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Arbitration Agreements and Class Action Waivers —Practical Steps in an Uncertain Landscape

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One year ago, in its landmark decision in *AT&T Mobility LLC v. Concepcion*, the U.S. Supreme Court held that the Federal Arbitration Act (''FAA'') preempts state laws that interfere with the ''fundamental attributes of arbitration.''[1] It found that a rule barring class action waivers ''interfere[d] with fundamental attributes of arbitration.''[2] In so doing, the court built upon the pro-arbitration principles articulated in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,[3] which decided that parties cannot be required to arbitrate on a class-wide basis absent their agreement to do so. Both of those decisions signaled the court's clear preference for the enforcement of agreements to arbitrate on individual, bilateral terms at the expense of class action litigation.[4]

[1] 2011 BL 110648, 79 U.S.L.W. 4279 (U.S. 2011).
[2] *Id.*
[3] 2010 BL 92476, 78 U.S.L.W. 4328 (U. S. 2010).
[4] Since *Concepcion*, the Supreme Court subsequently has issued additional decisions that demonstrate its desire to protect the sanctity of agreements to arbitrate under the FAA. *Marmet Health Care Center Inc. v. Brown*, 2012 BL 50142, 80 U.S.L.W. 4160 (U.S. 2012) (vacating decision by Supreme Court of Appeals of West Virginia, which in turn, held unenforceable on public policy grounds all pre-dispute arbitration agreements that apply to claims alleging personal injury or wrongful death against nursing homes); *CompuCredit Corp. v. Greenwood*, 2012 BL 12217, 80 U.S.L.W. 4034 (U.S. 2012) (parties may agree to arbitrate claims arising under federal statutes so long as such statute does not contain a ''contrary congressional command''); *Sonic-Calabasas A Inc. v. Moreno*, 2011 BL 279888, 80 U.S.L.W. 1450 (U.S. 2011) (vacating and remanding a California Supreme Court decision in light of *Concepcion*, which in turn, had held that provisions in an arbitration agreement that waived an employee's purported right to invoke administrative dispute procedures under California law were substantively and procedurally unconscionable).
[5] 2012 BL 12217, 80 U.S.L.W. 4034 (U.S. 2012).

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Next in Store for Consumer Arbitration Clauses

On April 24, 2012, however, the Consumer Finance Protection Bureau (''CFPB'') announced that it will be studying the use and scope of pre-dispute arbitration clauses in consumer contracts. Although the purpose of the study is to determine whether the CFPB will promulgate new rules for such clauses and agreements, it appears likely that new rules are on the way. The CFPB has given the public and companies until June 23, 2012, to submit comments and viewpoints regarding consumer arbitration clauses.

The Reaction to *Concepcion*

Not surprisingly, in the wake of *Concepcion*, many businesses began to include class action waivers in their arbitration agreements. But the plaintiffs' bar has made strenuous efforts to preserve the class action industry by advocating for exceptions to *Concepcion*'s holding. Businesses seeking to enforce arbitration agreements—particularly those that include class action waivers—should be aware of recent challenges to the validity of these agreements and pay attention to upcoming rulemaking developments in the CFPB.

In the federal courts, there have been recent attacks on arbitration agreements that address claims arising under federal law. Earlier this year, however, in *CompuCredit Corp. v. Greenwood*,[5] the Supreme Court held that the FAA requires the enforcement of arbitration agreements ''even when the claims at issue are fed-

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eral statutory claims.''[6] In *CompuCredit*, the Supreme Court held that the ''FAA's mandate'' requiring the enforcement of arbitration agreements must be followed unless ''overridden by a contrary congressional command.''[7] In that case, the Supreme Court held that the federal Credit Repair Organizations Act[8] did *not* contain a ''contrary congressional command'' precluding the arbitration of claims under the Act, even though the Act uses the terms ''right to sue,'' ''action,'' ''class action'' and ''court.''

