Published on *The National Law Review* https://natlawreview.com

Supreme Court Again Set To Resolve A Circuit Split Over The Enforceability of Mandatory Class Arbitration Waivers

Article By:

Robert A. Horowitz

In ***AT&T Mobility LLC v. Concepcion***, 131 S. Ct. 1740 (2011), the United States Supreme Court appeared to finally settle the issue of whether class arbitration waivers can be enforced. The Court announced that they can. Ever since, the plaintiff class action bar has tried to find a way around *Concepcion*, arguing that enforcement of class arbitration waivers will essentially prevent consumers from enforcing their statutory rights. The Ninth and Eleventh Circuits have rejected those efforts, but the Second Circuit has offered the plaintiff bar a ray of hope, at least for now. The *Supreme* Court has agreed to resolve the split.

In *Concepcion*, the Supreme Court held that the **Federal Arbitration Act**, 9 U.S.C. § 1 *et seq.* ("FAA), preempted California state law that invalidated as unconscionable class action waivers if (1) "the waiver is found in a consumer contract of adhesion" drafted by a party that has superior bargaining power? (2) "disputes between the contracting parties predictably involve small amounts of damages"? and (3) "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." *Concepcion*, 131 S.Ct. at 1746 (quoting *Discover Bank*, 36 Cal.*Rptr.*3d 76, 113 P.3d at 1110).

The court found that under the California standard, all class action waivers in the consumer context would be invalidated as unconscionable. Because "[t]he overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings," the state's policy, as reflected in the standard, "interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 1748. Thus, the Court held that a state policy that effectively allows any party to a consumer contract to demand class procedures notwithstanding a contractual waiver of such procedures, is preempted by the FAA, *Id.* at 1750, even if the policy may be "desirable for [other] reasons." *Id.* at 1753.

The Eleventh Circuit considered the scope of *Concepcion* in *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205 (11th Cir. 2011). In *Cruz*, the district court enforced a class arbitration waiver in an action filed by consumers based on an alleged violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"). While the appeal was pending, the Supreme Court issued its decision in *Concepcion*. Relying on *Concepcion*, the Eleventh Circuit held that "to the extent that Florida law . . . would invalidate the class waiver simply because the claims are of small value, the potential claims are numerous, and many consumers might not know about or pursue their potential claims absent class procedures, such a state policy stands as an obstacle to the FAA's objective of enforcing arbitration agreements according to their terms and is preempted." *Id.* at 1212.

The Eleventh Circuit rejected plaintiffs' effort to distinguish *Concepcion*. As the court explained, plaintiffs argued that "Concepcion only preempts inflexible, categorical state laws that mechanically invalidate class waiver provisions in a generic category of cases, without requiring evidentiary *proof* regarding whether parties could vindicate their statutory rights in arbitration." *Id.* at 1213. According to plaintiffs, Florida law, unlike California law, "invalidates class action bans only when the individualized facts of the case demonstrate that the ban is functionally exculpatory." *Id.* Plaintiffs offered affidavits of three consumer law attorneys who attested that they would not represent consumers on an individual basis in pursuing their statutory claims because it would not be cost-effective, and who offered statistical evidence demonstrating that only an infinitesimal percentage of defendant's consumers have asserted their rights in an arbitration. The Eleventh Circuit concluded that this evidence did not take the case outside the holding in *Concepcion*: "[A]t least as applied to the facts of this case, we believe that the faithful adherence to *Concepcion* requires the rejection of the Plaintiff's argument. The Plaintiffs' evidence goes only to substantiating the very public policy arguments that were expressly rejected by the Supreme Court in *Concepcion* – namely, that the class action waiver will be exculpatory, because most of these small-value claims will go undetected and unprosecuted." *Id.* at 1214.[3]

The Second Circuit thereafter reached the opposite result in an antitrust class action, *In re: American Express Merchants' Litigation*, 667 F.3d 204 (*2d Cir.* 2011) ("*Amex*"), in which it refused to enforce a mandatory class arbitration waiver because it found the practical effect of enforcing the waiver would have been to preclude the consumer class from vindicating their statutory right to enforce under the Sherman Act. The court reiterated its earlier ruling in the case that "the record evidence before [the court] establishe[d], as a matter of law, that the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws." *Id.* at 217.

The Second Circuit rejected what it described as a "facile reading" of *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1774 (2010) (holding that "a party cannot be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so") and *Concepcion*, which would "find that the cases render class action arbitration waivers per se enforceable." *Id.* at 212. The court concluded that "neither one addresses the issue presented here: whether a class-action arbitration waiver clause is enforceable even 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." *Id.* The court found guidance in Supreme Court decisions that predated *Stolt-Nielsen* and *Concepcion*.

The Second Circuit began its analysis with *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614 (1985), in which the Supreme Court declared that arbitration is recognized as an effective vehicle for vindicating statutory rights, but only "so long as the prospective litigant may *effectively* vindicate its statutory cause of action in the arbitral forum." *Id.* at 632. In dicta, the Supreme Court noted in *Mitsubishi* that "*should* clauses in a contract operate "as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." *Id.* at 637, n. 19.

