Class Action Update

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CLASS ACTION UPDATE:

Class Action Practice in the Aftermath
of
AT&T Mobility, LLC v. Concepcion

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Recent Federal Class Action Developments

AVAILABILITY OF CLASS ACTIONS TO PLAINTIFFS:

CLASS ARBITRATION WAIVERS IN ARBITRATION AGREEMENTS

Is This You?

Limiting Exposure: The Concepcion decision is especially important if you have employees or sell goods or services to a broad base of customers via contract.

Employee-Based Antitrust Class Action

You: A Temp Agency that places temporary employees with companies in need.

• You have employment contracts with temporary employees and pay temporary employees' wages.

• Temporary employees file class action antitrust suit against you and other temp agencies, claiming price fixing to depress their wages.

Customer-Based Class Action

You: A National Supplier of Baked Goods, Including Special Recipe Muffins, to Grocery Stores, Restaurants, Coffee Shops and Cafés.

• Your contract defines Special Recipe and represents that all products designated as Special Recipe meet the requirements under the contract.

• Your customers bring a class action suit against you for false advertising, fraud, and breach of contract upon discovering that some of your Special Recipe products do not meet specifications.

Can You Prevent These Class Action Lawsuits?

Enter: The Class Arbitration Waiver

An arbitration clause which requires the arbitration of all disputes and also prohibits the parties from arbitrating any claims as part of a class, collective or representative action.

Recent Supreme Court Decisions support liberal federal policy favoring arbitration as a dispute resolution mechanism:

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S.Ct. 1758 (2010)

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S.Ct. 1758, 1765-68, 1775-77 (2010)

Class Arbitration Cannot Be Ordered If Parties Did Not Agree:

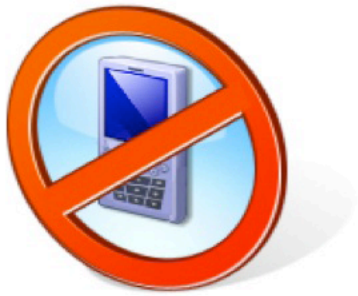
- Antitrust claims at issue.

- The Court took steps to preclude class arbitrations by prohibiting arbitrators from ordering class arbitration where the **arbitration agreement is silent** on the class issue.

- The Court reasoned that "a party may not 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."

Recent Supreme Court Decisions support liberal federal policy favoring arbitration as a dispute resolution mechanism:

AT&T Mobility LLC v. Vincent Concepcion et ux, 131 S.Ct. 1740 (2011) (Nov. 9, 2010, argued; April 27, 2011, Decided)



AT&T Mobility LLC v. Vincent Concepcion et ux, 131 S.Ct. 1740 (2011) (Nov. 9, 2010, argued; April 27, 2011, Decided)

- Putative Class Action Suit Against Cellular Telephone Service Provider in Federal District Court.
- Allegations of False Advertising and Fraud; Concepcions were charged sales tax on retail value of phones provided free under service contract.
- Contract Between Customer and Provider.
- Established Dispute Proceedings and provided for arbitration of unresolved disputes.
- Contract precluded class arbitration.

District Court's Holding in Concepcion:

- Denied AT&T's motion to compel arbitration.

District Court Holding in Concepcion (cont.)

- Arbitration provision was unconscionable;
- AT&T had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions.

9th Circuit Ruling in Concepcion:

- Affirmed District Court (denial of motion to compel arbitration)
- Contractual arbitration provision was unconscionable under California's Discover Bank rule.

9th Circuit Opinion in Concepcion (cont.)

- Discover Bank rule was not preempted by FAA because that rule was simply "a refinement of the unconscionability analysis applicable to contracts generally in California."

California's Discover Bank Rule:

- Class action waivers in consumer contracts of adhesion are unconscionable in cases where a party with superior bargaining power is alleged to have cheated large numbers of consumers out of individually small sums of money.

U.S. Supreme Court Holding in Concepcion:

- "Because it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress', ..., California's Discover Bank rule is preempted by the FAA."
- Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations.

Section II of the FAA:

- Permits agreements to be invalidated by "generally applicable contract defenses," but not by defenses that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue.

Discover Bank Rule

- Deemed by the Supreme Court in Concepcion not to be a ground that "exists at law or in equity for the revocation of any contract" under FAA § 2.

