Enforceability of Class Action Waivers in Employment Arbitration Agreements Post-*Concepcion*

By Gail L. Westover, Brendan Ballard and Srikanth Vadakapurapu

Class action waivers in employment agreements have been a point of contention for quite some time. More often than not, courts around the country have found that employment arbitration agreements with class action waivers are unenforceable. On April 27, 2011, in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the U.S. Supreme Court held that the Federal Arbitration Act (FAA) preempted California's rule deeming most mandatory consumer arbitration agreements with class action waivers unenforceable. In light of *Concepcion*, legal experts expected both federal and state courts to uniformly find employment agreements with class action waivers enforceable. However, courts have not been consistent and have gone in divergent directions. In this article we discuss some of these recent developments, particularly as they relate to drafting employment agreements.

Background

The FAA provides that:

A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

Despite this clear statutory support for freedom to contract into or out of arbitration, arbitration provisions—especially those in employment agreements—have

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had a difficult time surviving judicial challenges. For example, in 2007, in its seminal decision on this issue, the California Supreme Court concluded that "at least in some cases, the prohibition of classwide relief would undermine the vindication of the employees' unwaivable statutory rights and would pose a serious obstacle to the enforcement of the state's overtime laws." *Gentry v. Superior Court*, 42 Cal. 4th 443, 450 (2007).[1] Specifically, the California Supreme Court ruled that class action arbitration waivers may or may not be enforceable, depending upon a number of factors, such as "the modest size of the potential individual recovery, the potential for retaliation against members of the class, the fact that absent members of the class may be ill informed about their rights, and other real world obstacles to the vindication of class members' [rights] through individual arbitration." *Id.* at 463.

AT&T Mobility LLC v. Concepcion

In 2011, although outside of the employment context, the U.S. Supreme Court finally ruled on the enforceability of class action waivers in arbitration agreements. *Concepcion* 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.[2] 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." 131 S. Ct. at 1748.

Post–*Concepcion* Decisions

Post-*Concepcion*, courts have taken different approaches in adjudicating the validity of class action waivers in employment arbitration agreements. While some courts have upheld them under *Concepcion*, others have invalidated them on other grounds.[3] Yet other courts have held that *Concepcion* cannot prevent certain claims from being brought collectively under the National Labor Relations Act (NLRA) or on a representative basis under state statutes, such as the California Private Attorney General Act (PAGA).

Courts in New York and California have had some of the busier dockets on this issue. In *LaVoice v. UBS Fin. Servs., Inc.*, No. 11 Civ. 2308, 2012 WL 124590 (S.D.N.Y. Jan. 13, 2012), the plaintiff brought a putative class action alleging various wage and hour violations of the Fair Labor Standards Act (FLSA) and New York labor laws. The court followed *Concepcion* and held:

> The Court finds this argument, which assumes that a collective action requirement can be consistent with the FAA, precluded in light of the Supreme Court's decision in [*Concepcion*]. Given that the Supreme Court held in [*Concepcion*] that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA," this Court must read [*Concepcion*] as standing against any argument that an absolute right to collective action is consistent with the FAA's "overarching purpose" of "ensur[ing] the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."

***Id.* at *6.**

In following *Concepcion*, the *LaVoice* court refused to follow the Southern District's prior post-*Concepcion* decision in *Raniere v. Citigroup Inc.*, 827 F. Supp. 2d 294 (S.D.N.Y. 2011). In *Raniere*, plaintiffs had brought a putative nationwide collective action under the FLSA, as well as a New York class action under the New York Labor Law, to recover allegedly uncompensated overtime wages and liquidated damages. The court held that the right to proceed collectively under the FLSA cannot be waived, stating "[t]here are good reasons to hold that a waiver of the right to proceed collectively under the FLSA is per se unenforceable—and different in kind from waivers of the right to proceed as a class under Rule 23 . . . Congress created a unique form of collective actions for minimum-wage and overtime pay claims brought under the FLSA" (*Id.* at 311), even though each named plaintiff's individual

recovery is potentially "large enough that it would be neither lunacy nor fanaticism for either plaintiff, or her counsel, to pursue her claim individually." *Id.* at 317. The *Raniere* court distinguished *Concepcion* by finding that the Supreme Court "addressed only whether a state law rule holding class action waivers unconscionable was preempted by the FAA" and, therefore, despite *Concepcion*, "an arbitration provision which precludes plaintiffs from enforcing their [federal] statutory rights is unenforceable." *Id*. at 310.

