The Continued Erosion Of Overbroad Class Actions - The Ninth Circuit Takes Action

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Class Action Waivers

- *AT&T Mobility LLC v. Concepcion*
  - 5-4 decision
  - Arbitration provision with class waiver upheld
  - California's *Discovery Bank* rule overturned

Federal Arbitration Act

Agreements to arbitrate are:

"valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

9 U.S.C. §2

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Fraud

Duress

Unconscionability

Discovery Bank Rule

"[W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when 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, then … the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' Under these circumstances, such waivers are unconscionable under California law and should not be enforced"

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FAA Preemption

"When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."

April 27, 2012

HUFF POST POLITICS

An Anniversary You Are *Forced* to Remember

Posted: 04/27/2012 10:02 am

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Read more > AT&T Mobility v. Concepcion , AT&T Mobility v. Concepcion Anniversary , AT&T Mobility v. Concepcion Supreme Court , CFPB Arbitration Clauses , Class Action Lawsuit , Consumer Protection , Consumer Protection Rights , Federal Arbitration Act , Naca , National-Association-Of-Consumer-Advocates , Politics News

One year after a U.S. Supreme Court decision gave corporations free rein to block class action lawsuits, judges have used the decision to prevent at least 76 potential class-action suits from going forward, a new report by Public Citizen and the National Association of Consumer Advocates (NACA) has found.

The report, "Justice Denied," tracks the anti-consumer effects of *AT&T Mobility v. Concepcion*, in which the Supreme Court ruled that corporations could block consumers' rights to sue collectively -- even in the 19 states that have laws protecting such rights.

Kilgore v. KeyBank, NA

Ninth Circuit, March 7, 2012

Preemption of state law barring arbitration of cases seeking public injunction under UCL 17200

- *Broughton/Cruz* line of cases overturned
- 17200 claims seeking public injunctions are arbitrable

"But the very nature of federal preemption requires that state law bend to conflicting federal law– no matter the purpose of the state law"

Kilgore v. KeyBank, NA

Ninth Circuit, March 7, 2012

Translation:

Even very desirable state policies limiting arbitration are trumped by FAA

Only Congress can limit

Kilgore v. KeyBank, NA

Ninth Circuit, March 7, 2012

Arbitration Provision was not unconscionable

- *No procedural or substantive unconscionability*
  - *Oppression or surprise due to unequal bargaining power*
  - *Overly harsh or one-sided results*
- *Unilateral opt-out provision without consequence*
- *60 days to provide opt out*
- *Multiple warnings of consequences*
- *"Clear, easy-to-follow instructions"*

Kilgore v. KeyBank, NA

Ninth Circuit, March 7, 2012

Arbitration Provision was not unconscionable

- *Lack of sophistication not enough*
- *Promise from the student that s/he would read contract carefully "even if otherwise advised"*

"We will not relieve Plaintiffs of their contractual obligation to arbitrate by manufacturing unconscionability where there is none."

THE NATIONAL LAW JOURNAL
with D.C. news from Legal Times

Feds target arbitration clauses in consumer contracts

By Jenna Greene | Contact | All Articles
The National Law Journal | April 24, 2012

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Consumer Financial Protection Bureau head Richard Cordray
Diego M. Radzinschi/NLJ

The Consumer Financial Protection Bureau has set its sights on mandatory arbitration clauses in consumer financial products.

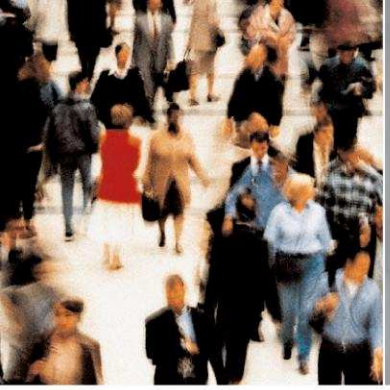
The agency announced April 24 it is launching a public inquiry into how consumers and companies are affected by using arbitration to resolve disputes.

"Arbitration clauses are found in many contracts for consumer financial products," said CFPB Director Richard Cordray in a news release. "We want to learn how arbitration clauses affect consumers, and how effective arbitration is in resolving consumers' issues. This inquiry will help the bureau assess whether

RELATED ITEMS

Consumer Financial Protection Bureau Study

- The prevalence of arbitration clauses in consumer financial products and services;
- What claims consumers bring in arbitration against financial services companies;
- If claims are brought by financial services companies against consumers in arbitration;
- How consumers and companies are affected by actual arbitrations; and
- How consumers and companies are affected by arbitration clauses outside of actual arbitrations.
- Response Deadline: June 23



Class Action Alert
Recent developments in class action law

A publication of Nixon Peabody LLP

MARCH 28, 2013

U.S. Supreme Court rejects class certification based on the damages model: *Comcast Corp. v. Behrend*

By Christopher M. Mason, Todd R. Shinaman, Devon Haft Little, and Annica Sunner

Yesterday, the United States Supreme Court reversed the certification of a class of over two million present and former cable television customers seeking antitrust damages against their cable provider. *Comcast Corp. v. Behrend*, No. 11-864, 2013 U.S. LEXIS 2544 (2013). The 5-4 decision, authored by Justice Scalia, marks the second time in 3 years that the Court has evaluated and overturned a grant of class certification based on a "rigorous analysis" of the certification standards in Federal Rule of Civil Procedure 23. In doing so, the decision expressly extends the trend of *Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541 (2011) to damages classes certified solely under Federal Rule of Civil Procedure 23(b)(3), and may open the door for arguments about commonality of damages in a way not previously pursued in many decisions.

Facts

Comcast Corporation and its subsidiaries ("Comcast") own and operate cable television systems, including in the Philadelphia metropolitan area. Between 1998 and 2007 (according to paragraph 35 of the plaintiffs' complaint), Comcast entered into nine "agreements to exchange or 'swap' [Comcast] cable customers in other areas of the country for the cable customers of competitors in [Comcast's] cluster in and around Philadelphia." These customer-swapping transactions supposedly not only substantially increased Comcast's market share in the Philadelphia "cluster," but violated Sections 1 and 2 of the Sherman Act. To remedy this, the plaintiffs sued Comcast in the United States District Court for the Eastern District of Pennsylvania.

The District Court's decision

In their lawsuit, the plaintiffs asserted four different ways in which they believed Comcast's swap transactions injured competition and damaged customers. One of these theories was that the customer swaps deterred competitors from "overbuilding," that is, from building a cable system alongside Comcast's existing operations in the Philadelphia cluster. The consequence of this deterrence was to reduce competition in the Philadelphia cluster, which in turn allowed Comcast to

raise the price of cable services above competitive levels.

When the plaintiffs moved to certify a class, the District Court held that, of their four different theories of injury, only this overbuilder theory was capable of class-wide proof. *See Comcast Corp. v. Behrend*, 264 F.R.D. 150, 174 (E.D. Pa. 2010). It therefore certified a class only as to this theory. As to that theory, however, the District Court held that the plaintiffs had met all the requirements of Federal Rule of Civil Procedure 23(a) (numerosity, commonality, typicality, and adequacy), as well as the predominance and superiority requirements of Rule 23(b)(3). As to the predominance requirement, it held in particular that the plaintiffs had shown that a "common methodology" was available "to measure and quantify damages on a class-wide basis." *Id.* at 191.

The basis for the District Court's finding that a "common methodology" for measuring the class' damages existed was an economic model offered by the plaintiffs' expert using regression analysis to compare the actual price of cable service in the Philadelphia "Designated Market Area" (or "DMA") to hypothetical prices that would have prevailed in that DMA in the absence of Comcast's anticompetitive behavior. *See id.* at 181-83. In what would prove to be an important detail, this model did not, however, isolate the damages only resulting from the deterrence of overbuilders. *See id.* at 190-91; *Comcast Corp. v. Behrend*, 655 F.3d. 182, 215, n.18 (3d. Cir. 2011). Instead, it calculated overall damages without distinguishing between the four theories originally offered by the plaintiffs. *See id.* at 190-91; *Comcast Corp. v. Behrend*, 655 F.3d. 182, 215, n.18 (3d. Cir. 2011).

The Third Circuit's affirmance

Now facing a class of over two million members, Comcast appealed this certification decision. A divided panel of the United States Court of Appeals for the Third Circuit affirmed the District Court. In doing so, the Third Circuit reiterated its holding in *In re Hydrogen Peroxide Antitrust Litig.,* 552 F.3d 305 (3d Cir. 2008), to the effect that "a district court may inquire into the merits only insofar as it is 'necessary' to determine whether a class certification requirement is met." *Comcast Corp. v. Behrend*, 655 F.3d at 199. It also rejected Comcast's argument that the plaintiffs' model was not adequate because it did not separately identify the damages for each of the plaintiffs' theories of harm, stating that "[a]t the class certification stage we do not require that [p]laintiffs tie each theory of antitrust impact to an exact calculation of damages, but instead that they assure us that if they can prove antitrust impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations." *Id.* at 206.

The Supreme Court's reversal

In his opinion for a 5-4 majority, Justice Scalia held that the Third Circuit had erred in affirming class certification, and in particular, erred in agreeing that the plaintiffs had satisfied Rule 23(b)(3)'s requirement that questions of law or fact common to class members predominate over questions affecting only individual members. On the record presented, plaintiffs were only entitled to seek damages on a class basis with respect to one type of antitrust impact: overbuilding. Yet, there was "no question" that the regression model offered by the plaintiffs' economic expert failed to measure damages resulting specifically from overbuilding as opposed to any other type of antitrust impact. And where a damages model offered to show commonality does not measure the damages actually attributable to the plaintiffs' particular theory of liability, "it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." *Comcast v. Behrend*, 2013 U.S. LEXIS 2544 at *15. (Indeed, according to Justice Scalia, even though the plaintiffs

had claimed a geographic market consisting of a cluster of counties, "if the model had identified subscribers who paid more solely because of the deterrence of overbuilding, it still would not have established the requisite commonality of damages unless it plausibly showed that the extent of overbuilding (absent deterrence) would have been the same in all counties, or that the extent is irrelevant to effect upon ability to charge supra-competitive prices." *Id.* at *20-21 n.6). In short, the lower courts had failed to do a properly "rigorous analysis" of the expert witness' proposed method for calculating damages and how it would support the requirement that common questions predominate. *Id.* at *15.

In a lengthy dissent, Justices Ginsburg and Breyer, joined by Justices Sotomayor and Kagan, argued that the case was not properly before the Court for both procedural and substantive reasons. First, they noted that the Court, in granting *certiorari*, had changed the question presented from "from the District Court's Rule 23(b)(3) analysis to its attention (or lack thereof) to the admissibility of expert testimony." *Id.* at *22. Second, they argued that any issue of the admissibility of the expert's testimony had been waived by Comcast's failure to timely object to it. Thus, the Court should have dismissed its own writ of *certiorari* as improvidently granted. *Id.* at *23. (Justice Scalia, however, retorted that even if that were the case, "it does not make it impossible for them to argue that the evidence failed 'to show that the case is susceptible to awarding damages on a class-wide basis.'" *Id.* at *11 n.4.) Third, trying to limit the prospective effect of the majority's opinion, the dissenters argued that "[t]he Court's ruling is good for this day and case only", *id.* at *28, and that the majority's decision "should not be read to require, as a prerequisite to certification, that damages attributable to a classwide injury be measurable 'on a class-wide basis.'" *Id.* at *25.

As to this last point, it is true that the parties did not challenge the District Court's holding that damages need to be provable on a class-wide basis. The majority opinion acknowledged this, and the dissenters read that acknowledgment as an indication that "the decision should not be read to require, as a prerequisite to certification, that damages attributable to a classwide injury be measureable 'on a class-wide basis.'" *Id.* The issue therefore appears to be open for debate.