Discover Bank Rule (cont.)

- Although FAA § 2's saving clause preserves generally applicable contract defenses, it does not suggest an intent to preserve state law rules that stand as an obstacle to the accomplishment of the FAA's objectives.

Discover Bank Rule (cont.)

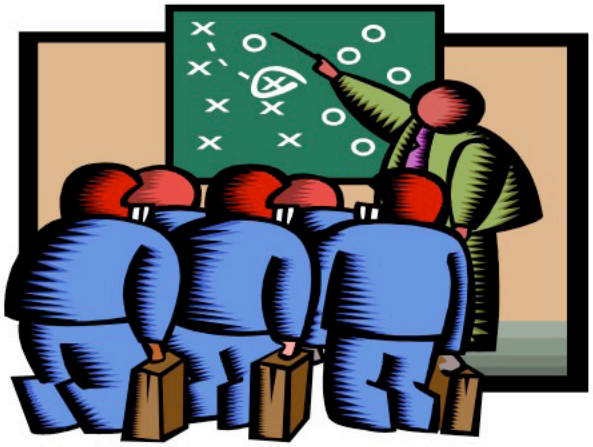
- The FAA's overarching purpose is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate informal, streamlined proceedings.

Supreme Court Holding in Concepcion (cont.)

- Class arbitration, to the extent it is manufactured by Discover Bank rather than consensual, interferes with fundamental attributes of arbitration.

- The switch from bilateral to class arbitration sacrifices arbitration's informality and makes the process slower, more costly and more likely to generate procedural morass than final judgment.

The Game Plan



Impact of Supreme Court's Decisions

Companies should consider drafting or revising **commercial** and **consumer contracts** to include binding arbitration provisions that explicitly preclude class arbitration. (Stolt-Nielsen and Concepcion)

Impact of Supreme Court's Decisions

Companies also should consider drafting or revising **employment contracts** and **collective bargaining agreements** to include such class action waivers, **although** the statutory framework governing employer-employee relationships **may limit** the enforceability of such waivers.

Impact of Supreme Court's Decisions

Companies should consider trying to **re-open cases** in which courts have struck down class arbitration bans and FAA preemption of the state law was argued prior to Concepcion.

Impact of Supreme Court's Decisions

Companies should consider including provisions in class arbitration waivers that provide for the **company to pay** some portion or all of the **arbitration fees, including associated attorneys' fees** incurred by a putative plaintiff.

This should minimize or preclude any argument that arbitrating an individual claim would be cost prohibitive.

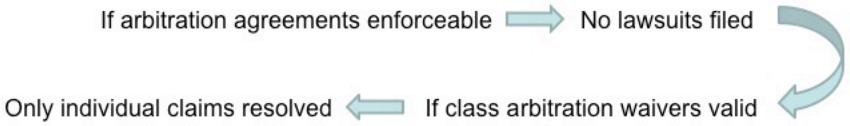
Recent Federal Class Action Developments

EXPLORING THE REACH AND LIMITATIONS OF CONCEPCION

The Limitations of Concepcion

Could Concepcion mean the end of class dispute resolution altogether, whether via litigation or alternative means?

Followed to its logical conclusion:



The Limitations of Concepcion

In many ways, Concepcion is a "green light" for using class arbitration waivers to protect against class and collective actions. However, we must yield to recognize that there is a significant possibility that Concepcion will not preclude all such actions.

The Limitations of Concepcion

We must consider the nuances of the laws applicable to **different lines of business**:

- Fair Debt Collection
- Mortgage & Mortgage Servicing
- Insurance Contracts
- Fair Credit Reporting

The Limitations of Concepcion

We must consider whether **state law** is **preempted** by federal law.

The Limitations of Concepcion

We must consider whether **legislation** exists which **prohibits arbitration** of a specific type of claim.

The Limitations of Concepcion

We must consider whether a class action waiver interferes with a plaintiff's ability to **vindicate a right or claim**.

Concepcion and The Vindication of Rights

The U.S. Supreme Court and Circuit Courts have established that agreements to arbitrate statutory claims may be **unenforceable** if the terms of the agreement prevent the plaintiff from effectively vindicating his statutory rights.

