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Class Action Waivers After *Concepcion*: The Emergence of a Circuit Split Over the Decision's Impact on Federal Claims Makes a Return to the Supreme Court Likely

By Stephen A. Fogdall and Christopher A. Reese

A year ago, the U.S. Supreme Court handed down its ruling in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011), which enforced a contractual waiver of class arbitration in an arbitration clause under the Federal Arbitration Act ("FAA") in the face of an unconscionability challenge based on state law. Since then, the federal circuit courts have digested the ruling's impact in numerous cases. The arbitration clause in *Concepcion* had several "consumer-friendly" provisions, prompting some commentators to question whether the Court's ruling was limited to clauses containing such provisions. The consensus in the circuit courts is that the answer is no, at least with respect to claims under state law. However, a circuit split has emerged regarding the impact of *Concepcion* when the plaintiff's claim is based on federal statutory law.

The "Consumer-Friendly" Arbitration Clause in *Concepcion*

In *Concepcion*, the Supreme Court held that a California state law rule invalidating class-action waivers in consumer contracts where the defendant has allegedly cheated large numbers of consumers out of small amounts of money was preempted by the FAA because that rule stood "as an obstacle to the accomplishment of the FAA's objectives." The majority opinion rejected the dissent's argument "that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system." The majority responded that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." Moreover, the majority noted that "the claim here was most unlikely to go unresolved" because the arbitration clause at issue included several consumer-friendly provisions, including provisions that required AT&T to pay for the costs of all non-frivolous claims that proceeded to arbitration and to pay a minimum amount of $7,500.00 plus twice the amount of the claimant's attorney's fees in the event that the claimant were to win an award larger than AT&T's final written settlement offer.

Some commentators questioned whether the Supreme Court's willingness to enforce class action waivers was limited to arbitration clauses containing consumer-friendly provisions like those in *Concepcion*. The first circuit court to address that question was the Eleventh Circuit, in *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205 (11th Cir. 2011). In that decision, which involved only claims under state law, the Eleventh Circuit suggested that *Concepcion* was not limited to factual scenarios involving consumer-friendly arbitration clauses, but ultimately concluded that it "need not reach the question," because the arbitration clause in *Cruz* was identical to the clause in *Concepcion*.

However, just last month, on August 20, 2012, the Eleventh Circuit revisited this issue in *Pendergast v. Sprint Nextel Corp.*, No. 09-10612, 2012 U.S. App. LEXIS 17512 (11th Cir. Aug. 20, 2012). The plaintiff attempted to distinguish *Concepcion* on the basis that the arbitration agreement at issue did not contain the consumer-friendly provisions that were present in the contract at issue in *Concepcion*. The Eleventh Circuit rejected this argument. The court determined that resolution of the case, which contained only claims under state law, required "only a straightforward application of *Concepcion* and *Cruz*," and concluded that "[t]he Supreme Court in *Concepcion* expressly rejected the notion that the state law should not be preempted" even when the arbitration clause at issue "would effectively shield the defendant from liability" because the plaintiff could not practically pursue his claims individually.

Two days later, on August 22, 2012, the Third Circuit reached the same conclusion in an unpublished decision

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in a case involving only claims under state law — *Homa v. American Express Co.*, No. 11-3600, 2012 U.S. App. LEXIS 17763 (3rd Cir. Aug. 22, 2012). The Third Circuit concluded that "[e]ven if [the plaintiff] cannot effectively prosecute his claim in an individual arbitration that procedure is his only remedy, illusory or not." The Third Circuit panel acknowledged that some might view this result as unfair, and accepted the plaintiff's argument that enforcing the class arbitration waiver would effectively eliminate any potential for recovery on his claims, but noted that if it adopted the plaintiff's position, "millions of arbitration provisions in consumer contracts would be rendered unenforceable inasmuch as the arbitration provisions in such contracts typically preclude class-arbitration proceedings."

A Different Rule for Federal Claims?

