arbitration agreement as a basis for distinguishing *Concepcion* was the Massachusetts Superior Court's decision in *Feeney v. Dell, Inc*.[9] Like *Amex III*, *Feeney* declined to apply *Concepcion* where doing so would deprive the plaintiffs of any meaningful course of action. Unlike in *Amex III*, however, *Feeney* distinguished *Concepcion* by referencing the provisions in the AT&T arbitration agreement that would make it feasible for a consumer to arbitrate small dollar value claims. In contrast, the arbitration provision in *Feeney* had no consumer protections, and required individual arbitration for all actions, including one plaintiff's $13.65 claim. As such, unlike the Concepcions, the *Feeney* plaintiffs could not reasonably pursue their claims absent class status. The court, therefore, found *Concepcion*'s preemption analysis inapplicable, stating that enforcing the arbitration agreement in this instance could not advance the FAA's goals, insofar as doing so would result in *no* proceeding, informal or otherwise.

Other courts have more closely duplicated the Second Circuit's *Amex III* reasoning, likewise finding that *Concepcion* does not require upholding an arbitration provision when doing so would effectively obliterate federal rights. In *Chen-Oster v. Goldman, Sachs & Co.*,[10] a judge in the Southern District of New York ruled that enforcing an arbitration agreement that did not make class proceedings available would violate an employee's right under Title VII to pursue certain discrimination claims only available to a class of plaintiffs.[11] Decisions have likewise found *Concepcion*'s preemption analysis inapplicable when claims arising under the Fair Labor Standards Act and the National Labor Relations Act could only be brought via class proceedings.[12]

Where courts have addressed the question of whether an arbitration provision should be deemed unconscionable, the exact issue addressed in *Concepcion*, courts have read *Concepcion* narrowly.[13] While *Concepcion* would appear to prohibit judicial rules disfavoring arbitration, courts have held that *Concepcion* does not affect generally applicable unconscionability defenses under the FAA's Section 2

savings clause. For example, in *Sanchez v. Valencia Holding Co.*,[14] the California Court of Appeal determined that *Concepcion* did not apply, even though the validity of an arbitration provision containing a class action waiver was at issue. First, the court noted that it was applying unconscionability principles governing *all* contracts, not a judge-made rule singling out arbitration. Second, the court found its decision to void the arbitration provision did not conflict with the FAA's goals, as permitting arbitration under the specific terms of the provision would have resulted in inefficiency and delay.[15]

Likewise, in *NAACP of Camden County E. v. Foulke Mgmt Corp.*,[16] another decision invoking general principles of contract law to invalidate arbitration provisions, the New Jersey Superior Court noted that *Concepcion* left courts free to determine the enforceability of arbitration agreements using traditional contract doctrine. The court proceeded to find the arbitration provisions at issue, which included a class waiver, so confusing as to be easily misunderstood by the average car purchaser signing the contract. The court took pains to note that per *Concepcion*, it was not ruling the class action waiver *per se* invalid, only so riddled with ambiguities as to be unenforceable due to a lack of mutual assent.[17]

Although *Concepcion* held that the FAA preempted California common law, some California courts have declined to apply *Concepcion* when doing so would adversely affect enforcement of state labor laws. A handful of California courts have invalidated arbitration provisions waiving a party's rights under California's Private Attorney General Act (PAGA).[18] The PAGA allows employees to bring civil suits against their employers. In *Brown v. Ralphs Grocery Co.*,[19] the court emphasized that an individual bringing PAGA claims acts as an agent of state labor law enforcement, a far cry from the private, waivable right to class arbitration addressed by *Concepcion*.[20] Further, the court noted that PAGA claims do not share the aspects of class arbitration found to burden arbitration, and as such do not conflict with the FAA's goal to promote prompt, efficient, and cost-effective dispute resolution.[21]