See, for example:

Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000)

Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc., 473 U.S. 614, 636-37 (1985)

In re Cotton Yarn Antitrust Litig., 505 F.3d 274, 288–89 (4th Cir. 2007)

Concepcion and The Vindication of Rights

This principle has been recognized as applying:

To ensure a plaintiff's ability to enforce a substantive statutory right based on Mitsubishi, 473 U.S. at 628, 636-37.

The Mitsubishi Court held that an international agreement to arbitrate antitrust claims was enforceable, reasoning that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."

Concepcion and The Vindication of Rights

This principle has been recognized as applying:

Potentially to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive. Green Tree, 531 U.S. at 90-92.

The Green Tree Court stated:

> It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum….. we believe that where, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.

The Court found that the plaintiff failed to meet that burden in this case.

Concepcion and The Vindication of Rights

Lower courts have begun to prescribe how the long-standing principle regarding vindication of statutory rights will be applied to class arbitration waivers **post-Concepcion**, illuminating our understanding of the potential limitations on the reach of Concepcion and the substantive areas of the law that may be subject to those limitations.

These limitations should be taken into account in assessing the enforceability of such a waiver **prior to drafting** an arbitration agreement and **during the course of litigation**.

Concepcion and The Vindication of Rights

Lower courts have indicated that among the factors that may determine whether a class arbitration waiver interferes with the vindication of rights post-Concepcion are:

(1) Whether Concepcion is controlling given the **federal or state nature** of the claims at issue;
(2) Whether a particular **statutory scheme** requires that class or collective procedures be available; or
(3) Whether a plaintiff would pursue individual claims in the absence of a class procedure due to the **small value** of the individual claims or **cost prohibitive nature** of an individual action.

Concepcion and The Vindication of Rights: Federal vs. State claims

Concepcion has been dismissed as not controlling in cases where the statutory rights at issue were federal because Concepcion **addressed only state law preemption** and not how the Federal Arbitration Act ("FAA") affects arbitration with respect to federal statutory rights.

Chen-Oster v. Goldman, Sachs & Co, No. 10 Civ. 6950, 2011 WL 2671813, *5 (S.D.N.Y. July 7, 2011)(Title VII pattern and practice discrimination claims at issue).

Raniere v. Citigroup Inc., No. 11-CIV-2448, 2011 WL 5881926, *13 (S.D.N.Y. Nov 22, 2011) (Fair Labor Standards Act claims at issue).

Concepcion and The Vindication of Rights: Availability of Class or Collective Actions Required

Substantive areas of the law to which the reach of Concepcion may be prohibited include:

- Title VII pattern and practice discrimination claims
- Clayton Act antitrust claims
- Fair Labor Standards Act ("FLSA") claims

Some courts have read the statutory schemes controlling these types of claims as **requiring that a class or collective procedure be available** or as **prohibiting such claims from being brought as individual claims**.

Concepcion and The Vindication of Rights: Availability of Class or Collective Actions Required

At issue in Chen-Oster v. Goldman, Sachs & Co, No. 10 Civ. 6950, 2011 WL 2671813, (slip opinion) (S.D.N.Y. July 7, 2011):

The statutory right to be free from pattern and practice discrimination under Title VII and the corresponding prohibition from pursuing such claims on an individual basis.

Concepcion and The Vindication of Rights: Availability of Class or Collective Actions Required

The District Court for the Southern District of New York refused to compel arbitration of a plaintiff's discrimination claims under Title VII where the employment agreement at issue contained a class arbitration waiver. Chen-Oster, 2011 WL 2671813, at *1, 3.

Concepcion and The Vindication of Rights: Availability of Class or Collective Actions Required

The court reasoned that because pattern and practice discrimination claims are **prohibited by law from being brought as an individual claim**, compelling arbitration in the face of the class waiver would require the plaintiff to forfeit the ability to enforce the right to be free from pattern and practice discrimination. Chen-Oster, 2011 WL 2671813, at *3-4.

Concepcion and The Vindication of Rights: Availability of Class or Collective Actions Required

At issue in AT & T Mobility LLC v. Fisher, No. Civ. A. DKC 11-2245, 2011 WL 5169349, *6 (D.Md. Oct 28, 2011):

Whether to issue a preliminary injunction preventing the compulsion of arbitration, on the basis that an antitrust action under the Clayton Act is by nature a **"representative"** action (even if not fashioned as a class action) and the parties did not agree to arbitrate "representative" actions.