In *Sutherland v. Ernst & Young LLP*, 847 F. Supp. 2d 528 (S.D.N.Y. 2012), a matter in which the plaintiff filed a collective and putative class action alleging that she was wrongfully classified as exempt from the overtime requirements of the FLSA and New York state law, the court stated that the applicability of *Concepcion* was a "close question," but refused to enforce the arbitration agreement because, if enforced, the plaintiff would be unable to vindicate her rights on an individual basis. Although the end result was the same in *Sutherland* and *Raniere* (*i.e.*, the court found the class action waiver unenforceable), the reasoning for not following *Concepcion* was different. While the *Raniere* court found *Concepcion* inapplicable when a federal statute preempts the FAA, the *Sutherland* court reasoned that the waiver in that case would have prevented plaintiffs from vindicating their statutory rights, making it unenforceable.

Similar to New York, California courts have ruled divergently on class action waivers in employment arbitration agreements. In *Brown v. Ralphs Grocery Co*., 197 Cal. App. 4th 489 (Cal. Ct. App. 2011), the court held that *Concepcion* did not apply to claims brought under PAGA. At least one court held that an arbitration provision in the employment context was unenforceable without even mentioning *Concepcion*. *See Wisdom v. AccentCare Inc.*, 202 Cal. App. 4th 591 (Cal. Ct. App. 2012) (refusing to enforce arbitration provision due to substantive and procedural unconscionability). However, other courts have found class action waivers enforceable even when claims were brought under PAGA. *See, e.g.*, *Morvant v. P.F. Chang's China Bistro, Inc.*, No. 11-CV-05405, 2012 WL 1604851 (N.D. Cal. May 7, 2012) (granting defendant's motion to compel individual arbitration in a putative class action alleging that defendant had failed to provide meal and rest breaks and refused to pay for missed breaks based on a finding that *Concepcion* applied to arbitration agreements in the employment context); *Iskanian v. CLS Transp. Los Angeles, LLC*, 206 Cal. App. 4th 949 (Cal. Ct. App. 2012) (following *Concepcion* and holding that individual arbitration was proper because the FAA preempted California law holding class action waivers of employees' unwaivable rights to be contrary to public policy).

Rulings diverge in other jurisdictions as well. In *D.R. Horton Inc.*, 12-CA-25764, 2012 WL 36274 (N.L.R.B. Jan. 3, 2012), the National Labor Relations Board (NLRB) invalidated an employment agreement that required employees to arbitrate employment claims on an individual basis because it violated sections 7 and 8 of the NLRA. The NLRB found *Concepcion* inapplicable because it did not involve a "waiver of rights protected by the NLRA or even employment agreements." *Id.* at *16. However, on January 7, 2013, in *Owen v. Bristol Care, Inc.*, No. 12-1719, 2013 WL 57874 (8th Cir. Jan. 7, 2013), the U.S. Court of Appeals for the Eighth Circuit declined to follow *D.R. Horton* in a putative class action alleging claims under the FLSA. According to the Eighth Circuit, *D.R. Horton* "carries little persuasive authority" because the court is "not obligated to defer to [the NLRB's] interpretation of Supreme Court precedent . . . " *Id.* at *3 (citations omitted). The Eighth Circuit concluded that "arbitration agreements containing class waivers are enforceable in FLSA cases . . . given the absence of any 'contrary congressional command' from the FLSA that a right to engage in class action overrides the mandate of the FAA in favor of arbitration." *Id.* at *4.

Although there is no unanimity, many courts that have declined to follow *Concepcion* appear to be concerned about the fairness of upholding a waiver that essentially precludes a party from vindicating its statutory rights. Therefore, to help their cause, employers should at least ensure that their employment arbitration agreements are procedurally and substantively fair to their employees.