Implications

In *Comcast*, just as he did in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), Justice Scalia wrote for a five-justice majority, joined by Chief Justice Roberts and Justices Thomas, Kennedy, and Alito. And just as in *Wal-mart*, Justice Scalia's opinion in *Comcast* raises the level of scrutiny for class action certifications. Supreme Court Raises the Bar for Class Certification in Landmark Sex Discrimination Decision (June 2011); Dukes redux: plaintiffs seek certification of smaller class sizes in two states (Nov. 2011).

In *Wal-Mart*, the Court applied a "rigorous analysis" requirement to the existence of a common issue of law or fact under Rule 23(a). *Wal-Mart*, 131 S. Ct. at 2551. In *Comcast*, the Court applied the same standard to plaintiffs' damages calculations as a matter of satisfying Rule 23(b)(3). In each instance, the Court found (without addressing whether the expert testimony requirements of *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993), must apply) that the expert statistical and economic evidence offered was not sufficient to support class certification. This will necessarily make it more difficult for plaintiffs typically relying on such evidence—for example, plaintiffs alleging violations of employment or antitrust laws based on impacts on class members—to certify large classes.

In addition, Justice Scalia's footnote 6, rebuking the plaintiffs in *Comcast* for lacking "the requisite commonality of damages" would seem to support arguments that putative classes in many other cases should be limited to smaller groups (as occurred on remand in the *Wal-Mart* case, *see* Dukes redux: plaintiffs seek certification of smaller class sizes in two states (Nov. 2011)), with smaller differences in damages, despite boilerplate comments that have existed for years to the effect that differences in damages alone do not provide a basis for denying class certification if damages can be proved by a mathematical calculation or formula. *See, e.g.*, *Gunnells v. Healthplan Servs.*, 348 F.3d 417, 427-29 (4th Cir. 2003), *cert. denied*, 542 U.S. 915 (2004).

In short, *Comcast* is a further decision favoring defendants in class actions. And so long as the five Justice majority in it and the *Wal-Mart* case hold together, defendants have hopes that the heightened scrutiny proposed by Justice Scalia may be applied to other elements of class certification.

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Class Action Alert
Recent developments in class action law

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FEBRUARY 28, 2013

Don't "put the cart before the horse": Supreme Court rejects Amgen's argument that securities fraud plaintiffs must prove materiality of alleged misrepresentations at the class certification stage

By Carolyn G. Nussbaum, Christopher M. Mason, Leah Threatte Bojnowski, and Paige L. Berges

On February 27, 2013, the Supreme Court issued a split decision in *Amgen Inc. v. Conn. Retirement Plans and Trust Funds*, No. 11-1085, 2013 U.S. LEXIS 1862 (February 27, 2013) upholding the Ninth Circuit's decision that plaintiffs in securities fraud actions based on the fraud-on-the-market theory of reliance do not have to *prove* the materiality of alleged misrepresentations or omissions regarding the securities at issue to certify a class under Federal Rule of Civil Procedure 23(b)(3).[1] Acknowledging that materiality is essential to the fraud-on-the-market presumption itself, the Court nonetheless concluded that materiality need not be proven at the class certification stage because it is a question common to all class members: "failure of common proof on the issue of materiality ends the case for the class." *Id.* at *34.

Background

Connecticut Retirement Plans and Trust Funds ("Connecticut Plans") sued Amgen Inc. ("Amgen") alleging that Amgen made misrepresentations and misleading omissions regarding the safety, efficacy, and marketing of two of its flagship drugs. The Connecticut Plans sought to represent all investors who purchased Amgen stock between the date of the first alleged misrepresentation (April 22, 2004) and the date of the last alleged corrective disclosure (May 10, 2007). *Id.* at *16. The District Court granted Connecticut Plans' motion and certified the proposed class under Rule 23(b)(3). Amgen moved for interlocutory appeal from the District Court's class-certification order. Amgen argued that reliance cannot be proved on a class-wide basis unless materiality is also proved because, by definition, a class member could not rely on an immaterial representation. The Court of Appeals did not accept this argument and affirmed the class certification.

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[1] Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members."

The Supreme Court granted Amgen's petition for certiorari, 132 S. Ct. 2742 (2012), citing a split among the Courts of Appeals. While the Seventh Circuit had held that plaintiffs must "plausibly allege-but need not prove" materiality at the certification stage, *Schleicher v. Wendt*, 618 F.3d 679 (7th Cir. 2010), the Second and Fifth Circuits had required proof of materiality, or allowed defendants to rebut materiality on a certification motion. *See In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474 (2d Cir. 2008); *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 401 F.3d 316 (5th Cir. 2005).

"Fraud-on-the-market" theory

The fraud-on-the-market theory was created by the Supreme Court in its decision in *Basic Inc. v. Levinson*, 485 U.S. 224 (1998). There, the Court held that "if a market is shown to be efficient, courts may presume that investors who traded in that market relied on public, material misrepresentations regarding those securities." *Id.* at 245. This theory is important to securities fraud class actions because, as the Court notes in *Amgen*, requiring a showing of individual reliance for each class member would likely "overwhelm questions common to the class" and preclude certification of a class action. *Amgen* at *14. Materiality is both an element of a securities fraud claim under Rule 10b-5, and "an essential predicate of the fraud-on-the-market" theory. *Id.* at *20.

The Supreme Court last addressed the showing required by plaintiffs invoking fraud on the market at the class certification stage in *Erica P. John Fund, Inc. v. Halliburton Co.*, No. 09-1403, 2011 U.S. LEXIS 4181 (June 6, 2011). In *Halliburton*, the Court held unanimously that securities fraud plaintiffs do not need to prove loss causation to obtain class certification, noting however, that to invoke the fraud-on-the-market theory, plaintiffs did have to prove the elements of market efficiency and the public nature of an alleged misrepresentation.[2] The Court side-stepped the issue of whether plaintiffs must prove other elements of fraud-on-the-market theory—including reliance—or whether defendants may rebut these elements at the class certification stage, admonishing that, "we need not, and do not, address any other questions about *Basic*, its presumption, or how and when it must be rebutted." 2011 U.S. LEXIS at *19.

By contrast, in *Amgen,* the Court addressed these questions left open in *Halliburton*. Handing the defense a significant setback, the Court defined the issue on certification as whether "proof of materiality is needed to ensure that the questions of law or fact common to the class will 'predominate over any questions affecting only individual members.'" *Amgen* at *2. On the merits, the Court held the answer is "clearly 'no'" for two reasons. First, the question of materiality is an objective one, to be proven through evidence common to the class. Second, a failure of proof on materiality will not result in a predominance of individual questions; instead, such a failure will end the case for all class members. *Id.* at *3.

Responding to the dissents' suggestion that materiality must be assessed at the certification stage as an element of the fraud-on-the-market theory, the majority focused on the narrow question presented on certification—whether common questions predominate over questions affecting only individual class members, allowing certification of a class for monetary damages under Rule 23(b)(3). The majority of the Court reasoned that plaintiffs' ultimate inability to prove materiality on summary judgment or at trial, while fatal to the entire case, is not a "fatal dissimilarity" among class members

[2] See our prior Alert here: http://www.nixonpeabody.com/files/Class_Action_Alert_06_08_2011.pdf.

that would render the use of the class-action device inefficient or unfair so as to defeat certification. *Id.* at *26-27. Thus, the Court held that materiality is not an issue relevant to the predominance analysis required to decide certification under Rule 23(b)(3).

The Court contrasted materiality from the other elements of the fraud-on-the-market theory required by *Halliburton* to be addressed at certification—market efficiency and publicity—noting that, although failure to prove these elements might defeat a finding of commonality and certification, such a failure would not by itself end the case on the merits. *Amgen* at *33. For example, if the defendant's alleged misrepresentations or omissions were not aired publicly, or if the market for its securities were not efficient, individual plaintiffs could not invoke the fraud-on-the-market presumption of reliance, but might still be able to establish individual reliance, along with all of the remaining requisite elements of a Rule 10b-5 claim. Conversely, a failure on materiality would end the case for all plaintiffs in the potential class.

The Court gave short shrift to *Amgen's* public policy argument that certification often leads to *in terrorem* settlements, warranting closer scrutiny before granting certification. The Court noted that Congress has addressed perceived litigation abuses with the enactment of the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u–4 (2006), imposing certain burdens on plaintiffs, and the Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. §78bb(f)(1) (2006). Yet Congress has never opted to legislatively reject *Basic* or its presumption of classwide reliance. *See Amgen* at *38. Therefore, the Court did not think it "appropriate" for the judiciary to reinterpret the tenets of securities law where Congress has declined to do so. *Id.* at *39.

The Justices' comments at oral argument had revealed a philosophical split and gave rise to speculation that the Court might take the occasion to do what Congress has not: revisit *Basic* and the fraud-on-the-market theory's appropriateness as a whole. Indeed, Justice Alito's concurring opinion notes that although the petitioners did not ask the Court to revisit *Basic*'s fraud-on-the-market presumption, reconsideration of *Basic* itself may be appropriate as "more recent evidence suggests that the presumption may rest on a faulty economic premise." *Amgen* at *49. Likewise, Justice Scalia's dissent leaves no doubt of his view of the fraud-on-the-market theory, suggesting that "some" consider the four-justice opinion in *Basic* "regrettable" and warning that the Court's opinion expands the consequences of *Basic* "from the arguably regrettable to the unquestionably disastrous." *Amgen* at *54-55.

In the end, the Justices agreed that materiality is an element of the fraud-on-the-market theory, but differed in their views of when materiality must be proven or may be rebutted. The majority held that adjudicating materiality at the certification stage would "have us put the cart before the horse." *Id.* at *9. The dissents challenged that characterization with Justice Thomas asserting that the majority, rather than Amgen, would put the cart before the horse. In his view, joined by Justice Kennedy, the plaintiff who cannot prove materiality should never get to the merits, because without materiality, fraud-on-the-market does not apply, individual questions of reliance predominate, and certification is not possible. *Id.* at *71. Similarly, Justice Scalia's dissent would have required a plaintiff to establish at the class certification stage all of the elements of the fraud-on-the-market theory, including materiality, if the presumption is relied upon to justify certification. *Id.* at *51-53.

Analysis

The majority position in *Amgen* includes justices all along the ideological spectrum, and seems at first glance to be an exception to the recent general trend of cases limiting the availability of class actions and favoring defendants. From a class-action plaintiffs' perspective, the *Amgen* decision also appears to be a win on two key fronts: the fraud-on-the-market presumption is preserved for the time being, and the battle over materiality is removed from the certification landscape. Whether *Amgen* actually marks an end point generally to decisions disfavoring class actions, however, may not be known until the outcome of *American Express v. Italian Colors Restaurant*, No. 12-133, 2012 US LEXIS 8697 (Nov. 9, 2012).[3] Further, on March 25, the Court is scheduled to hear arguments in *Oxford Health Plans LLC v. Sutter*, cert. granted, No. 12-135, 2012 U.S. LEXIS 9417 (December 7, 2012)[4] over whether an arbitrator correctly ruled that the parties had consented to authorize class arbitration of pay disputes under the broad language of their individual plans requiring arbitration. This case may finally test whether the Court will apply limits to an arbitrator's power under the Federal Arbitration Act. *See Question Presented and Grant of Cert.,* available at: http://www.supremecourt.gov/qp/12-00135qp.pdf

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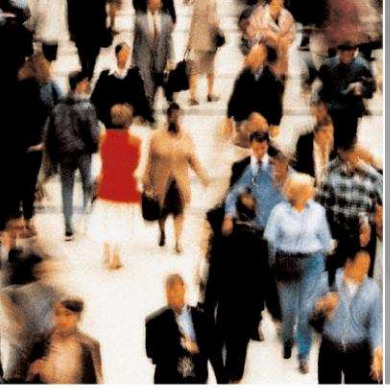
[3] See our prior Alert here: http://www.nixonpeabody.com/landmark_class_action_waiver_case
[4] Docket available at: http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-135.htm (accessed February 28, 2013)