Concepcion and The Vindication of Rights: Availability of Class or Collective Actions Required

AT&T Mobility argued that the waiver at issue prevented the plaintiff from (1) arbitrating class actions, (2) arbitrating this "representative" Clayton Act antitrust action, and (3) from pursuing class and "representative" actions in court.

Concepcion and The Vindication of Rights: Availability of Class or Collective Actions Required

- The court granted the preliminary injunction preventing compulsion of arbitration, but declined to address whether the class arbitration waiver at issue would be valid if taken to the extreme that AT&T Mobility advocated.

- Still, the court noted that "**in the event the choice-of-forum and choice-of-law clauses operated in tandem 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**." Fisher, 2011 WL 5169349 at *5-6 (emphasis added).

Concepcion and The Vindication of Rights: Availability of Class or Collective Actions Required

At issue in Raniere v. Citigroup Inc., No. 11-CIV-2448, 2011 WL 5881926 (S.D.N.Y. Nov. 22, 2011):

Whether the right to proceed collectively under the Fair Labor Standards Act ("FLSA") may be waived.

Concepcion and The Vindication of Rights: Availability of Class or Collective Actions Required

- Plaintiffs sought to recover uncompensated overtime wages and liquidated damages in collective action under FLSA.

- Arbitration agreement provided that:

  Claims covered under this Policy must be brought on an individual basis. Neither Citi nor any employee may submit a class, collective, or representative action for resolution under this Policy. …Accordingly, employees may not participate as a class or collective action representative or as a member of any class, collective, or representative action, and will not be entitled to any recovery from a class, collective, or representative action in any forum.

  Raniere, 2011 WL 5881926 at *7.

Concepcion and The Vindication of Rights: Availability of Class or Collective Actions Required

Held:

"[A] waiver of the right to proceed collectively under the FLSA is **unenforceable as a matter of law** in accordance with the [U.S. Supreme] Court's recognition that '[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute.' " Raniere, 2011 WL 5881926 at *17 (citation omitted).

Concepcion and The Vindication of Rights: Availability of Class or Collective Actions Required

The Court distinguished waivers of FLSA collective actions from waivers of class actions:

- "There 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**."

- "Collective actions under the FLSA are a unique animal. Unlike employment-discrimination class suits under Title VII or the Americans with Disabilities Act that are governed by Rule 23, Congress created a unique form of collective actions for minimum-wage and overtime pay claims brought under the FLSA."

Raniere, 2011 WL 5881926 at * 15.

Concepcion and The Vindication of Rights: Availability of Class or Collective Actions Required

BUT…

Concepcion and The Vindication of Rights: Availability of Class or Collective Actions Required

Other courts have read Concepcion to validate class arbitration waivers that preclude class or collective FLSA actions.

See, e.g., Hobson, et al. v. Murphy Oil USA, Inc., Case No. 2:10-cv-01486-HGD, (N.D.Ala. April 26, 2012) (Magis. Davis) (Report & Recommendation that defendant's motion to compel arbitration of FLSA claims be granted).

Concepcion and The Vindication of Rights: Availability of Class or Collective Actions Required

The NLRB recently ruled that class arbitration waivers **in individual employment contracts** which prohibit both class arbitrations and class actions in a judicial forum are **unenforceable** because they prohibit the exercise of an employee's substantive rights under **Section 7 of the National Labor Relations Act** "' to engage in . . . Concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .' 29 U.S.C. §157."

D. R. Horton, Inc. and Michael Cuda, Case 12–CA–25764, 357 NLRB No. 184, 2-4, 9-12 (Jan. 3, 2012).

Concepcion and The Vindication of Rights: Small Value Claims & Prohibitive Costs

Will class arbitration waivers be subject to invalidation due to the size of individual claims or costs associated with arbitrating an individual claim?

Concepcion and The Vindication of Rights: Small Value Claims & Prohibitive Costs

The U.S. Supreme Court in Concepcion seems to reject this argument, stating:

> The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."

131 S.Ct. at 1753 (citation omitted).

Concepcion and The Vindication of Rights: Small Value Claims & Prohibitive Costs

However, lower courts have differed in their view of what Concepcion had to say on this point.