Plaintiffs also have argued recently for the invalidation of class action waivers where the supposed effect of those waivers would be to prevent a plaintiff from being able to ''effectively vindicate [his or her] statutory cause of action in the arbitral forum.''[9] At least one federal appellate court has accepted that argument, holding that class action waivers may be invalidated where ''the only economically feasible means for plaintiffs enforcing their statutory rights is via a class action''—the theory being that ''only a lunatic or a fanatic sues for $30.''[10] Two other federal appellate courts, however, have disagreed with that approach as inconsistent with the Supreme Court's ruling in *Concepcion*.[11]

Likewise, when confronted with arbitration agreements that do *not* contain class action waivers, the plaintiffs' bar has argued that such agreements implicitly permit class arbitration. In *Stolt-Nielsen*, the Supreme Court held that an arbitration agreement ''which [i]s silent on the question of class procedures, could not be interpreted to allow them.''[12] Recently, however, some class action plaintiffs have argued that an agreement that makes no mention of class procedures is not necessarily ''silent'' as to waiver; accordingly, they assert, if a court or arbitrator can infer the defendant's consent to class arbitration, class arbitration should be permitted. Remarkably, some federal courts have accepted that argument.[13]

Best Practices for Businesses to Avoid Class Arbitration

To put itself in the best position to avoid class arbitration, a business should include express waivers of class arbitration in their arbitration agreements or clauses, which will unequivocally express the parties' intent and make it difficult for a plaintiff to argue that the business's consent can be inferred. The express waivers should, where possible, anticipate and address the specific types of claims that may arise in arbitration. In addition, companies should review existing arbitration agreements and be prepared to challenge any efforts by plaintiffs to construe those agreements as allowing for class action procedures in arbitration.

The most common form of attack on arbitration agreements are challenges based on the alleged unconscionability of the agreement. In *Concepcion*, the Supreme Court expressly held that arbitration agreements may still be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, so long as those defenses do *not* ''apply only to arbitration or . . . derive their meaning from the fact that an agreement to arbitrate is at issue.''[14] Several courts have recently used that exception to invalidate arbitration agreements on the grounds of unconscionability.[15] Fortunately, however, this also is an area mostly within the control of the party drafting the arbitration agreement. In order to minimize the possibility that an arbitration agreement will be found to be unconscionable, arbitration agreements should be drafted so that the arbitration agreement's terms are mutual, *i.e.*, that the business and its customer are subject to the same arbitration terms, to the extent possible.[16]

For example, if a customer is required to forego the right to proceed in court on all disputes between the parties, then generally so too should the business. Similarly, the arbitration terms should not make the costs of

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[6] *Id.*; *see also Kassner v. Kadlec Regional Medical Center*, 2012 BL 72327 (E.D. Wash. Feb. 15, 2012) (''[A]rbitration agreements must be enforced according to their terms *even when the claims at issue are federal statutory claims*, unless the FAA's mandate has been overridden by a contrary congressional command.'') (emphasis added). *Aneke v. American Express Travel Related Services.*, 2012 BL 22200 (D.D.C. Jan. 31, 2012) (''As the Supreme Court has held, claims based on federal statutes are no exception to the general rule that arbitration agreements should be enforced according to their terms.'').

[7] *Id.* (citing *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

[8] 15 U.S.C. § 1679 *et seq.*

[9] *Italian Colors Restaurant v. American Express Travel Related Services Co. (In re American Express Merchants' Litigation)*, 667 F.3d 204, 214, 2012 BL 27969 (2d Cir. 2012).

[10] *Id.* at 214, 218.

[11] *See Coneff v. AT&T Corp.*, 2012 BL 61851, 80 U.S.L.W. 1252 (9th Cir. Mar. 16, 2012); *id.* at n. 2 (''To the extent that the Second Circuit's opinion [in *Amex*] is not distinguishable, we disagree with it and agree instead with the Eleventh Circuit.''); *Cruz v. Cingular Wireless LLC*, 648 F.3d 1205, 1214, 2011 BL 209370, 80 U.S.L.W. 189 (11th Cir. 2011) (noting that those are 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.'').

[12] 2010 BL 92476, 78 U.S.L.W. 4328 (U.S. 2010) (explaining *Stolt-Nielsen* and stating that ''class arbitration, to the extent it is manufactured by [state law] rather than consensual, is inconsistent with the FAA'').