Class Action Alert
Recent developments in class action law

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JUNE 24, 2013

SCOTUS upholds class action waiver again: Amex III significantly limits the "effective vindication" of statutory rights doctrine

By W. Scott O'Connell, Christopher M. Mason, W. Daniel Deane, Morgan C. Nighan, and Paige L. Berges

Last year, we noted that when the United States Court of Appeals for the Second Circuit denied rehearing *en banc* of its decision rejecting a class action waiver in *In re Am. Express Merchants' Litig.*, 681 F.3d 139 (2d Cir. 2012), the dissent to that denial argued that the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), "teaches that the FAA does not allow courts to invalidate class-action waivers even if 'class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system.'" 681 F.3d at 143. *See* "U.S. Supreme Court will hear landmark class action waiver case: *American Express Co. v. Italian Colors Restaurant*," November 19, 2012, *available at* http://www.nixonpeabody.com/landmark_class_action_waiver_case. We predicted this argument might carry weight with the Supreme Court when it finally resolved the issue—and it clearly did. In a 5 to 3 decision,[1] with the majority opinion authored by Justice Scalia, the Supreme Court forcefully held that agreements to waive class procedures in otherwise valid agreements *will* be enforced according to their terms, even if one consequence may be to render the pursuit of a particular claim uneconomic. The decision is particularly important for businesses that use arbitration agreements with class waivers (and should encourage other businesses that have avoided arbitration clauses in recent years to reconsider their decision). Such agreements may no longer need to include the kinds of devices found in the arbitration clauses in *Concepcion,* such as bounties, premiums, or multiplier cost shifting mechanisms to ensure enforcement of the waiver. At this point, the cumulative effect of recent decisions by the Supreme Court under the Federal Arbitration Act, 9 U.S.C.A. §§ 9-16 (West 2013) (the "FAA"), has reached a level where we would recommend to many clients that they take a new, close look at arbitration and dispute resolution clauses generally in their businesses.

In *Am. Express Co. v. Italian Colors Restaurant*, the majority held that the FAA, does not allow the invalidation of class waivers merely because the costs of arbitrating claims individually may outweigh the potential recovery. No. 12-133, 2013 U.S. LEXIS 4700 at *16-17 (2013) (*Amex III*). Justice Scalia's opinion also makes clear to state and lower federal courts that the "effective vindication" of statutory rights doctrine—the idea that the law does not recognize agreements to prospectively waive

[1] Justice Sotomayor recused herself because she had participated in the case while on the Second Circuit.

congressionally created entitlements—must be construed narrowly in the context of agreements to arbitrate. In doing so, the Court sent a strong message that its earlier arbitration-friendly decision in *Concepcion* should be read expansively when courts are considering arguments that an agreement to bilateral arbitration should be set aside. Echoing the Second Circuit dissent to the denial of *en banc* review, Justice Scalia noted that the decision in *Concepcion* "all but resolves this case." *Id.* at *16.

The resolution of the issues in *Amex III* became necessary because, despite the Supreme Court's views of the primacy of party agreement in earlier decisions, lower courts had continued to show hostility toward arbitration agreements and class waiver provisions. Those decisions usually invoked the FAA's "Savings Clause," 9 U.S.C.A. § 2, to hold an arbitration agreement unenforceable under a particular state law definition of unconscionability.[2]

In its 2011 decision in *Concepcion*, the Supreme Court had limited application of the Savings Clause, holding that defenses which, in theory can be generally applied to all contracts (like unconscionability), were still preempted by the FAA if they were applied disproportionately to invalidate arbitration agreements. As recently as last week, however, state courts were still using the vindication of statutory rights doctrine to invalidate arbitration clauses and class waivers, and citing pre-*Concepcion* Supreme Court holdings to do so. *See*, *e.g.*, *Feeney v. Dell, Inc.*, 465 Mass. 470, 2013 WL 2479603 (June 12, 2013) ("*Feeney II*") (citing, e.g., *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000), and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). *See* "Massachusetts SJC rules on class waivers days before United States Supreme Court issues *Amex* decision," June 19, 2013, *available at* http://www.nixonpeabody.com/MA_SJC_rules_on_class_waivers. Such efforts to avoid the Supreme Court's views will be very difficult now.

Background to Amex III

Merchants who accept American Express cards have an agreement that requires the arbitration of any disputes and waives the merchants' right to arbitrate as a class. A few years ago, some of these merchants filed a lawsuit alleging that American Express had used its monopoly power in the market for charge cards to force merchants to accept credit cards at rates approximately 30% higher than the fees for competing credit cards.

American Express moved to compel individual arbitration of these antitrust claims pursuant to its agreements with the merchants. In resisting the motion, the merchants argued that the cost of an expert economic analysis necessary to prove the individual antitrust claims would amount to hundreds of thousands of dollars (and possibly over $1 million) for each claimant. Yet the expected recovery for each individual plaintiff would likely be less than $40,000.

The District Court granted American Express's motion to dismiss, but the United States Court of Appeals for the Second Circuit reversed and remanded for further proceedings on the ground that that the class action waiver was unenforceable in the face of the merchants' supposedly "prohibitive costs if compelled to arbitrate under the class action waiver." 2013 U.S. LEXIS 4700 at *6 (quoting *In re Am. Express Merchants' Litig.*, 554 F.3d 300, 315-316 (2d Cir. 2009)).

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[2] The Savings Clause provides that "such grounds as exist at law or in equity for the revocation of any contract" will still apply to any purported agreement to arbitrate.

The Supreme Court granted *certiorari* and vacated this decision, remanding for further consideration in light of *Stolt-Nielsen, S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662 (2010), which held that a party may not be compelled to submit to class arbitration absent an agreement to do so. *Am. Express Co. v. Italian Colors Restaurant*, 559 U.S. 1103 (2010). The Court of Appeals stood by its reversal, but later *sua sponte* reconsidered its ruling in light of *Concepcion*, in which the Supreme Court had held that the FAA pre-empted a *state* law barring enforcement of a class-arbitration waiver. *See* 131 S. Ct. at 761-62. Yet despite the holding in Concepcion, the Second Circuit sided with the merchants for a third time by distinguishing Concepcion, which was premised on FAA preemption of a state law policy that conflicted with the FAA, from the case at bar, which involved the competing policies of two federal statutes (the FAA and the Sherman Act). After the Second Circuit denied rehearing *en banc*, the Supreme Court granted *certiorari* to consider "whether the Federal Arbitration Act permits courts . . . to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim." *Amex III*, 2013 U.S. LEXIS 4700 at *7.

The decision

In answering this question, Justice Scalia, writing for the same conservative majority that decided *Concepcion*, reiterated the common refrain from earlier decisions that "arbitration is a matter of contract." *Id.* at *8. In addition, however, he pointedly noted that "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim." *Id.* Contrary to the views of the Second Circuit, any vindication of statutory rights doctrine arose only as "dicta" in *Mitsubishi Motors* (a decision that in fact upheld the enforceability of an arbitration clause). *Id.* at *11. The true nature of that doctrine is a "desire to prevent 'prospective waiver of a party's *right to pursue* statutory remedies.'" *Id.* (quoting *Mitsubishi Motors*, 473 U.S. at 637) (emphasis in original). As Justice Scalia explained, "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy." *Id.* at *13 (emphasis in original). As long as an agreement provides *some* method to pursue a remedy, an arbitration clause containing a class action waiver provision will therefore be upheld under the FAA even though it may not be cost effective for the claimant to actually pursue the remedy in arbitration. According to Justice Scalia, the Court in *Concepcion* had already "specifically reject[ed] the argument that class arbitration was necessary to prosecute claims 'that might otherwise slip through the legal system.'" *Id.* at *17 (quoting *Concepcion*, 131 S. Ct. at 1752). That principal "all but resolves this case." *Id.*

The "nutshell" dissent

Justice Scalia's majority opinion is clear and forceful. Justice Kagan's dissent is also quite clear. As she put it, "here is the nutshell version of today's opinion, admirably flaunted rather than camouflaged: too darn bad." *Id.* at *20 (Kagan, J., dissenting).

Justice Kagan sided with the merchants and accused the majority of rendering a decision that "operates to confer immunity from potentially meritorious federal claims," an outcome that the FAA was never meant to produce. *Id.* at *21. (Kagan, J., dissenting). According to her, the effect of the majority's decision is that "[t]he monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse." *Id.* at *20. (Kagan, J., dissenting).

Regarding prospective waivers of federal rights, the dissent insists this rule can only work if it applies not just to a contract clause explicitly barring a claim, but to others, such as the one in this case, that have the practical effect of barring claims.[3] In *Mitsubishi Motors*, for example, the Court held that an arbitration clause "should be 'set[] aside' if 'proceedings in the contractual forum will be so gravely difficult' that the claimant 'will for all practical purposes be deprived of his day in court.'" *Id.* at *24-25 (Kagan, J., dissenting). (quoting *Mitsubishi Motors*, 437 U.S., at 632). The FAA itself also supposedly supports a vindication of rights doctrine by reflecting a federal policy favoring arbitration as a "'method of resolving disputes,' not as a foolproof way of killing off valid claims." *Id.* at *26 (Kagan, J., dissenting) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989)).

Effects of Amex III:

The *Amex III* decision puts an exclamation point on the Supreme Court's series of significant arbitration decisions over the last few terms. In itself, it makes class waivers in arbitration clauses very difficult to defeat. Any effort to use a vindication of statutory rights doctrine for that purpose, for example, will be limited to instances when a party prospectively waives rights to *pursue* federal statutory claims. The fact that pursuit of those claims is difficult, expensive, or burdensome will not itself constitute a "waiver." As we noted earlier, it may be time for clients to spend some time reviewing their arbitration and dispute resolution clauses and strategies anew. While *Amex III* will not stop some courts and parties from trying to find ways around otherwise appropriate clauses favoring individualized resolution of disputes, the Supreme Court has now indicated a very clear preference for party choice and traditional, bilateral, dispute resolution. *See also, e.g.*, Christopher M. Mason, Devon Haft Little, and Sherli Yeroushalmi, *Supreme Court Addresses Problems of Size: 'Too big' and 'too small' cases pose a* struggle, N.Y.L.J., June 10, 2013, at S2.

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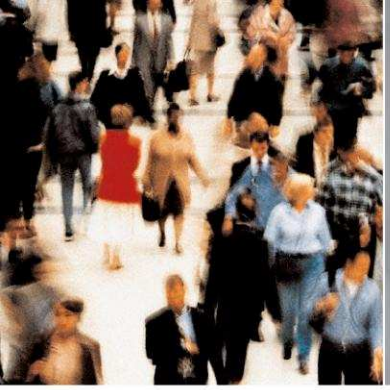
[3] Notably, the dissent explicitly argues that the vindication of statutory rights doctrine does *not* apply to state law, meaning any possible application of it in the future can only be used for federal claims. This statement by the dissent further undermines the decisions of several federal and state courts that have extended "effective vindication" of statutory rights doctrine to state law claims.



Class Action Alert
Recent developments in class action law

A publication of Nixon Peabody LLP

MARCH 20, 2013

The Supreme Court tightens up on CAFA—and on class plaintiffs

By Christopher M. Mason, Sara E. Farber, and Scott O'Connell

Yesterday, the United States Supreme Court decided a deceptively important question of class action law in *Standard Fire Insurance Co. v. Knowles*, No. 11-1450, 2013 U.S. LEXIS 2370 (March 19, 2013). While the Court's conclusion—that a named plaintiff in a putative state court class action cannot, simply by disclaiming damages above $5 million at the start of the case, avoid the effect of the jurisdictional provisions of the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. 1332(d)(2), (5), allowing removal to federal court of actions involving more than $5 million in collective damages—seems procedural, in fact, it is a significant statement about the powers of representative plaintiffs generally.