One state court invalidated a class arbitration waiver and anchored its ruling on the **small value** of the individual claims at issue. See Feeney v. Dell, Civil Action No. MICV 2003-01158, (slip opinion)(Mass. Sup. Ct. September 30, 2011).

Concepcion and The Vindication of Rights: Small Value Claims & Prohibitive Costs

- The Massachusetts Court declined to accept what it referred to as the "defendants' invitation to magnify one sentence in Concepcion, into a broad rule preempting all state law unconscionability rules that prohibit use of Dell-like arbitration clauses."

- Held that the class arbitration procedure was necessary for plaintiffs to vindicate their rights because, absent a class procedure, there was no incentive for a plaintiff to pursue an individual claim.

Feeney.

Concepcion and The Vindication of Rights: Small Value Claims & Prohibitive Costs

The Massachusetts court reasoned that Feeney is distinguishable from Concepcion based on the questions presented:

> [Feeney] dealt with the situation where class procedures are necessary to vindicate the plaintiffs' claims. The logic of Concepcion, on the other hand, did not stray from the specific question on which the United States Supreme Court granted certiorari: "Whether the Federal Arbitration Act preempts States from conditioning the enforcement of an arbitration agreement on the availability of particular procedures – here, class-wide arbitration – when those procedures **are not necessary** to ensure that the parties to the arbitration agreement are able to vindicate their claims." The two decisions answer different questions.

Feeney (emphasis in original).

Concepcion and The Vindication of Rights: Small Value Claims & Prohibitive Costs

And based on specific provisions of the Concepcion contract that created incentives for individual actions:

> The Supreme Court's "sentence [in Concepcion] was only a partial response to the dissenters' views; the greater part of the response focused upon the provisions of the AT&T Arbitration Clause that – unlike the Dell Arbitration Clause -- made the Concepcions "better off under their arbitration agreement with AT&T than they would have been as participants in a class action . . .."

Feeney.

Concepcion and The Vindication of Rights: Small Value Claims & Prohibitive Costs

Other lower courts have recognized that **Concepcion forecloses the argument** that class arbitration waivers are subject to invalidation due to the size of individual claims or costs associated with arbitrating an individual claim.

Concepcion and The Vindication of Rights: Small Value Claims & Prohibitive Costs

Kaltwasser v. AT & T Mobility LLC, 812 F. Supp. 2d 1042, 1048 (N.D.Cal. 2011)

- Plaintiff with state law claims argued that Concepcion left intact a vindication-of-rights doctrine under federal common law, which allows him to avoid bilateral arbitration if he can show that the costs involved in proving his claims exceed the damages he can potentially recover.

- The Court questioned whether Green Tree even applies to **state rights**: "[I]t is not clear that Green Tree's solicitude for the vindication of rights applies to rights arising under state law."

Concepcion and The Vindication of Rights: Small Value Claims & Prohibitive Costs

The Court rejected the plaintiff's argument:

> [I]t is incorrect to read Concepcion as allowing plaintiffs to avoid arbitration agreements on a case-by-case basis simply by providing individualized evidence about the costs and benefits at stake. Kaltwasser, 812 F. Supp. 2d at 1049.

Concepcion and The Vindication of Rights: Small Value Claims & Prohibitive Costs

> To be sure, Concepcion does not explicitly over-rule Green Tree, but it does make it untenable to read Green Tree for a vindication-of-rights principle as robust as Kaltwasser asserts here. If Green Tree has any continuing applicability it must be confined to circumstances in which a plaintiff argues that costs specific to the arbitration process, such as filing fees and arbitrator's fees, prevent her from vindicating her claims. **Concepcion forecloses plaintiffs from objecting to class-action waivers in arbitration agreements on the basis that the potential cost of proving a claim exceed potential individual damages**.

Kaltwasser, 812 F. Supp. 2d at 1050 (citation omitted) (emphasis added).

Concepcion and The Vindication of Rights: Small Value Claims & Prohibitive Costs

Hendricks v. AT & T Mobility, LLC, 823 F. Supp. 2d 1015, 1019 (N.D.Cal. 2011)

Argument made by Plaintiff with state claims that the cost of pursuing his case on an individual basis would be prohibitive is foreclosed by Concepcion.