The U.S. Court of Appeals for the Second Circuit reached a different result in *In re American Express Merchant's Litigation*, 554 F.3d 300 (2d Cir. 2009), 634 F.3d 187 (2d Cir. 2011), 667 F.3d 204 (2d Cir. 2012), which involved a class arbitration waiver in an arbitration agreement which did not contain consumer-friendly provisions. There, the plaintiff sought to litigate claims under the federal antitrust laws. The Second Circuit held that although the class arbitration waiver would be enforceable if the claims were brought under state law, *Concepcion* does not require courts to find class arbitration waivers enforceable "if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to vindicate their federal statutory rights." The Second Circuit held that each such waiver clause must be considered individually and that, because the U.S. Supreme Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S.Ct. 1758 (2010), prohibits courts from ordering parties to participate in class arbitration without a contractual agreement to do so, and because the plaintiffs can only effectively pursue their federal statutory claims through a class proceeding, a decision to strike down a class arbitration waiver requires striking down the entire arbitration agreement so that plaintiffs can pursue class actions in court.

Lower courts in the Second Circuit have emphasized the potential differential treatment of state and federal claims under the *American Express* ruling. For example, on August 21, 2012, just a day after the Eleventh Circuit's ruling in *Pendergast*, the U.S. District Court for the District of Connecticut struck down an arbitration agreement containing a class arbitration waiver because enforcing it would effectively deprive the plaintiff of any real chance of recovery. *Fromer v. Comcast Corp.*, No. 3:09cv2076, 2012 U.S. Dist. LEXIS 117807 (D. Conn. Aug. 21, 2012). The district court concluded that, under the Second Circuit's decision in *American Express*, "the class action waiver in this case effectively precludes Fromer from pursuing federal statutory remedies," and thus "the class arbitration waiver is void." The district court noted that the reasoning in *American Express* "does not apply to [the Plaintiff's Connecticut Unfair Trade Practices Act] claim, and the inability to vindicate that statutory right does not provide a basis for [finding] the arbitration agreement unenforceable with regard to that claim." Still, the district court found that the entire arbitration agreement was unenforceable because it contained a provision which stated that "[i]f the class action waiver is found to be illegal or unenforceable, the entire Arbitration Provision will be unenforceable, and the dispute will be decided by a court."

These rulings out of the Second Circuit are in direct conflict with the Ninth Circuit's decision in *Coneff v. AT&T Corp.*, 673 F.3d 1155 (9th Cir. 2012). In *Coneff*, the Ninth Circuit held that "*Concepcion* is broadly written" and that it requires enforcement of class arbitration waivers, even if the effect of enforcement is to effectively preclude individual plaintiffs from pursuing their claims. The plaintiff asserted claims under both state and federal law, but the Ninth Circuit's analysis did not recognize any meaningful distinction between these two categories of claims.

In view of the split between the Second and Ninth Circuits, American Express has filed a Petition for Writ of Certiorari to the Supreme Court from the *American Express* decision. The petition asks the Supreme Court to eliminate any distinction between state and federal claims for purposes of enforcing class action waivers in arbitration clauses, and to reiterate that such clauses should be enforced in all cases, even when doing so would effectively eliminate any real chance of recovery for individual plaintiffs. Based on the sheer volume of consumer contracts containing class action waivers and the Supreme Court's recent trend of accepting and deciding cases involving the FAA, it appears likely that the Petition will be granted.

Conclusion

In sum, the decisions by the Circuits in the year following the Supreme Court's ruling in *Concepcion* make clear that class action waivers in arbitration clauses will be en-

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forced as to state law claims, even if enforcement effectively eliminates any real prospect of recovery for individual plaintiffs. However, a circuit split has developed as to whether *Concepcion* has the same effect where the plaintiff brings at least one claim based on federal law.

If the Supreme Court agrees to hear the *American Express* case, and ultimately accepts the Second Circuit's approach to class action waivers in the context of federal claims, the impact could be dramatic and wide-sweeping: many arbitration clauses could be stricken in their entirety, because many, if not most, arbitration clauses are like the one at issue in *Fromer*, and expressly require that the entire clause be struck down if the class action waiver is found to be unenforceable. This would threaten a massive increase in consumer class actions based on federal statutory violations. While potential defendants could mitigate this outcome to some extent by including a *Concepcion*-style consumer-friendly arbitration clause in every consumer contract, thus blunting any argument that consumers would be deprived of an opportunity to effectively pursue their claims individually, such a result still would likely increase litigation costs and interfere with efforts to streamline private dispute resolution in a way that the FAA was specifically intended to avoid. ◆

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