Overview

As we have noted for many years, CAFA is a complex statute, and has perhaps not always accomplished as much reduction in state court class action litigation as President George W. Bush and the defense bar expected when it was signed into law as the first legislation of President Bush's second term of office. *See* Christopher M. Mason and Philip M. Berkowitz, *Decisions Begin To Interpret the Class Action Fairness Act* (March 21, 2005), available here; Christopher M. Mason, *A Giant Step Forward for the Class Action Fairness Act* (Feb. 14, 2005), available here; *see also* White House Transcript, *President Signs Class-Action Fairness Act of 2005* (Feb. 18, 2005), available here. This new decision, however, advances those expectations as well as providing guidance about the power of representative plaintiffs generally.

Background

The plaintiff in the *Standard Fire Insurance Co. v. Knowles* case, Greg Knowles ("Knowles"), filed a class action lawsuit in Arkansas state court against Standard Fire Insurance Company ("Standard Fire"). Knowles claimed that Standard Fire had breached the homeowners' insurance policy sold to him by underpaying claims for hail damage to Knowles' home. Knowles alleged that his policy, and the

policies of those similarly situated, provided for full reimbursement for such loss or damage, including for reasonable charges associated with retaining a general contractor to repair or replace the damaged property. Standard Fire, however, had refused to reimburse "general contractors' overhead and profit," or about 20% of the costs of a contractor making repairs. According to Knowles, there were likely "hundreds, and possibly thousands" of individuals in Arkansas who suffered similar damages in the form of underpayments. 2013 U.S. LEXIS 2370, at * 4 (internal citation omitted).

When Knowles filed his complaint, he stipulated that the Circuit Court of Miller County, Arkansas, had jurisdiction over the action because his recovery and that of any class member individually would not exceed $75,000.00, and his total damages and those of all class members in aggregate would be less than $5,000,000.00. The point of this stipulation, of course, was to try to avoid removal on CAFA's minimal diversity grounds (*i.e.*, given that the insurer was not from Arkansas, if the collective amount in controversy exceeded $5 million, federal jurisdiction would exist, *see* 28 U.S.C. §§ 1332(d)(2), (5)(B), (6)).

The Lower Courts' Decisions

Standard Fire, however, was not dissuaded by Knowles' stipulation. It removed the action to federal court, arguing that, regardless of Knowles' effort to limit his and the purported class' damages, his counsel never agreed that they would not seek attorney's fees that would bring total recovery beyond that amount. Standard Fire also claimed that Knowles lacked authority to limit other class members' damages through a stipulation.

There was good support for Standard Fire's position—other courts that had considered the issue were split on it. *Compare, e.g., Bell v. Hershey Co.*, 557 F.3d 953, 958 (8th Cir. 2009) *with Lowdermilk v. United States Bank Nat'l Assoc.*, 479 F.3d 994, 998 (9th Cir. 2007). But this meant that Knowles also had authority for his prompt motion to remand the action. In doing so, Knowles simply claimed that his stipulation was effective to limit the total recovery to below federal jurisdictional limits, and that as a plaintiff he had the right to craft his complaint in a way that would enable him to bring his action in the court of his choosing.

The District Court agreed with Knowles. It held that, by means of a binding stipulation, Knowles had shown in good faith that the aggregate damages claimed on behalf of the class would not exceed $5 million. It also held that if class members felt constrained by Knowles' limitation on recoveries, they could opt out of the class and pursue other remedies. It, therefore, remanded the case to state court.

Standard Fire sought an interlocutory appeal to the United States Court of Appeals for the Eighth Circuit. The Court of Appeals, however, denied that request without explanation. Standard Fire then filed a petition for *certiorari* to the Supreme Court, which the Court granted on August 31, 2012.

The Supreme Court's Decision

The Supreme Court held that Knowles' stipulation could not avoid CAFA because the stipulation could not bind absent class members. The unanimous opinion by Justice Breyer asserts that the "reason is a simple one: Stipulations must be binding", 2013 U.S. LEXIS 2370, at * 7, but "a plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified", *id.* at * 7–8. At that point there would have been a decision as to whether, for example,

Knowles was an adequate class representative, Fed. R. Civ. P. 23(a)(4), and exactly what the class contained, Fed. R. Civ. P. 23(c)(1)(B).

Interestingly, while the opinion states that one characteristic of a binding stipulation is that it is "not subject to subsequent variation" and is "conclusive[ ]", 2013 U.S. LEXIS 2370, at * 7 (quoting *Christian Legal Soc. v. Martinez,* 130 S. Ct. 2971, 2983 (2010), and 9 J. Wigmore, Evidence § 2590, at 822 (J. Chadbourn rev. 1981)), Federal Rule of Civil Procedure 23(c)(1)(C) expressly recognizes that class certification orders may be altered or amended, thus undermining the assumption that a class representative's stipulation after certification will necessarily be as binding as one by an individual plaintiff. Indeed, the Court's own opinion recognizes that a court could "permit the action to proceed with a new representative" other than Knowles in the future. 2013 U.S. LEXIS 2370, at * 10. Thus, the deep structure of the Court's decision in *Standard Fire Insurance Co. v. Knowles* is not one based on rules of evidence or procedure, but doubt about the ultimate power of a class representative absent the oversight of a court. In effect, a stipulation limiting damages before class certification is a sort of settlement, and settlements require express court approval. *See, e.g.,* Fed. R. Civ. P. 23(e).

Conclusion

The Supreme Court's decision was welcomed by traditional class action defense lawyers as a win. But it may have effects beyond even the rigor it places on CAFA procedure. In particular, it emphasizes that named plaintiffs *cannot* assume that their general power to define their own case will withstand scrutiny when they appear to leave substantial issues without potential resolution to avoid a problem of jurisdiction—prior pending action—or greater authority by a regulator. We have, for example, seen named plaintiffs attempt to include in proposed classes entities that cannot be sued or that must be represented by other counsel besides the proposed class counsel. The *Standard Fire Insurance Co. v. Knowles* opinion indicates that such attempts should receive closer scrutiny than they often have been given in the past.

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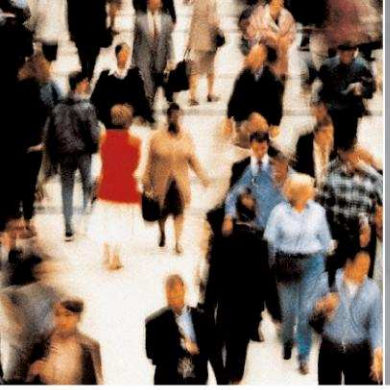

Class Action Alert
Recent developments in class action law

A publication of Nixon Peabody LLP

JUNE 19, 2013

Massachusetts SJC rules on class waivers days before United States Supreme Court issues Amex decision

By ***Scott O'Connell, Christopher M. Mason, W. Daniel Deane, and Morgan C. Nighan***

The United States Supreme Court stands poised to rule any day on whether "the Federal Arbitration Act permits courts, invoking the 'federal substantive law of arbitrability,' to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim." Question Presented and Grant of Cert., *Am. Express Co. v. Italian Colors Restaurant*, No. 12-133. The Supreme Judicial Court of Massachusetts (the "SJC") is not, however, waiting for a ruling from its federal counterpart. Instead, it has just held, in *Feeney v. Dell, Inc.*, 465 Mass. 470, 2013 WL 2479603 (June 12, 2013) ("*Feeney II*"), that a consumer-facing arbitration clause is unenforceable because its class waiver provision prevents customers from effectively vindicating their rights under Massachusetts's consumer protection statute.

The scope of the Federal Arbitration Act ("FAA"), 9 U.S.C.A. § 1-16 (West 2013), particularly its effect on consumer arbitration agreements that contain class action waivers, has been the subject of continual litigation in recent years (see prior alerts, below). Congress enacted the FAA in 1925 in response to widespread judicial hostility to arbitration agreements. The United States Supreme Court has defined the scope of the FAA broadly, stating that it "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). But Section 2 of the FAA (the "Savings Clause") also provides that "such grounds as exist at law or in equity for the revocation of any contract" will still apply to any purported agreement to arbitrate.

Despite the clear national policy favoring arbitration agreements, some state and federal courts have applied the Savings Clause to invalidate arbitration provisions containing class action waivers on the theory that such waivers are unconscionable as a matter of common law. Partially in response to this trend, the Supreme Court limited application of the Savings Clause in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011), holding that defenses that, in theory, can be generally applied to all contracts, such as unconscionability, are still preempted by the FAA if they are disproportionately applied to invalidate arbitration agreements. In *Feeney II*, the SJC considered, in the wake of *Concepcion*, "under what conditions a State court may still invalidate an arbitration agreement containing a class waiver as unconscionable or against public policy without running afoul of the FAA." *Feeney II*, 465 Mass. 470, 2013 WL 2479603, at *14. The SJC held that *Concepcion* still allows the

invalidation of class waivers in cases where plaintiffs can prove, after an individualized factual inquiry, that class proceedings are the only viable way for plaintiffs to vindicate their claims.

Background: Feeney I

In 2003, consumer plaintiffs commenced a putative class action alleging that the Dell computer company had engaged in unfair or deceptive acts or practices in violation of the Massachusetts Consumer Protection Act, G.L. c. 93A ("93A"), by systematically charging and collecting from customers a charge falsely characterized as a "sales tax" on the purchase of optional service contracts for Dell computers. See *Feeney v. Dell, Inc.* 454 Mass. 192 (2009) (*Feeney I)*. Dell moved to stay the proceedings and to compel arbitration in accordance with Dell's "Terms and Conditions of Sale," a purchase agreement that contained terms mandating individual arbitration of customer disputes and precluding customers from bringing a class action. The terms did not bind Dell in connection with any claims it might have had against the consumer plaintiffs.

The plaintiffs resisted arbitration, arguing that the prohibition on class arbitration was unconscionable and undermined the purpose of 93A by unilaterally precluding class actions. A Massachusetts Superior Court allowed Dell's motion to compel arbitration and the plaintiffs sought interlocutory review, where a single justice of the Appeals Court denied plaintiffs' petition. Plaintiffs, thereafter, filed their arbitration claims "under protest," and, after failing to obtain any relief in arbitration, they again sought relief in Superior Court by filing a motion to vacate the arbitration award and to reconsider the order allowing Dell's motion to compel arbitration. The plaintiffs' motion was denied and the case was dismissed with prejudice. The SJC then granted direct appellate review and issued a decision reversing the order to compel arbitration, but dismissing the plaintiff's complaint, without prejudice, for failure to state a claim. In its ruling striking the arbitration clause, the SJC concluded that the class action prohibition "contravenes Massachusetts public policy," which it believed strongly favors class actions for 93A cases. *Feeney I*, 454 Mass. at 199. The plaintiffs filed an amended complaint, but, before the case could proceed further, the United States Supreme Court issued its opinion in *Concepcion*. That decision cast substantial doubt on the ground for the SJC's class waiver holding (see prior alerts below; U.S. Supreme Court upholds class action waivers in consumer contracts: *AT&T Mobility v. Concepcion*, dated April 27, 2011).

Concepcion: rejects argument that a class waiver is unconscionable and holds that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons"

In *Concepcion*, the Supreme Court considered whether the FAA prohibits states from conditioning the enforceability of certain arbitration agreements on the availability of class-wide arbitration procedures. In that case, plaintiffs had purchased AT&T services that purportedly included a free cellular telephone. But after plaintiffs were charged $30.22 in sales tax on the "free" telephones, they filed a class action lawsuit in federal district court alleging that AT&T had engaged in false advertising and fraud. AT&T moved to compel arbitration pursuant to the arbitration clause in its standard service agreement, which included a class action waiver. The contract contained other "consumer-friendly" terms aimed at encouraging arbitration, including a requirement that a customer awarded an amount in excess of AT&T's last settlement offer would be entitled to a $7,500 minimum recovery plus an award of twice the amount of the customer's attorney's fees. The District

Court nevertheless applied California's common law "*Discover Bank* rule,"[1] and found the arbitration agreement unconscionable because AT&T had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions. The United States Court of Appeals for the Ninth Circuit affirmed the District Court, and the Supreme Court granted certiorari.