Concepcion and The Vindication of Rights: Small Value Claims & Prohibitive Costs

Although Plaintiff is correct that Concepcion does not discuss Green Tree by name, **he is incorrect in interpreting the opinion as indifferent to this issue**.

> The respondents in Concepcion raised the issue of large expenses interfering with the vindication of statutory rights. …The majority explicitly considered the dissent's argument that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system" and answered that "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." Concepcion, 131 S.Ct. at 1753.

Hendricks, 823 F. Supp. 2d at 1021.

Concepcion and The Vindication of Rights: Small Value Claims & Prohibitive Costs

Hendricks Court agreed with Kaltwasser Court:

- It is simply unworkable for "every court evaluating a motion to compel arbitration" to "have to make a fact-specific comparison of the potential value of a plaintiff's award with the potential cost of proving the plaintiff[']s case."

- "If Green Tree has any continuing applicability [post-Concepcion] it must be confined to circumstances in which a plaintiff argues that costs specific to the arbitration process, such as filing fees and arbitrator's fees, prevent her from vindicating her claims."

Hendricks, 823 F. Supp. 2d at 1021-22 (quoting Kaltwasser).

Concepcion and The Vindication of Rights: Small Value Claims & Prohibitive Costs

Will Green Tree Preclude Class Arbitration Waivers When Federal Claims Are At Issue?

Concepcion and The Vindication of Rights: Small Value Claims & Prohibitive Costs

Prior to Concepcion, the Second Circuit invalidated a class arbitration waiver in a **federal** antitrust action relying upon Green Tree.

In re American Express Merchants' Litig., 554 F.3d 300, 315–20 (2d Cir. 2009), vacated sub nom. American Express Co. v. Italian Colors Rest., 130 U.S. 2401 (2010), reaff'd, 634 F.3d 187, 196 (2d Cir.2011).

Concepcion and The Vindication of Rights: Small Value Claims & Prohibitive Costs

The propriety of the American Express ruling was called into question by the Second Circuit itself and other courts.

The Second Circuit took it upon itself to consider rehearing its decision in light of Concepcion. And lower courts questioned whether American Express was good law in light of Concepcion.

Concepcion and The Vindication of Rights: Small Value Claims & Prohibitive Costs

Hendricks, 823 F. Supp. 2d at n.2:

> Plaintiff further cites to cases in which courts have applied Green Tree and found that plaintiffs had adequately demonstrated that the costs posed were prohibitive. But it is not at all clear to the Court that those cases remain good law. The Second Circuit even issued an order in August 2011 stating that it was *sua sponte* considering rehearing the In re American Express Merchants' Litig. case in light of Concepcion. See In re American Express Merchants' Litig., No. 06–1871–CV (docket entry of 8/1/11). (Citation omitted).

Concepcion and The Vindication of Rights: Small Value Claims & Prohibitive Costs

Kaltwasser, 812 F. Supp. 2d at 1049:

> American Express was decided prior to Concepcion, and in fact, the Second Circuit has stayed proceedings in that case while it "*sua sponte* consider[s] re-hearing" in light of Concepcion. See Order, In re American Express Merchants' Litigation, No. 06–1871–cv (2d Cir. Aug. 1, 2011);
>
> see also D'Antuono v. Service Road Corp., 789 F.Supp.2d 308, 341–42 (D.Conn. 2011) (expressing "some doubt about American Express ... in light of AT & T Mobility [v. Concepcion]" although concluding that district courts in the Second Circuit "remain[ ] obligated to apply American Express.").

Concepcion and The Vindication of Rights: Small Value Claims & Prohibitive Costs

After considering the Concepcion decision, the Second Circuit **stood its ground** and **once again** held that the class arbitration waiver was **unenforceable**.

Concepcion and The Vindication of Rights: Small Value Claims & Prohibitive Costs

"It is tempting to give both Concepcion and Stolt-Nielsen such a facile reading, and find that the cases render class action arbitration waivers per se enforceable. But a careful reading of the cases demonstrates 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."

Italian Colors Rest. v. Am. Express Travel Related Servs. Co. (In re Am. Express Merchs. Litig.), 667 F.3d 204, 212 (2d Cir. 2012).