The Second Circuit then turned to *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), in which the Supreme Court acknowledged, again in dicta, "that [i]t may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum." *Id.* at 90. The Second Circuit considered *Green Tree* "controlling to the extent it holds that when 'a party seeks to invalidate an arbitration agreement on the ground that the arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.'" 667 F.3d at 216 (quoting *Green Tree*, 531 U.S.at 92). The court also cited dicta in pre-*Concepcion* decisions in two other circuits, *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 285 (4th Cir. 2007) and *Livingston Assocs. Fin., Inc.* 339 F.3d 553, 557 (7th Cir. 2003), that similarly concluded that an arbitration agreement may be invalid if the plaintiff shows that the arbitration would be prohibitively expensive. *Id.* at 217.

In *Amex*, plaintiffs offered expert testimony demonstrating that the cost of individually arbitrating their Sherman Act claims would be prohibitive, effectively depriving them of the ability from vindicating their right to enforce the Sherman Act. According to their expert, the expert witness fees alone would be approximately $1 million, while the expected damages for each individual plaintiff would be less than $2,000 (less than $6,000 when trebled). The Second Circuit reiterated its earlier holding that the fee-shifting provisions of the Clayton Act in private antitrust suits did not alleviate its concerns because of the "low expert witness reimbursement rate," and because a plaintiff, in considering whether to pursue the claim, would have to factor in the risk of losing and therefore recovering none of its costs, including its reasonable attorney's fees.

Because the mandatory arbitration provision at issue prohibited a class arbitration, and *Stolt-Nielsen* therefore prohibited the court from compelling a class arbitration, the Second circuit directed the district court to deny the defendant's motion to compel arbitration.

On May 29, 2012, *Amex*'s motion for rehearing en banc was denied, with five judges dissenting. 681 F.3d 129 (2d Cir. 2012). Judge Rosemary Pooler, the author of the opinion on which rehearing was sought, distinguished *Amex* from *Concepcion* on the ground that *Concepcion* dealt with the vindication of state contract rights while *Amex* dealt with the vindication of federal statutory rights. *Id.* at 140. The dissenting judges argued that the ruling opens the door to challenges to the enforceability of class action waivers in virtually every consumer arbitration agreement, *id.* at 143, and in each case the district court will have to conduct an evidentiary hearing to determine the enforceability of class arbitration waivers which will "render arbitration too expensive and too slow to serve any of its purposes." *Id.* at 145. Moreover, the dissenting judges noted that district courts have already expanded the ruling to bar arbitration of federal employment claims. On June 11, 2012, the Second Circuit granted American Express' motion to stay the mandate, thus texing the case up for review by the Supreme Court.

Most recently, in *Conell v. AT&T Corp*, 673 F.3d. 1155 (9th Cir. 2012), the Ninth Circuit expressly rejected the Second Circuit's holding in *American Express*. *Id.* at 1159, n.3. The court rejected plaintiffs' argument that the Supreme Court precedents relied on by the Second Circuit require arbitration of statutory rights only if a prospective litigant effectively may vindicate *those* rights in the arbitral forum. *Id.* at 1158.[2] "Although Plaintiffs argue that the claims at issue in this case cannot be vindicated effectively because they are worth much less than the cost of litigating them, the *Concepcion* majority rejected that premise." *Id.* at 1159. Moreover, according to the court, the claims could be vindicated in an individual arbitration because under the arbitration agreement, "aggrieved consumers who filed claims would be essentially guaranteed to be made whole." *Id.* (citing *Cruz*, 648 F.3d at 1215 (quoting *Concepcion*, 131 S. Ct. at 1753.) The Ninth Circuit noted that the Second Circuit's concern that consumers may have insufficient incentive to vindicate their rights is irrelevant after *Concepcion*. The lack of incentive is a "primary policy rationale for class actions," but the Supreme Court in *Concepcion* stated "such unrelated policy concerns, however worthwhile, cannot undermine the FAA." *Id.* at 1159.

In *Conell*, plaintiffs argued that Washington state's unconscionability rule should not be preempted by the FAA because class action waivers under Washington law are rejected only on a case-by-case specific finding of exculpation. The Ninth Circuit rejected the argument, citing *Cruz* conclusion that such evidence "goes only to substantiating the very public policy arguments that were expressly rejected by the Supreme Court in *Concepcion*." *Id.* at 1160.

The Supreme Court has now agreed to review the Second Circuit's ruling in *Amex*. When it rules, it may very well hold that "we meant what we said in *Concepcion*," and reverse the Second Circuit's holding in favor of the views of the Ninth and Eleventh Circuits. If so, practitioners will be able to ensure the enforceability of their clients' class arbitration waivers by drafting clear and conspicuous arbitration provisions with clear and conspicuous waiver language, and avoiding loading up the contract with provisions that could be attacked as substantively unconscionable. When the arbitration provision and class arbitration waiver appear on a web site in the terms of use, or in an online contract, the consumer or other counterparty should be required to click on a link acknowledging that he/she read the terms of use or contract and agreed to all of the terms before proceeding with the transaction. Such so-called "clickwrap" agreements are routinely enforced, provided the link does not appear on a separate web page the consumer would not otherwise see (or at least not have reason to access) during the online purchase process.

National Law Review, Volume II, Number 342