Although the *Discover Bank* rule was rooted in California's version of the unconscionability doctrine—a state rule generally available to invalidate *any* contract—the Supreme Court found that California applied that rule in a way that had a disproportionate impact on arbitration agreements, and thus contravened the FAA's national policy favoring arbitration. In other words, the FAA preempted the *Discover Bank* rule "because [that rule] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the Congress." *Concepcion*, 131 S. Ct. 1740. In a pair of *per curiam* rulings since then, the Supreme Court has re-affirmed *Concepcion* and emphasized that any state law rules that categorically "prohibit[] outright the arbitration of a particular type of claim" are trumped by the FAA's pro-arbitration policy. *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012); *Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500 (2012).

SJC avoids Concepcion by applying the "vindication of statutory rights" doctrine

Following *Concepcion*, Dell filed a renewed motion to confirm the arbitration award, arguing that *Concepcion* abrogated the SJC's decision in *Feeney I*. After the superior court denied Dell's motion, the SJC granted direct appellate review.

The SJC acknowledged that *Concepcion* abrogated *Feeney I* insofar as *Feeney I* purported to strike the class action waiver based on a holding that the waiver violated a fundamental public policy of the Commonwealth of Massachusetts (a policy very similar to California's *Discover Bank* rule). Nevertheless, the court believed that Dell's class waiver remained unenforceable under the so-called "vindication of statutory rights doctrine," mentioned in another line of United States Supreme Court cases. See, e.g., *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). The SJC reasoned that Congress enacted the FAA to "preserve the availability of an arbitral forum and remedy for the resolution of disputes between parties to a commercial contract," and that it would be "contrary to Congressional intent to interpret the FAA to permit arbitration clauses that effectively deny consumers any remedy for wrongs committed in violation of other Federal and state laws intended to protect them." *Feeney II*, 2013 WL 2479603, at *1. Accordingly, in situations where a court determines, following an individualized factual inquiry, "that class proceedings are the *only* viable way for a consumer plaintiff to bring a claim against a defendant, as may be the case where the claims are complex, the damages are demonstrably small[,] and the arbitration agreement does not feature the safeguards found in the *Concepcion* agreement, a court may still invalidate a class waiver." *Id.* at *20 (emphasis added).

The SJC noted that *Concepcion* "did not render the Savings Clause of [FAA Section 2] a dead letter," and there must remain grounds at law or in equity for the revocation of a contract that may be properly invoked to void an arbitration agreement containing a class waiver. It relied for this proposition on the Supreme Court's statements in *Randolph* acknowledging that an arbitration clause would not be enforceable in the face of a showing that "the existence of large arbitration costs could preclude a litigant … from effectively vindicating her federal statutory rights in the arbitral forum …"

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[1] *Discover Bank v. Superior Ct.*, 113 P.3d 1100 (2005) (holding that arbitration clauses in consumer contracts that require consumers to arbitrate all claims and surrender the right to proceed as a class are unconscionable).

531 U.S. at 90-91. The SJC concluded that this line of reasoning remained undisturbed by *Concepcion*, as evidenced by efforts in the *Concepcion* majority opinion to emphasize the overall fairness of AT&T's arbitration agreement, and the court's ultimate conclusion that an AT&T customer could successfully pursue a remedy under the arbitration regime established by AT&T's agreement. According to the *Feeney II* court, this discussion of the AT&T agreement would have been superfluous if the majority intended to establish a blanket rule completely preempting all state law unconscionability defenses. See *Feeney II,* 2013 WL 2479603, at *16 (citing *Concepcion,* 131 S. Ct. at 1753).[2]

The SJC also addressed the Supreme Court's admonition in *Concepcion* that: "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons[,]" including the fear that absent the availability of class procedures "small-dollar claims … might otherwise slip through the legal system." *Concepcion*, 131 S. Ct. at 1753. The SJC contended that this line of argument focused on the concern that plaintiffs would have insufficient *incentive* to file claims, not that they would be completely or effectively foreclosed from vindicating their substantive rights. In support of this argument, the SJC cited several recent decisions that have also read *Concepcion* narrowly, suggesting an exception to FAA preemption where substantive rights might be lost in arbitration; see *Feeney II*, 2013 WL 2479603, at *16-18 (citing, e.g., *Coneff v. AT&T Corp*, 673 F.3d 1155, 1159 (9th Cir. 2012); *Sutherland v. Ernst & Young LLP*, 847 F. Supp. 2d 528, 537 (S.D.N.Y. 2012); *Franco v. Arakelian Enters., Inc.*, 211 Cal. App. 4th 314, 370 (Cal. Ct. App. 2012)). The SJC also acknowledged, with little discussion, a contrary line of authority, largely in the Third Circuit, that has concluded that *Concepcion* prohibits a court from invalidating a class waiver provision in an arbitration agreement even where every indication points to claims being nonremediable in the absence of class proceedings. See id., at *17 (citing *Quillon v. Tenet HealthSystem Philadelphia, Inc.*, 673 F.3d 221, 232 (3d Cir. 2012), and collecting other similar cases).[3]

After finding the ability to invalidate an arbitration agreement under the vindication of statutory rights doctrine on a factually specific basis, the SJC concluded that Dell's arbitration agreement, which stood "in stark contrast to the AT&T agreement in Conception," *Feeney II*, 2013 WL 2479603, at *22, met that burden by rendering the plaintiffs' claims nonremediable. The Dell agreement provided no pro-consumer incentives to arbitrate, and simply required arbitration of all disputes, even those that would not (in the SJC's view) possibly justify the expense in light of the amount in controversy. In addition, Dell's arbitration clause did not permit a consumer to bring qualifying claims in small claims court in lieu of arbitration. These factors meant, according to the court, that there was no realistic individual claim arbitration process that the FAA could promote and that the arbitration clause effectively precluded relief for many individual plaintiffs.

Feeney II faces additional preemption issue

The vindication of statutory rights doctrine is essentially the same argument accepted by the United States Court of Appeals for the Second Circuit in *In re Am. Express Merchants' Litig.*, 667 F.3d 204 (2d Cir. 2011) (*Amex III*), cert. granted, 133 S. Ct. 594 (2012). A decision may be issued any day now in

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[2] Similarly, according to the SJC, the Supreme Court struck down the *Discover Bank* rule because it categorically invalidated class action waivers without regard to whether a consumer could viably resolve her claims through individual arbitration.

[3] The SJC also completely ignored decisions in other states—issued well before *Concepcion*—that held that their state policies (also expressed in strong consumer-protection acts) freely permit class action waivers. See, e.g., *Ranieri v. Bell Atl. Mobile,* 759 N.Y.S.2d 448, 449 (N.Y App. Div. 2003) (collecting cases).

that case. (See prior alert, U.S. Supreme Court will hear landmark class action waiver case*: American Express Co. v. Italian Colors Restaurant*, dated November 19, 2012). But even assuming the United States Supreme Court were to invalidate the class action waiver in that case on a theory of vindication of statutory rights, that might not protect the *Feeney II* decision. The plaintiffs' argument in *Amex III* is premised on the vindication of federal rights, as are the other United States Supreme Court precedents to which the SJC looked for guidance in *Feeney II*. The United States Supreme Court has never clearly held that FAA preemption can be defeated for purposes of vindicating a *state* statutory claim, and, given the import of the Supremacy Clause of the United States Constitution, there is good reason to believe the vindication-of-rights analysis will be different in the context of a state law claim. See *Kilgore v. KeyBank Nat'l Ass'n*, 673 F.3d 947, 961 (2012), aff'd on rehearing on other grounds, Nos. 09-16703, 10-15934 (9th Cir. 2013) (en banc); *Orman v. Citigroup, Inc.*, No. 11-CV-7086, 2012 WL 4039850 (S.D.N.Y. 2012).

In analyzing the state law issue, the SJC held that the FAA would not conflict with a state court's invalidation of an arbitration provision on the grounds that, if enforced, the clause would deny a consumer any remedy. It acknowledged, however, that other courts have rejected this argument with respect to claims based on state statutes. See *Feeney II*, 2013 WL 2479603, at *14–15 (collecting cases). But, according to the SJC, these decisions "miss[] the point" because the real issue is whether a state court's invalidation of an arbitration agreement that effectively precludes consumers from obtaining a remedy to which they are lawfully entitled "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Id. at *15 (quoting *Concepcion,* 131 S. Ct. at 1753).

Looking ahead: Consumer-facing businesses and employers should continue to provide "consumer-friendly" incentives to arbitrate

Feeney II presents another example of the continuing complexity courts and parties face in trying to define the scope of FAA preemption and the FAA Savings Clause, even after *Concepcion*. Although the Supreme Court's decision in *Amex III* is likely to bring some clarity—particularly with regard to whether the vindication of statutory rights doctrine can be applied to invalidate class action waivers—the additional question highlighted in *Feeney II* as to whether that doctrine applies to purely state law claims will likely remain open. The *Feeney II* decision (and the impending decision in *Amex III*) adds further incentive for companies to review their arbitration agreements with consumers and employees. The nearly constant developments in this area of the law require vigilance. Moreover, as *Feeney II* highlights, despite the efforts of Congress and the Supreme Court to bring uniformity to the treatment of arbitration agreements, divergences between jurisdictions stubbornly persist. Companies with a presence in multiple states must be aware that different rules of construction may apply to their arbitration clauses depending upon where a dispute arises.

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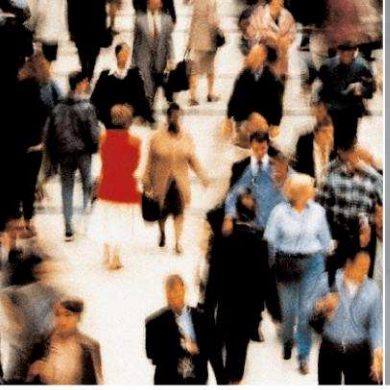
Nixon Peabody has issued several alerts examining the scope of the Federal Arbitration Act preemption, including the enforceability of arbitration agreements and class action waivers. Click below to read previous alerts on this topic:

- Update on the Kilgore Ninth Circuit appeal: California's public injunction exception escapes for another day, but the en banc court reads the exception to arbitration narrowly and rejects plaintiffs' attempt at artful pleading (April 16, 2013)
- U.S. Supreme Court tells Oklahoma state court that state law does not trump the Federal Arbitration Act: *Nitro-Lift Technologies, L.L.C. v. Howard* (November 29, 2012)
- U.S. Supreme Court will hear landmark class action waiver case: *American Express Co. v. Italian Colors Restaurant* (November 19, 2012)
- Ninth Circuit applies *Concepcion* to invalidate California's "public injunction" exception to arbitration and further upholds KeyBank's "opt-out" clause (March 12, 2012)
- U.S. Supreme Court upholds class action waivers in consumer contracts: *AT&T Mobility v. Concepcion* (April 27, 2011)



Class Action Alert
Recent developments in class action law

A publication of Nixon Peabody LLP

APRIL 16, 2013

Update on the Kilgore Ninth Circuit appeal: California's public injunction exception escapes for another day, but the en banc court reads the exception to arbitration narrowly and rejects plaintiffs' attempt at artful pleading

By Scott O'Connell and Dan Deane (Counsel to KeyBank in the action)

In a prior alert (see Ninth Circuit applies Concepcion to invalidate California's "public injunction" exception to arbitration and further upholds KeyBank's "opt-out" clause, March 12, 2012), we reported on a three-judge panel decision of the Ninth Circuit, which ruled in favor of KeyBank and held that the Federal Arbitration Act ("FAA") trumps California's court-made rule that actions seeking relief on behalf of the public may only be adjudicated in court and not in arbitration.[1] That panel had concluded that the Supreme Court's rulings in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011), and *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201, 182 L. Ed. 2d 42 (Feb. 21, 2012) (per curiam) made clear that any state law rules that "prohibit[] outright the arbitration of a particular type of claim" are displaced by the FAA. The en banc Ninth Circuit reconsidered that decision and, after further briefing and arguments before a ten-judge panel, issued a decision on April 11, 2013. *See Kilgore v. KeyBank, National Association*, No. 09-16703, 2013 U.S. App. LEXIS 7312 (9th Cir. en banc Apr. 11, 2013). While the en banc Court declined to go as far as the original panel to declare the outright demise of the public injunction rule, it applied a narrow definition of what it means to bring a public injunction action. Digging below the surface of plaintiffs' claims, the en banc Court rejected the plaintiffs' avowals that they sought relief on behalf of the general public, and concluded that arbitration is a proper forum for their claims.