Concepcion and The Vindication of Rights: Small Value Claims & Prohibitive Costs

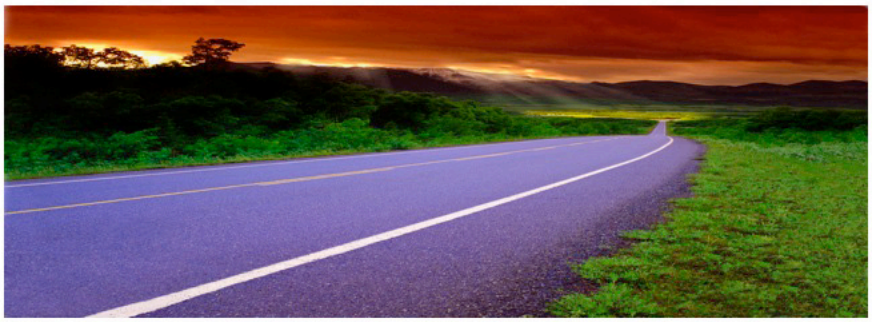
Take Away:

Concepcion seems clear that a **state's** preference for the availability of a class procedure over individual arbitration is not sufficient to warrant obstruction of the FAA's objectives. Opinions like Feeney likely will be challenged.

It remains to be seen whether Concepcion will be deemed to limit a **federal** vindication of rights argument based upon the value of claims at issue or costs of individual arbitration.

How Far Does Concepcion Take Us?

The U.S. Supreme Court likely will be called upon to clarify the impact of Concepcion on **employment cases** and **small value individual claims, both state and federal**.



About Tony Lathrop

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Tony Lathrop is a seasoned corporate trial lawyer who partners closely with his clients to handle trials, litigation and disputes in ways that maximize value for their businesses. He uses his experience as a trial attorney and certified mediator to develop strategies for obtaining optimal trial results or other resolutions in high-stakes cases and to advise his clients regarding strategies to reduce future risk.

Mr. Lathrop has experience representing a diverse portfolio of clients in a broad range of complex civil litigation matters. He has represented his clients successfully in the state and federal courts of North Carolina, before mediators and arbitrators, and before North Carolina administrative courts and agencies. Mr. Lathrop's recent matters include the following federal and state actions at the trial and appellate levels involving class action, breach of contract, intellectual property, insurance, eminent domain, and product liability claims:

- A purported class action involving breach of contract and other claims against a client cemetery.
- A breach of a contract claim (sale of a $40 million manufacturing facility), representing a plaintiff Fortune 500 corporation.
- A federal theft of trade secret case in which he obtained preliminary and permanent injunctions for a manufacturer.
- A trademark infringement and breach of contract action involving competing cable television networks.
- An insurance contract dispute regarding retroactive workers' compensation insurance premiums.
- A claim regarding a lapsed long term care insurance policy
- A coverage dispute over provisions of a contingent automobile liability insurance policy in connection with the vehicle leasing program of a Fortune 500 company.
- Approximately 20 municipal eminent domain actions, representing the condemnor.
- A police liability claim in Federal court in which summary judgment for defendants was affirmed by the Fourth Circuit.
- Vehicle and device products liability claims, defending international manufacturers of vehicles, aircraft, and medical devices.

As a recognized leader within the legal community of North Carolina and nationwide, Mr. Lathrop has developed relationships and credibility that add value for the firm's clients. He currently serves as the Immediate Past Chair of The Network of Trial Law Firms, which is an organization of 7,000 attorneys in 25 separate and independent trial law firms practicing in over 140 offices throughout the United States and Canada. In his nearly thirty years of service to the North Carolina legal community, Mr. Lathrop also has served as the President of the Mecklenburg County Bar (2006-2007), the Chair of the Merit Selection Panels for two U.S. Magistrate Judges in North Carolina's Western District (2003-2004), a member of the Advisory Committee on Local Patent Rules for the U.S. District Court for the Western District of North Carolina (2010), an Aide to Governor James B. Hunt, Jr. (1983-1985), and an appointed member of Governor Hunt's Crime Commission (1982-1985). He currently serves on the Charlotte Mecklenburg Planning Commission.

Education

- B.A., University of North Carolina at Chapel Hill, 1983
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