Florida Appellate Review

Published By Dan Bushell

Concepcion Decision Not Surprising And Not the End of Consumer Class Actions

Posted by Dan Bushell on April 28, 2011

Sometime around 2004, I heard that consumer class actions were dead. Why? Companies were inserting into consumer contracts mandatory arbitration clauses that waived the right to proceed as a class action. Courts were upholding them – arbitration clauses are, after all, pretty much inviolate – and surely every company would soon be using them. Fast forward seven years or so, and as April 27, 2011 at 9:00 AM, the consumer class action business was booming.

What happened? For one, state supreme courts, led by the California Supreme Court in Discover Bank v. Superior Court, started holding that class action waivers, at least in certain contexts, could be unconscionable and unenforceable. And federal courts of appeals, led by the 9th Circuit, began enforcing those state court holdings and precluding the enforcement of class action waivers. Section 2 of the Federal Arbitration Act (FAA) "preempts" state laws and rules that prohibit (whether directly or indirectly) enforcement of arbitration agreements. But arbitration agreements can be invalidated "upon such grounds as exist at law or in equity for the revocation of any contract." Courts reasoned that Discover Bank rule was not preempted because it was based on unconscionability, a defense that is applicable to all contracts, so if a state would also invalidate a class action waiver if it was found in a non-arbitration contract, it could invalidate class waivers contained in arbitration clauses without being preempted.

Since 2005, the 9th Circuit has applied the Discover Bank rule in at least a dozen cases. The same principle was applied under Washington state law. The Eleventh Circuit invalidated class waivers under similar circumstances based on Florida and Georgia law. The 3rd Circuit had done the same based on New Jersey law. The 1st Circuit and 2nd Circuit had even held that class waivers were unenforceable in the arbitration context under the "federal common law" of arbitration.

Yesterday the U.S. Supreme Court quashed that line of reasoning in AT&T Mobility LLC v. Concepcion, No. 09-893, holding that the Discover Bank rule (and by extension, similar rules in other states) is preempted by FAA Section 2.

Although the rule invalidates class action waivers in non-arbitration contracts as well as in arbitration contracts, the Court reasoned, the rule disproportionately affects arbitration agreements. And its operative effect is much the same as a rule that bans arbitration, because companies would never agree to class arbitration.

Moreover, the Court explained, there is a fundamental disconnect between class adjudication, which is public, lengthy, and procedurally complex on the one hand, and arbitration, which is supposed to be private, quick, and laid-back, on the other.

A Few Observations:

- The outcome, in my view, was all but inevitable. Last June, the Supreme Court held in *Stolt-Nielsen S.A. v. Animalfeeds International* that the FAA prohibits arbitrators from allowing class arbitration unless the parties signed an arbitration agreement that specifically allows it. In other words, under the FAA, arbitration clauses are assumed to *disallow* class arbitration. Under the Discover Bank Rule, arbitration clauses *must allow* class arbitration. So the holding in *Concepcion* may have been fore-ordained by the reasoning of *Stolt-Nielsen*.

- The only real possibility of a different conclusion would have been if the Court had viewed the consumer adhesion contracts in *Concepcion* as fundamentally different from the commercial contracts in *Animalfeeds*. In law school they probably still teach the concept of adhesion contracts, and that courts are more hesitant to enforce them against the party in the weaker bargaining position. But that notion doesn't carry the weight with courts these days that it used to, at least since *Carnival Cruise Lines v. Shute*. The majority made short shrift of the adhesion contract aspect of the case, so I'd expect that trend to continue.

- The lawyers for the Respondents/Plaintiffs focused their briefs and oral argument on trying to win over Justice Thomas based on his federalism/states' rights jurisprudence. Justice Thomas did disagree with the majority's reasoning, and he wrote a concurrence stating that he had serious reservations joining the majority opinion. But not based on federalism. Instead, Justice Thomas wrote that the plain meaning of the language of Section 2 allows arbitration agreements to be invalidated only when there is a defect in *making* the agreement. In his view, other rules that can preclude enforcement of contracts generally simply don't apply to arbitration agreements.

- There are many headlines today like "After At&T Ruling, Should We Say Goodbye to Consumer Class Actions?" (Ashby Jones, WSJ Law Blog). It feels like déjà vu all over again. But I don't think the death of the consumer class action is coming any time soon. For one thing, many consumer class actions are brought by plaintiffs who have not signed any contracts with the defendant they're suing, so they can't have signed an arbitration agreement. Nor would I be surprised to hear that lawyers have come up with some new reason why class waivers can't be enforced. And initiatives – legislative or otherwise – to undo the effect of this decision are sure to come. Indeed, Daniel Fisher reported yesterday that a legislative work-around may already be in place, at least regarding contracts under the Consumer Finance Protection Bureau's jurisdiction.

In short, the outcome of *Concepcion* is not a huge surprise. And while it may slow down consumer class actions for a while, it's hardly their death knell.

Florida Appellate Review

Bushell Appellate Law, P.A.
2000 Glades Road, Suite 110 Boca Raton, Florida 33431