The *Kilgore* lawsuit was brought by two aspiring helicopter pilots who had enrolled in Silver State Helicopters, LLC, a national aviation school, before it declared bankruptcy in February 2008. KeyBank had been one of Silver State's preferred lenders. Dissatisfied with the training they received from Silver State, the plaintiffs brought a preemptive class action in May 2008 alleging that Silver State was a sham school for which the students should not be required to pay. Because the school was insolvent, the plaintiffs sought loan forgiveness from the lender. On behalf of themselves, and a putative class of about 120 other former California-based Silver State borrowers, plaintiffs filed suit

[1] *See Kilgore v. KeyBank, National Association* 673 F.3d 947 (9th Cir. 2012), *vacated and rehearing en banc granted by Kilgore v. KeyBank Nat'l Assoc.*, 697 F.3d 1191 (9th Cir. Sept. 21, 2012).

in California state court. KeyBank removed the lawsuit to the U.S. District Court for the Northern District of California.

Plaintiffs claimed that KeyBank should be held derivatively liable for the flight schools' failures because KeyBank had allegedly violated California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, by failing to include the "holder in due course" notice required by the Federal Trade Commission's "holder rule." Had the holder notice been included in the promissory notes, plaintiffs would have been entitled to assert any claims or defenses against KeyBank arising from Silver State's misconduct. The plaintiffs argued that pursuant to the UCL, the FTC's holder notice should be read into the promissory notes despite KeyBank's omission of it. For relief, the plaintiffs sought an order enjoining KeyBank from (1) enforcing collection under the promissory notes; (2) making adverse reports concerning class members to the credit reporting agencies; and (3) engaging in false and deceptive acts and practices with respect to consumer credit transactions (namely, disbursing loan proceeds to any seller without including the holder rule language in the consumer credit contract).

The promissory note for each Silver State student in the class contained an identical arbitration clause, which provided that any disputes between the lender and the borrower would be subject to binding bi-lateral arbitration upon election of either party, and that if arbitration is elected, the borrower waives any right to participate as a representative or member in a class action. But the clause also provided that any borrower could "opt out" of the arbitration provision (and the class action waiver) simply by providing written notice of such election to KeyBank within 60 days of signing the promissory note. The promissory note did not tie disbursement of the loan funds to the passage of this 60-day opt-out period, and therefore borrowers were not penalized for making that election.

Because neither of the *Kilgore* plaintiffs had elected to opt out of the arbitration clause, KeyBank sought to remove the case to arbitration. But the district court denied KeyBank's motion to compel arbitration based on California's policy against arbitrating public injunction claims. In California, this rule is commonly called the "*Broughton/Cruz*" rule, after the two California Supreme Court cases that established it.[2] KeyBank immediately filed for interlocutory appeal pursuant to the FAA. In the meantime, the district court retained jurisdiction and then granted KeyBank's motion to dismiss on all grounds, ruling that plaintiffs' various claims either failed to state a claim or were preempted by the National Bank Act. Plaintiffs appealed the district court's dismissal order and that appeal was consolidated with KeyBank's arbitration appeal.

In March 2012, a three-judge panel of the Ninth Circuit ruled in favor of KeyBank on its arbitration appeal and vacated the district court's dismissal order as moot. Applying *Concepcion* and the body of Supreme Court case law before and since, the Ninth Circuit panel ruled that California's public injunction rule must yield to the FAA. The panel ruled that the public injunction rule could not survive *Concepcion* because the FAA expressly displaces state rules that amount to a categorical ban against arbitration. Congresses' national policy that all valid agreements to arbitrate should be

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[2] *Broughton v. Cigna Health-plans of California*, 988 P.2d 67 (Cal. 1999) (public injunction claims brought under the Consumer Legal Remedies Act not arbitrable); *Cruz v. Pacificare Health Systems, Inc.*, 66 P.3d 1157 (Cal. 2003) (public injunction claims brought under the UCL not arbitrable). *See also Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1082 (9th Cir. 2007) (applying California rule against arbitrating actions seeking public injunctions to federal case).

enforced, trumps any state law-making body's conclusion that arbitration is unsuitable in some cases. The panel remanded to the district court with instructions to compel arbitration.

The plaintiffs thereafter petitioned the en banc Ninth Circuit for rehearing. Underscoring the stakes involved, plaintiffs' petition was supported by several amicus briefs filed by organizations aligned with the plaintiffs' bar, including, among others, the National Association of Consumer Advocates, National Consumer Law Center, the National Employment Lawyers Association, and an alliance of law professors from across the country. KeyBank opposed the petition for rehearing and was joined by its own amicus ally, the United States Chamber of Commerce. The Ninth Circuit granted the plaintiffs' petition for rehearing and an argument before the ten-judge en banc panel was conducted on December 11, 2012.

Plaintiffs' focused their argument on the so-called "vindication of rights" exception to arbitration. In a number of cases, the Supreme Court has recognized an exception to the FAA in addition to the savings clause—namely, that the FAA cannot compel enforcement of an arbitration clause where enforcement would prevent a party from effectively vindicating its substantive statutory rights. *See*, *e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). Plaintiffs argued that while a party may waive procedural rights by arbitration agreement, they cannot waive substantive rights, and the right to seek a public injunction is a substantive right that cannot be adequately vindicated in arbitration. KeyBank and the Chamber of Commerce responded by pointing out that all of the Supreme Court's "vindication of rights" cases concerned the vindication of *federal* statutory rights. Contrary to cases involving state law exceptions to arbitration, cases involving federal statutes do not implicate the Supremacy Clause. The Supremacy Clause prevents state courts and state legislatures from carving their own exceptions out of federal law, however well intentioned; that prerogative is left solely to Congress. KeyBank also argued that plaintiffs were seeking a public injunction in name only, not in substance, and thus the vindication of rights argument was inapplicable.

Judge Andrew D. Hurwitz, writing for the nine-judge majority, seized the latter argument as a vehicle for resolving the case without reaching the broader question of the vitality of California's public injunction rule. The majority opinion analyzed the definition of a "public injunction": "Whatever the subjective motivation behind a party's purported public injunction suit, the *Broughton* rule applies only when 'the benefits of granting injunctive relief by and large do not accrue to that party, but to the general public in danger of being victimized by the same deceptive practices as the plaintiff suffered.'" *Kilgore*, 2013 U.S. App. LEXIS 7312, at *18-19 (quoting *Broughton*, 988 P.2d at 76). Breaking down the *Kilgore* plaintiffs' individual claims for relief, the majority concluded that they do not fall within the "narrow exception to the rule that the FAA requires state courts to honor arbitration agreements." *Id.* at *19 (quoting *Cruz*, 66 P.3d at 1162). The first two claims for relief—seeking to enjoin KeyBank from enforcing the promissory notes and from reporting defaults to the credit agencies—would only benefit the 120 putative class members. While the third requested injunction—barring future loan disbursements to sellers without the holder rule language—could potentially amount to a claim for public relief, it was not such a claim on the undisputed facts of this case. As the plaintiffs' third amended complaint conceded, KeyBank had completely withdrawn from the private school lending business and there was no allegation that KeyBank was still making similar loans. The majority rejected the notion that arbitration of plaintiffs' claims would be inadequate in this case, "where Defendants' alleged statutory violations have, by Plaintiffs' own admission, already ceased, where the class affected by the alleged practices is small, and where there is no real

prospective benefit to the public at large from the relief sought." In other words, the Ninth Circuit looked past plaintiffs' conclusory assertion of a claim for public injunctive relief, and found that plaintiffs merely sought run-of-the mill individual debt relief—exactly the type of claim well suited to arbitration.

The majority also ruled that the arbitration agreement was not unconscionable. Under California law, a contractual provision is unenforceable only if it is both procedurally and substantively unconscionable. The majority found that KeyBank's arbitration provision was neither. The arguments that the class waiver provision or the costs of arbitration could make the arbitration clause substantively unconscionable are both foreclosed by Supreme Court precedent. *See id.* at *13 (citing *Concepcion*, 131 S. Ct. at 1753, and G*reen Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90-91 (2000)). Moreover, the majority had little trouble finding that the arbitration provision was not procedurally unconscionable inasmuch as the arbitration clause was not buried in fine print, was clearly labeled in bold and set forth in its own section of the promissory note, and provided all borrowers with an opportunity to opt out of arbitration within 60 days of signing the note. *See id.* at *14. Accordingly, the Court reversed the denial of the motion to compel arbitration and remanded to the district court with instructions to compel arbitration.

Judge Pregerson wrote the lonely dissent. The dissent did not engage the public injunction argument, but instead rested on Judge Pregerson's belief that the arbitration clause is unconscionable.

The end result of the en banc rehearing is a modest ratcheting back of the initial panel's opinion, which had relegated California's public injunction exception to the scrap heap of California rules preempted by the FAA. While the en banc decision preserves that question for another day (and the public injunction rule survives on life support), the decision significantly limits the exception by defining it narrowly.

The Ninth Circuit's ruling sends a strong signal to the plaintiffs' bar that they will not be successful in circumventing the preemptive effect of the FAA through artful pleading. The ruling should discourage tactical pleading of "public injunction" claims solely for the purpose of gaining settlement leverage. Additionally, the majority opinion's unconscionability analysis provides a roadmap for businesses seeking to craft arbitration clauses that will withstand judicial scrutiny. And it is not just consumer-facing businesses that should take note, as the impact of the decision is likely to reverberate in other areas. For example, many employers now require their employees to sign agreements mandating arbitration of any disputes. The *Kilgore* decision further affirms the national policy that arbitration is a preferred method of dispute resolution and that unsubstantiated unconscionability challenges will not be given credence.

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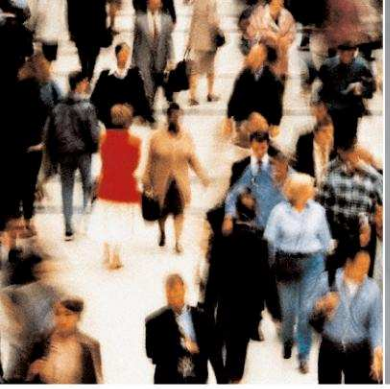

Class Action Alert
Recent developments in class action law

A publication of Nixon Peabody LLP

AUGUST 14, 2013

The Second Circuit turns over a new leaf: class action waivers work after Amex III

By Paige Berges and Christopher M. Mason

The Second Circuit has just applied the Supreme Court's recent decision in *American Express v. Italian Colors Restaurant* to compel an individual employee to pursue a claim through individual rather than class arbitration in *Sutherland v. Ernst & Young*.[1] This represents an important change in the tenor of the Circuit's approach to these issues, and clients should be mindful of this change and review their arbitration and dispute resolution clauses and strategies.