As these cases illustrate, *Concepcion* does not inevitably mean that a class action waiver in an arbitration agreement will preclude the assertion of claims by means of a class action. The absence of a *per se* rule barring class action waivers does not foreclose would-be class plaintiffs from arguing that, in the specific circumstances of their claims, enforcement of the class action waiver would effectively deprive them of the ability to vindicate their rights, thereby rendering the waiver unconscionable. The potential viability of such arguments does not mean that businesses should abandon efforts to enter into arbitration agreements with their customers that incorporate class action waivers. *Concepcion* will continue to protect businesses from the threat of class litigation in circumstances where the waiver has not foreclosed customers' ability to pursue a meaningful remedy. Businesses should also consider whether their arbitration agreements should incorporate procedural protections for customers that would make the pursuit of small claims through arbitration feasible and minimize the viability of unconscionability arguments against enforceability of a class action waiver.

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Endnotes

1 131 S. Ct. 1740 (2011).

2 No. 06-1871-cv (2d Cir. Feb. 1, 2012).

3 9 U.S.C. § 1-14 (2006).

4 *See Discover Bank v. Sup. Ct.*, 113 P.3d 1100 (Cal. 2005).

5 9 U.S.C. § 2.

6 *Concepcion*, 131 S. Ct. at 1748 (quoting *Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 227-228 (1998)).

7 *Amex III*, at p. 25.

8 *See Concepcion*, 131 S. Ct. at 1744.

9 No. MICV 2003-01158, 2011 WL 5127806, at *8 (Mass. Super. Ct. Oct. 4, 2011).

10 No. 10 Civ. 6950 (LBS) (JCF), 2011 WL 2671813 (S.D.N.Y. July 7, 2011).

11 The plaintiff sought to show that the defendant engaged in a 'pattern or practice' of employment discrimination in violation of Title VII, a claim an individual may not bring. *Id.* at *3.

12 *See Williams v. Securitas Sec. Servs. USA, Inc.*, No. 10-7181, 2011 WL 2713741 (E.D. Pa. July 13, 2011); *D.R. Horton, Inc.*, 357 N.L.R.B. 184 (2012).

13 *See Palmer v. Infosys Techs. Ltd.*, No. 2:11cv217-MHT, 2011 WL 5434258 (M.D. Ala. Nov. 9, 2011); *Urbino v. Orkin Servs. of Cal., Inc.*, No. 2:11-cv-06458-CJC (PJWx), 2011 WL 4595249 (C.D. Cal. Oct. 5, 2011); *Kanbar v. O'Melveny & Myers*, No. C-11-0892 EMC, 2011 WL 2940690 (N.D. Cal. July, 21 2011); *Mission Viejo Emergency Med. Assocs. v. Beta Healthcare Group*, 128 Cal. Rptr. 3d 330 (Ct. App. 2011).

14 201 Cal. Rptr. 3d 19 (Ct. App. 2011).

15 The arbitration agreement permitted appeal to a panel of arbitrators if the award was over $100,000 or if an injunction was issued, a provision the court found to benefit the defendant. *Id.* at 36. Thus, if the defendant lost, he could force the plaintiff to undergo further litigation, mooting the benefits of arbitration. *Id.*

16 24 A.3d 777 (N.J. Super. Ct. App. Div. 2011).

17 *See id.* at 428.

18 Cal. Lab. Code § 2698-2699.5 (2004). *See Urbino v. Orkin Servs. of Cal., Inc.*, No. 2:11-cv-06458-CJC (PJWx), 2011 WL 4595249 (C.D. Cal. Oct. 5, 2011); *Plows v. Rockwell Collins, Inc.*, No. SACV 10-01936 DOC (MANx), 2011 WL 3501872 (C.D. Cal. Aug. 9, 2011).

19 128 Cal. Rptr. 3d 854 (Ct. App. 2011).

20 *See id.* at 861.

21 These aspects of class arbitration found burdensome include "class certification, notices, and opt-outs." *Id.* at 863.