[13] P*Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 2011 BL 174743, 80 U.S.L.W. 46 (2d Cir. 2011). Numerous other courts, however, have disagreed with this interpretation. *See, e.g., Reed v. Florida Metropolitan University Inc.*, 2012 BL 123375 (5th Cir. May 18, 2012); *Bernal v. Burnett*, 793 F. Supp. 2d 1280, 1283, 1287, 2011 BL 148753 (D. Colo. 2011) (compelling arbitration where ''there was no explicit agreement to class arbitration so as to allow [the arbitrator] to compel class arbitration under *Stolt-Nielsen*''); *D'Antuono v. Service Road Corp.*, 789 F. Supp. 2d 308, 337, 344, 2011 BL 137681 (D. Conn. 2011) (granting motion to compel individual arbitration and striking class allegations, noting that it is ''impermissible to impose class arbitration on parties when their arbitration agreements are silent as to that issue''); *United Food & Commercial Workers, Local 21 v. Multicare Health System*, 2011 BL 56694, at *6 (W.D. Wash. Mar. 3, 2011) (declining to order consolidated arbitration under *Stolt-Nielsen* ''because the parties did not agree to it'' and ''the absence of [evidence that the parties disfavored class arbitration] was insufficient to establish that the parties agreed to authorize class arbitration'').

[14] 2011 BL 110648, 79 U.S.L.W. 4279.

[15] *See, e.g., Lau v. Mercedes-Benz USA LLC*, 2011 BL 148753 (N.D. Cal. Jan. 31, 2012).

[16] *Concepcion*, 2011 BL 110648, 79 U.S.L.W. 4279 (deeming arbitration agreement unconscionable in part due to nonmutuality of appeal provisions).

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arbitration prohibitive. One way to do this is to provide that the customer's costs in the arbitration will not exceed those the customer would bear if the matter proceeded in court.[17] To illustrate, a business could agree to bear the costs of the arbitration, including the arbitrator's fees, with the exception of an initial filing fee. Furthermore, arbitration clauses and class action waivers should be conspicuous and prominently noted in the contract.[18] Businesses also should consider including a provision allowing a court/arbitrator[19] to sever ''offending'' provisions, *i.e.*, delete arbitration terms that are unacceptable to the court while leaving the rest of the arbitration agreement intact.

Conclusion

Given these and other recent developments, businesses should review their arbitration clauses and agreements to confirm that those agreements are up-to-date, and to determine whether there are steps the business can take to fortify itself against challenges to its arbitration clauses and agreements. Even after adopting class action waivers that conform to *Concepcion* and its progeny, however, businesses should remain vigilant for changes in the ''rules of the road.''

For instance, the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank'') vests the CFPB with authority to impose limitations on the use of mandatory arbitration agreements and to prohibit their use entirely, if the CFPB finds that it is ''in the public interest and for the protection of consumers'' to do so.[20] Before taking any action, however, the CFPB must conduct a study and report to Congress on ''the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services.''[21] While Dodd-Frank does not say when the CFPB's study must be completed, certain interest groups have put pressure on the CFPB to complete its study, and thereafter to promulgate regulations limiting or prohibiting the use of class action waivers in arbitration agreements. CFPB's April 24, 2012 announcement concerning the initiation of its study is the first step in the likely imposition of new rules regulating pre-dispute arbitration clauses.

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[17] *Id.* (noting that costs of arbitration under agreement stood ''in stark contrast to pursuing litigation in federal court where Plaintiff would only have to pay a filing fee of $350'').

[18] *Kilgore v. KeyBank N.A.*, 2012 BL 53654, 80 U.S.L.W. 1211 (9th Cir. Mar. 7, 2012) (enforcing arbitration agreement where agreement was ''not buried within the document; it is conspicuous and appears in its own section of the Note'').

[19] Depending on their preference, businesses should be clear to specify whether a court or an arbitrator will decide issues of arbitrability and enforceability, as the law will require a court to do so absent a ''clear and unmistakable'' agreement to the contrary. *First Options of Chicago Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)

[20] 12 U.S.C. § 5518(b).

[21] 12 U.S.C. § 5518(a).