Amex I, II, and III

By the time it decided *In re Am. Express Merchants' Litig.* ("*Amex III*"),[2] the Court of Appeals for the Second Circuit had already twice rejected class action waivers when such waivers seemed to the Court to preclude a plaintiff's ability to vindicate federal statutory rights. The Supreme Court had once granted *certiorari* and vacated the Second Circuit's decision to that effect in *In re Am. Express Merchants' Litig.* ("*Amex I*"),[3] remanding the case for reconsideration in light of *Stolt-Nielsen, S.A. v. Animal Feeds Int'l Corp*.[4] The Second Circuit itself then *sua sponte* reconsidered its similar decision in *In re Am. Express Merchants' Litig.* ("*Amex II*")[5] in light of *AT&T Mobility LLC v. Concepcion*.[6] Finally, the Second Circuit had denied rehearing *en banc* in *In re Am. Express Merchants' Litig.*[7]

In November 2012, the Supreme Court granted a writ of *certiorari* to review the Second Circuit's *Amex III* decision.[8] The question presented was "whether the Federal Arbitration Act permits courts

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[1] See *Sutherland v. Ernst & Young*, 12-304-CV, 2013 U.S. App. LEXIS 16513 (2d Cir. Aug. 9, 2013).
[2] 667 F.3d 204 (2d Cir. Feb. 1, 2012).
[3] 554 F.3d 300, 315-316 (2d Cir. 2009).
[4] 559 U.S. 662 (2010).
[5] 634 F.3d 187, 193 (2d Cir. 2011).
[6] 131 S. Ct. 1740 (2011).
[7] 681 F.3d 139 (2d Cir. May 29, 2012). See our prior alert, U.S. Supreme Court will hear landmark class action waiver case: *American Express Co. v. Italian Colors Restaurant*.
[8] See *American Express Travel Related Services Co. v. Italian Colors Restaurant* ("*In re Amex Merchants' Litigation*"), No. 12-133, 2012 U.S. LEXIS 8697(Nov. 9, 2012).

. . . to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim."[9]

The Supreme Court decided the case on June 20, 2013, holding in a 5 to 3 decision that agreements to waive class proceedings will be enforced even if enforcement of the waiver would appear in the abstract to render a plaintiff's claim economically infeasible.[10]

The Second Circuit has now for the first time applied this holding, doing so in *Sutherland v. Ernst & Young*.[11] Its opinion reverses the decision of the United States District Court for the Southern District of New York and holds (consistent with the Supreme Court's analysis) that an employee cannot invalidate a class-action waiver provision in an arbitration agreement even when such waiver removes the "financial incentive" to pursue a claim under the Fair Labor Standards Act of 1938 ("FLSA").

The issues in Sutherland

In *Sutherland*, a former employee of Ernst & Young ("E&Y") sued on behalf of herself and similarly situated plaintiffs to recover "overtime" wages pursuant to the FLSA and New York minimum wage laws. The plaintiff had signed an agreement calling for mediation and arbitration which expressly barred "any class or collective proceedings in the arbitration."[12] Nonetheless, the plaintiff filed a class action in New York federal court. E&Y promptly moved to dismiss and to compel arbitration. The plaintiff argued that requiring individual arbitration would dwarf her potential recovery of less than $2,000. On this basis, the district court denied E&Y's motion, holding the class action waiver unenforceable under the then binding precedent of *Amex I*.[13]

On appeal, the Second Circuit recognized that "*Amex I* and the subsequent decisions that followed in [this] Circuit are no longer good law in light of the Supreme Court's recent decision in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013)." In particular, the Second Circuit described the Supreme Court's ruling as holding "that plaintiffs could not invalidate a waiver of class arbitration under the so-called 'effective vindication doctrine' by showing that 'they ha[d] no economic incentive to pursue their antitrust claims individually in arbitration.'"[14]

The Second Circuit analysis of SCOTUS's Amex III decision

The Second Circuit first remarked that the Supreme Court establishes a "liberal federal policy favoring arbitration agreements… unless the FAA's [Federal Arbitration Act] mandate has been 'overridden by a contrary congressional command.'"[15] The plaintiff claimed that the FLSA contained such a command in its provision that an employee may maintain an action "by any one or more

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[9] *Am. Express Co. v. Italian Colors Restaurant*, No. 12-133, 2013 U.S. LEXIS 4700 at *7 (2013) ("*Amex III*") See our prior alert, U.S. Supreme Court will hear landmark class action waiver case: *American Express Co. v. Italian Colors Restaurant*.
[10] *Amex III*, 2013 U.S. LEXIS 4700 at **16-17. See our prior alert, SCOTUS upholds class action waiver again: *Amex III* significantly limits the "effective vindication" of statutory rights doctrine.
[11] 2013 U.S. App. LEXIS 16513 at *4 (2d Cir. Aug. 9, 2013).
[12] *Id.* at *11.
[13] See *Sutherland v. Ernst & Young LLP*, 847 F. Supp. 2d 528, 535 (S.D.N.Y. 2012).
[14] *Sutherland*, 2013 U.S. App. LEXIS 16513 at *6.
[15] *Id.* at *13 (internal citations omitted).

employees for and in behalf of himself or themselves or other employees similarly situated."[16] The Second Circuit rejected this statutory analysis and, citing *Concepcion*, stated that "Supreme Court precedents inexorably lead to the conclusion that the waiver of collective action is permissible in the FLSA context."[17]

The plaintiff had also claimed that E&Y's class waiver prevented her from "effectively vindicating her rights" because individual arbitration was "prohibitively expensive." She did so because the Supreme Court had left open, in *Green Tree Fin. Corp.-Ala v. Randolph*,[18] the argument that an arbitration agreement could be invalidated because of prohibitive costs. The Supreme Court had also held, however, that a party bears the burden of showing the likelihood of such costs.

Responding to this issue on appeal, the Second Circuit unequivocally states in its opinion that an argument that an arbitration that is "prohibitively expensive" is insufficient to invalidate a class-action waiver provision in light of *Amex III*. Although the Second Circuit claimed that the "'effective vindication doctrine' could be used to invalidate 'a provision in an arbitration agreement forbidding the assertion of certain statutory rights,'"[19] it also held that the Supreme Court's decision in *Amex III* "compels the conclusion that Sutherland's class-action waiver is not rendered invalid by virtue of the fact that her claim is not economically worth pursuing individually."[20] There did not seem to be any question in *Sutherland* that the plaintiff had demonstrated she would face substantial costs if forced to arbitrate individually. Nonetheless, the Second Circuit ultimately found that the "'effective vindication doctrine' cannot be used to invalidate class-action waiver provisions in circumstances where the recovery sought is exceeded by the costs of individual arbitration."[21]

Clients should be aware that courts all over the country will no doubt reexamine their own precedent in light of the Supreme Court's decision in *Amex III*. In addition to *Sutherland*, this has already happened in Massachusetts.[22] The Second Circuit's decision in *Sutherland* certainly raises by itself the question about whether the effective vindication doctrine is, in fact, a viable argument to invalidate an arbitration agreement on the basis of economic infeasibility. In light of these trends, businesses and individuals should review their current and future approaches to arbitration and dispute resolution.

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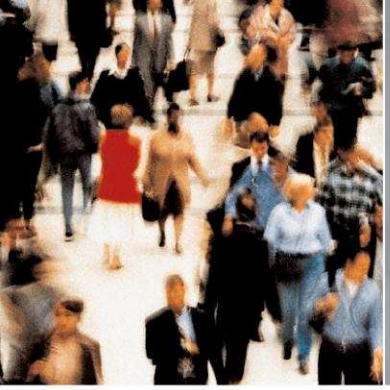
[16] *Id.* at *16, *quoting* 29 U.S.C. § 216(b).
[17] *Id.* at *16.
[18] 531 U.S. 79, 90 (2000).
[19] 2013 U.S. App. LEXIS 16513 . at *23 (emphasis added) (quoting *Amex III*, 133 S. Ct. at 2310-11).
[20] 2013 U.S. App. LEXIS 16513 at *22.
[21] *Id.* at *24.
[22] See our prior alert, UPDATE: Massachusetts SJC clarifies rule on class waivers in light of *Amex III*.



Class Action Alert
Recent developments in class action law

A publication of Nixon Peabody LLP

JUNE 11, 2013

U.S. Supreme Court allows class arbitration under Section 10(a)(4) of the Federal Arbitration Act: Oxford Health Plans LLC v. Sutter

By Christopher M. Mason, W. Daniel Deane, Paige L. Berges, and Devon Haft Little

While not all members of the United States Supreme Court may be comfortable with the idea of class arbitration, (*see, e.g.*, Christopher M. Mason, Devon Haft Little & Sherli Yeroushalmi, *Supreme Court Addresses Problems of Size*, N.Y.L.J., June 10, 2013, at S2), yesterday, all of them agreed that if an arbitrator finds that the parties have actually agreed to such a procedure, that finding is entitled to substantial deference under Section 10 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10(a)(4) (2013). *Oxford Health Plans LLC v. Sutter*, No. 12-135, 2013 U.S. LEXIS 4358 (2013). In reaching its conclusion, the Court distinguished *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010), on the grounds that the parties in *Oxford* had expressly submitted the issue of class arbitration to the arbitrator, and the arbitrator had decided (although perhaps wrongly, in the view of some of the Court) that they had agreed to it.

Facts

In 1998, Oxford Health Plans, LLC ("Oxford") and Dr. John Sutter entered into an agreement for Sutter to treat Oxford's plan members at set rates. The agreement included an arbitration clause stating that all disputes arising under it would be resolved through binding arbitration. It seemed, however, to be silent on the issue of class arbitration.

In 2002, Dr. Sutter sued Oxford for breach of contract and violations of state law. He did so not only on behalf of himself, but also on behalf of a proposed class of other health care providers under contract with the company. Pursuant to the terms of the parties' agreement, the court referred the dispute to an arbitrator. Examining the text of the agreement, the arbitrator found that "on its face, the arbitration clause . . . expresse[d] the parties' intent that class arbitration can be maintained." *Oxford Health Plans LLC*, 2013 U.S. LEXIS 4358, at *5.

Oxford promptly moved to vacate this decision on the theory that the arbitrator had exceeded his powers under Section 10(a)(4) of the FAA. A federal district court denied that motion, and on appeal, the United States Court of Appeals for the Third Circuit affirmed that denial.

The arbitration then proceeded on a class-wide basis until the Supreme Court rendered its decision in

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010). In *Stolt-Nielsen*, the Court held 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." 559 U.S. at 684 (emphasis in original).[i]

Given this language, Oxford filed a motion for reconsideration before the arbitrator of his earlier decision on class arbitration. The arbitrator, however, concluded that "*Stolt-Nielsen* had no effect on the case because [the] agreement authorized class arbitration." *Oxford Health Plans LLC*, 2013 U.S. LEXIS 4358, at *6. He reasoned that, unlike *Stolt-Nielsen*, the parties in *Oxford* had agreed to submit the entirety of the interpretation of the arbitration clause to an arbitrator; the arbitrator interpreted that clause as "vest[ing] in the arbitration process everything that is prohibited from the court process," *id.* at *5; and concluded on that basis that the parties "unambiguously evinced an intention to allow class arbitration." *Id.* at *7 (citations omitted).

Oxford once again sought review of the arbitrator's decision in federal court, and once again both the district court and the Third Circuit denied Oxford's motion. The Court of Appeals, in particular, rested its decision on the limited scope of judicial review permitted under Section 10(a)(4) of the FAA. As it concluded, where an arbitrator "makes a good faith attempt to [interpret and enforce a contract], even serious errors of law or fact will not subject his award to vacatur." *Sutter v. Oxford Health Plan LLC*, 675 F.3d 215, 220 (2012). While the arbitrator may not have been right in his conclusion, he had "endeavored to interpret the parties' agreement within the bounds of the law," and had articulated "a contractual basis for his decision to order class arbitration. . . ." *Id.* at 223-24. Oxford promptly sought and obtained a petition for certiorari to the Supreme Court.

