Concepcion Progeny Wrestle With Open Questions Surrounding Class-Action Waivers in Arbitration Agreements

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AN ARTICLE PUBLISHED IN THIS SPACE IN July 2011 discussed the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion* (2011) and asked the rhetorical question of whether the case signaled the beginning of the end of consumer class actions. This article attempts to answer that same question with the benefit of the guidance of a host of new cases applying the holding in Concepcion to other class action waiver provisions.

In *Concepcion*, the Supreme Court held that state laws barring arbitration provisions containing class action waivers are preempted by the Federal Arbitration Act ("FAA"). It thus validated contracts that required all disputes to be resolved through arbitration brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." It is clear from several cases decided after *Concepcion* that not all class action waivers will be enforced by courts but that the judiciary has become decidedly more receptive to agreements that require parties to arbitrate or litigate disputes on their own. In addition, despite objections from the class action plaintiffs' bar and many consumer groups, neither Congress nor the Bureau of Consumer Financial Protection has yet to enact any legislation or regulation that would reverse *Concepcion*. Absent such a development, it appears that well-drafted class action waiver provisions in arbitration agreements will spell the end of many consumer class actions.

One of the most significant post-*Concepcion* cases is the Third Circuit Court of Appeals' decision in *Homa v. American Express Co*. The plaintiff, on behalf of himself and others similarly situated, filed a class action against AMEX claiming that the company engaged in a bait-and-switch scheme in connection with its Blue cash card. The district court initially granted AMEX's motion to compel the plaintiff to arbitrate his claim on an individual basis based on a class-arbitration waiver in the plaintiff's contract with AMEX. The Court of Appeals reversed, saying the waiver might be unconscionable under applicable state law. On remand, the plaintiff developed a compelling record in the district court showing that the arbitration clause requiring him to challenge AMEX's practices on his own (rather than as part of a class) "would make it impossible for any person . . . to effectively vindicate his substantive statutory rights." After staying the case until the Supreme Court had decided *Concepcion*, the district court reinstated its order compelling the plaintiff to proceed against AMEX in an individual arbitration on the grounds that state unconscionability law could not trump the FAA. The Third Circuit affirmed, asserting that state law rules barring class-arbitration waivers are inconsistent with the FAA's preference for arbitration of disputes and cannot be enforced--even if that means a plaintiff will effectively not be able to vindicate his rights because the cost of arbitrating or litigating on his own exceeds the value of his claim.

A similar result was reached by the U.S. District Court for the Southern District of California in *Laster v. T-Mobile USA, Inc*. In *Laster*, which was decided under California law hostile to class action waiver provisions, the defendant essentially conceded that its arbitration provision was procedurally unconscionable, and the court found the waiver provision to be a contract of adhesion. Nonetheless, the court granted the defendant's motion to compel individual arbitrations on the ground that under *Concepcion*, the class action waiver was not substantively unconscionable and, therefore, was enforceable since California law will only invalidate agreements that are both procedurally and substantively unconscionable. In reaching its decision, the court rejected the argument that the waiver was one-sided given that the defendant would never initiate a class action proceeding against its customers. The court reasoned that *Concepcion* forecloses

such an argument since courts cannot reach a result (i.e., forcing a party into class action litigation) that the state legislature itself is barred from achieving in light of the FAA.

In *Porter v. MC Equities, LLC*, a federal district court in Ohio wrestled with the question of whether the holding in *Concepcion* applies in situations where the parties' arbitration agreement is silent as to whether a dispute can be resolved on a class-wide basis. The plaintiffs argued that their class action was not subject to the arbitration provision in an agreement signed with their employer because it was, by definition, a "collective action" and therefore not controlled by the clearly "bilateral" nature of their employment agreements. The court, citing both *Concepcion* and its predecessor, *Stolt Nielsen S.A. v. AnimalFeeds Int'l Corp*. (2010), rejected this argument, saying that both cases stand for the proposition that a party who has contracted for arbitration cannot be forced to either arbitrate or litigate on a class-wide basis absent some indication in the agreement that he consented to such a procedure. Allowing the plaintiffs to proceed on a class-wide basis would, in effect, permit them to avoid their individual arbitration agreements, a result at odds with the federal policy favoring arbitration.

Not all post-*Concepcion* decisions foreclose class action litigation in deference to contractual arbitration provisions, however, as demonstrated by the Second Circuit Court of Appeals' decision in *Schnabel v. Trilegiant Corp*. In *Schnabel*, the class action plaintiffs sued the defendants claiming that misrepresentations were made in connection with their membership in a discount club and that defendants enrolled the plaintiffs in a service and charged them a membership fee without their permission. The defendants moved to compel arbitration, citing a provision requiring any dispute between the member and the discount club be brought "in small claims court or by binding arbitration" and providing that "all disputes in arbitration will be handled just between the named parties, and not on any representative or class basis." The district court denied the motion to compel arbitration, and the Second Circuit affirmed that denial. The court predicated its refusal to enforce the arbitration and class action waiver provision on lack of consent. While acknowledging the Supreme Court's decision in *Concepcion*, the court analyzed whether, under state contract law, the plaintiffs had ever assented to the arbitration provisions of the defendants' "General Terms and Conditions" agreement since the agreement was only available via a hyperlink on the defendants' website, and the plaintiff disclaimed any knowledge of the arbitration provision when their contractual relationship with the defendants was formed. The defendants argued that the plaintiffs were bound by the arbitration provision since they (1) were on at least inquiry notice of the provision via the hyperlink and (2) received the benefits of membership and did not attempt to cancel their participation in the program even after they received mailed copies of the General Terms and Conditions agreement. The court disagreed, saying notice came too late after the plaintiffs enrolled in the discount program and that the plaintiffs' passive acceptance of the agreement did not constitute sufficient assent to the agreement to make that agreement enforceable as a matter of contract law.

The *Schnabel* case highlights a continuing challenge for companies hoping to channel customer disputes into arbitration and out of class action litigation. While courts are now more willing than ever to enforce class action waiver provisions (even in cases like *Homa* where the results seem harsh), judicial focus will shift to the factual issue of whether the customer assented to the arbitration agreement in the first place. Companies that bury such agreements in the fine print of electronic media, do not require written acknowledgement of a customer's assent before a transaction is completed, or use confusing or esoteric terms risk a finding that, while otherwise valid in light of *Concepcion*, arbitration and anti-class action waiver provisions are not enforceable. Companies would be wise to revise their arbitration agreements if they want to foreclose the possibility of being subject to class action lawsuits.

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