Practical Considerations

Given the unsettled state of the law, the following factors should be considered in drafting or updating employment arbitration agreements:

1. Avoid lengthy agreements filled with legalese; keep the language simple and straightforward.
2. Avoid one-sided provisions in the employer's favor.
3. Avoid provisions limiting or precluding an employee's statutory rights. Ensure the agreement provides employees with the same, or close to the same, substantive rights as they would have outside of arbitration.
4. Clearly specify the scope of the arbitration agreement and the scope of any waivers.
5. Clearly specify class action waivers because silence may be interpreted against a waiver. Avoid burying class action waivers in fine print.
6. If an employer wants to avoid class arbitration in case the waiver provision is stricken, consider making the entire arbitration provision voidable upon that eventuality.
7. Clearly specify the arbitration procedure; explain what rules will apply to the arbitration and make sure those rules are easily available to the claimant.
8. Consider opt-out provisions, which courts look upon favorably even though employees rarely take advantage of them.
9. Exclude claims under Section 7 of the NLRA and those otherwise not permitted by statute.
10. Consider allowing an employee to go to small claims court in lieu of arbitration, if the claim is less than the claim limit for that court.
11. Consider agreeing to pay all or most of the arbitrator's fees and expenses.
12. Consider paying employee's attorney's fees and costs up to a set amount in the event he or she prevails during arbitration.

Additionally, employers may wish to consider:

1. Disclosing the arbitration agreement to each employee in writing.
2. Avoiding any appearance of coercion in executing the arbitration agreement.
3. Holding informational meetings regarding arbitration agreements for new as well as existing employees and documenting these meetings.
4. Periodically checking personnel files to ensure all arbitration-related documents are complete and in proper order.
5. Mailing out arbitration rules and summaries annually.

Conclusion

Courts have not been consistent in applying *Concepcion* to employment arbitration agreements. In many jurisdictions, cases involving employment arbitration agreements are making their way through the appeals process. There is no guarantee that the highest courts of these various jurisdictions will rule the same way. Therefore, until the U.S. Supreme Court rules on the enforceability of class action waivers in the employment context, employers that wish to maximize the likelihood that their waivers are upheld may be better served by reviewing the arbitration clauses in their employment agreements for procedural and substantive fairness.

1. In *Iskanian v. CLS Transp. Los Angeles, LLC*, 206 Cal. App. 4th 949 (Cal. Ct. App. 2012), a putative class action against an employer for wage and hour violations, the California Court of Appeals followed *Concepcion* and held that the FAA preempted California law holding class action waivers as to employees' unwaivable rights to be contrary to public policy. The court also held that *Concepcion* conclusively invalidated *Gentry*. Specifically, the court held that *Concepcion* invalidated the *Gentry* four-factor test for determining whether a class waiver should be upheld. In other words, under *Iskanian* a class action waiver in an employment arbitration agreement survives even if a plaintiff can establish: (1) the modest size of the potential individual recovery; (2) the potential for retaliation against members of the class; (3) the fact that absent members of the class may be ill informed about their rights; and (4) other real world obstacles to the vindication of class members' rights to overtime pay through individual arbitration. On September 19, 2012, the California Supreme Court granted petition a to review the Court of Appeal's *Iskanian* decision.
2. The California Supreme Court's holding in *Discover Bank v. Sup. Ct.*, 113 P.3d 1100 (Cal. 2005), has come to be known as the *Discover Bank* rule. In *Discover Bank*, the court held: "[W]hen [a class action] waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another'" and therefore "such waivers are unconscionable." *Id.* at 1110 (citations omitted).
3. On February 27, 2013, the U.S. Supreme Court heard oral arguments in *American Express Co. v. Italian Colors Restaurant*, 12-133, an appeal from a decision of the U.S. Court of Appeals for the Second Circuit holding that a class action waiver in a consumer arbitration agreement was unenforceable because enforcement of the waiver would have prevented plaintiffs from vindicating their statutory rights under federal anti-trust laws. *See In re American Express Litigation*, 667 F.3d 204 (February 1, 2012) (holding "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 Second Circuit reasoned that *Concepcion* merely stands for the proposition that all class action waivers in arbitration agreements are not *per se* unenforceable, but does not prevent the court from finding a class action waiver unenforceable if it prevents a party of vindicating its statutory rights.