The Supreme Court affirms

In a unanimous opinion written by Justice Kagan, the Supreme Court affirmed the decision of the Court of Appeals, agreeing as to enormous deference afforded to an arbitrator's decision under the FAA. As it emphasized, "[s]o long as the arbitrator was 'arguably construing' the contract . . . a court may not correct his mistakes under § 10(a)(4)." *Oxford Health Plans LLC*, 2013 U.S. LEXIS 4358, at *15 (citing *Eastern Assoc. Coal Corp. v. Mine Workers*, 531 U.S. 57, 62 (2000)). Indeed, "[i]t is not enough . . . to show that the [arbitrator] committed an error—or even a serious error. Because the parties bargained for the arbitrator's construction of their agreement, an arbitral decision even arguably construing or applying the contract must stand, regardless of a court's view of its (de)merits. Only if the arbitrator act[s] outside the scope of his contractually delegated authority—issuing an award that simply reflect[s] [his] own notions of [economic] justice rather than draw[ing] its essence from the contract—may a court overturn his determination." *Oxford Health Plans LLC*, 2013 U.S. LEXIS 4358, at *9 (quoting *Stolt-Nielsen*, 559 U.S. at 671, and *Eastern Assoc. Coal Corp.*, 531 U.S. at 62) (internal quotation marks omitted).

The Court took care to distinguish its decision in *Stolt-Nielsen*, describing the contrast between the cases as "stark." *Oxford Health Plans LLC*, 2013 U.S. LEXIS 4358, at *13. In *Stolt-Nielsen*, unlike in *Oxford*, "the arbitrators did not construe the parties' contract, and did not identify any agreement authorizing class proceedings." *Id.* The Court had thus overturned the arbitral decision in *Stolt-Nielsen* "because it lacked any contractual basis for ordering class procedures, not because it lacked . . . a 'sufficient' one." *Id.* at *12. Thus the two cases "fall on opposite sides of the line that § 10(a)(4) [of the FAA] draws to delimit judicial review of arbitral decisions." *Id.* at *14.

All of this was a normal effort by the Court to use a standard of review to avoid a more substantive decision. And all members of the Court agreed on that course. But in a concurrence, Justices Alito and Thomas made clear that, if they had reviewed the arbitrator's interpretation of the parties'

agreement *de novo*, "we would have little trouble concluding that [the arbitrator] improperly inferred an implicit agreement to authorize class-action arbitration . . . from the fact of the parties' agreement to arbitrate." *Id.* at *17 (Alito, J., concurring) (quoting *Stolt-Nielsen*, 559 U. S. at 685) (internal quotation marks omitted). More significantly, Justice Alito also argued that the arbitrators decision and the arbitration clause itself gave "no reason to think that the absent class members ever agreed to class arbitration." *Oxford Health Plans LLC*, 2013 U.S. LEXIS 4358, at *18. It is therefore "far from clear that [the absent class members] will be bound by the arbitrator's ultimate resolution of [the] dispute." *Id.* In effect, he was alerting the parties that issues of class procedures and *res judicata* may yet allow Oxford to try to avoid much of any substantive decision by the arbitrator.

Implications

Overall, *Oxford* is a narrow decision as to class arbitration issues and a conventional decision as to standard of review under Section 10(a)(4) of the FAA. In *Stolt-Nielsen* the Court left open the question of whether the availability of class arbitration is a gateway "question of arbitrability" (*i.e.* whether specific classes of disputes are barred from arbitration) that can only be decided by a court. The Court briefly mentioned the issue in *Oxford*, but declined to address it because the parties had conceded that they had agreed the arbitrator was empowered to decide the question of arbitrability. It thus remains unclear how the Court would rule in different circumstances. It also remains unclear whether the majority that has favored class waivers and disfavored class arbitration in other cases,[ii] will find good use in later cases for Justice Alito's argument that an arbitrator's decision based on an otherwise silent arbitration clause, or without opt-in procedures, might not bind absent class members.

As with many prior decisions from the Court, the *Oxford* decision should remind drafters of arbitration clauses that clarity matters. If the parties do not want class or representative arbitrations, the better course may be to say so expressly. Particularly in the consumer or small business context, of course, such waivers may raise additional issues—issues that the Court may address in its upcoming *American Express Travel Related Services Co. v. Italian Colors Restaurant (In re AmEx Merchants' Litigation)* decision. *See, e.g.*, Christopher M. Mason, Carolyn G. Nussbaum & Paige L. Berges, *Landmark Class Action Case To Be Heard In Supreme Court,* Law360 (Dec. 13, 2012), *available at* http://www.law360.com/classaction/articles/398852/landmark-class-action-case-to-be-heard-in-supreme-court

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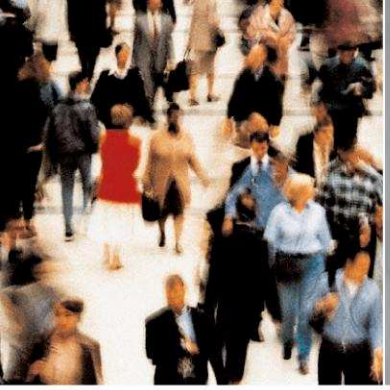
[i] See e.g. our prior alert here: http://www.nixonpeabody.com/Supreme_Court_speaks_loudly_in_Stolt_Nielsen.

[ii] See e.g. our prior alerts here: http://www.nixonpeabody.com/landmark_class_action_waiver_case; http://www.nixonpeabody.com/Supreme_Court_speaks_loudly_in_Stolt_Nielsen; http://www.nixonpeabody.com/Supreme_Court_upholds_class_action_waivers_in_consumer_contracts; http://www.nixonpeabody.com/Supreme_Court_rejects_class_certification_based_on_damages_model_Comcast_v_Behrend.



Class Action Alert
Recent developments in class action law

A publication of Nixon Peabody LLP

APRIL 11, 2013

Seller beware: merchants with stores that request zip codes may face consumer class actions after recent Massachusetts Supreme Judicial Court ruling

By George J. Skelly and J. Christopher Allen, Jr.

Can requesting zip codes from consumers in connection with retail credit card transactions constitute "unfair or deceptive" conduct that gives rise to liability under Chapter 93A, the Massachusetts consumer protection statute? On March 11, 2013, in *Tyler v. Michaels Stores, Inc.*, 464 Mass. 492 (2013), the Massachusetts Supreme Judicial Court answered that question in the affirmative, and, in response, the plaintiff's bar has wasted little time in serving retailers who operate in Massachusetts with demand letters asserting similar claims.

The plaintiff's claims

In *Tyler*, the plaintiff alleges that she made several purchases with her credit card at a Michaels Stores location in the Greater Boston area. In the course of each purchase, the plaintiff was asked to supply her zip code, and she did so under the "mistaken impression" that her zip code was needed as part of the transactions. *Id.* at 493. In her complaint, the plaintiff contends that the zip code was not, in fact, necessary to process her credit card but rather that Michaels Stores used it to obtain her address from a third party database and send her "unsolicited and unwarranted" marketing materials. *Id.* at 494. On the basis of these allegations, the plaintiff asserts that Michaels Stores violated Mass. Gen. Laws c. 93 § 105(a), which regulates credit card transactions.[1] The plaintiff further asserts that the violation of Chapter 93, § 105(a), in turn, constitutes "unfair or deceptive acts or practices" and gives rise to liability under the Massachusetts consumer protection statute, Chapter 93A, §§ 2 and 9. *Id.* The

[1] No person, firm, partnership, corporation or other business entity that accepts a credit card for a business transaction shall write, cause to be written or require that a credit card holder write personal identification information, not required by the credit card issuer, on the credit card transaction form. Personal identification information shall include, but shall not be limited to, a credit card holder's address or telephone number. The provisions of this section shall apply to all credit card transactions; provided, however, that the provisions of this section shall not be construed to prevent a person, firm, partnership, corporation or other business entity from requesting information is necessary for shipping, delivery or installation of purchased merchandise or services or for a warranty when such information is provided voluntarily by a credit card holder. Mass. Gen. Laws c. 93, § 105(a).

complaint also asserts a cause of action for unjust enrichment and seeks a declaratory judgment with respect to Michaels Stores' alleged violation of Chapter 93, § 105(a).

Federal District Court Judge Young grants motion to dismiss but permits plaintiff to certify issues to the Supreme Judicial Court

The Plaintiff brought suit in the United States District Court for the District of Massachusetts on behalf of herself and a putative class of Massachusetts consumers. *Id.* at 492. Michaels Stores responded to the plaintiff's complaint by filing a motion to dismiss for failure to state a claim as to all causes of action asserted. On January 6, 2012, the Hon. William G. Young granted Michaels Stores' motion. Judge Young concluded that, while Michaels Stores' request for the plaintiff's zip code may not have complied with Chapter 93, § 105(a), the plaintiff's allegations did not demonstrate that she had sustained any cognizable injury under Chapter 93A, and thus, her claims were not viable. Despite granting dismissal, however, Judge Young invited the plaintiff to certify several questions to the Massachusetts Supreme Judicial Court. Chief among them: whether a plaintiff could establish injury under Chapter 93A without alleging that her zip code was obtained for purposes of identity fraud.

The Supreme Judicial Court rejects Judge Young's conclusion that the plaintiff had not been injured

Addressing this issue in *Tyler*, the Supreme Judicial Court concluded at the outset that Chapter 93, § 105(a) was not intended as a protection against identity fraud, but rather "to address invasion of consumer privacy by merchants." *Id.* at 501. Therefore, as to the certified question, the Court held that it was not necessary for a plaintiff to allege identity fraud in order for a claim to survive dismissal. *Id.* Having discarded identity fraud as a requirement, the Court then proceeded to describe what circumstances may give rise to injury.

Although Chapter 93A, § 2 explicitly provides that recovery is only available to a "person ... who has been injured by another person's [unfair or deceptive conduct]," Mass. Gen. Laws c. 93A, § 9(1) (emphasis supplied), what constitutes cognizable injury has been ill defined in the Supreme Judicial Court's jurisprudence for several decades. As the Court acknowledged in *Tyler*, "one source of confusion" has been *Leardi v. Brown*, 394 Mass. 151 (1985), on which the *Tyler* plaintiff heavily relied. In *Leardi*, the Court introduced the concept that injury under Chapter 93A can arise where there has been an "invasion of a legally protected interest," *id.* at 160, but Massachusetts courts, including the Supreme Judicial Court, appears to have shied away from accepting the full implications of that notion. Indeed, in recent years, the Court has held that a violation of a consumer statute, like Chapter 93, § 105(a), may establish "per se" unfair or deceptive conduct in violation of Chapter 93A, but that such a "per se" violation is not sufficient to establish "per se" injury. *See, e.g. Rhodes v. AIG Dom. Claims, Inc.*, 461 Mass. 486, 496 n.16 (2012); *Casavant v. Norwegian Cruise Line Ltd.*, 460 Mass. 500, 504-505 (2011); *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 632-633 (2008); *Hershenow v. Enterprise Rent-A-Car Co. of Boston*, 445 Mass. 790, 801-802 (2006). Instead, "the violation of a legal right" must be shown to cause a "separate, identifiable harm." *Tyler*, 464 Mass. at 503.

In *Tyler*, the Supreme Judicial Court was careful to state that it was not relying upon *Leardi*. Nevertheless, the Court concluded that "a distinct injury" may "in theory" arise "in at least" two circumstances where Chapter 93, § 105(a) is violated:

> [T]here appear to be at least two types of injury or harm that might in theory be caused by a merchant's violation of [Chapter 93, § 105(a)]: the actual receipt by a consumer of unwarranted marketing materials as a result of the consumer's personal identification information; and the merchant's sale of consumer's personal identification information or the data obtained from that information to a third party.

Id. at 503-504. The Court explained that, in both instances, a cognizable injury is established because the retailer has used the information in violation of the right of privacy protected by Chapter 93, § 105(a) "for its own business purposes" and/or to make a "profit." *Id.* at 504.

The Supreme Judicial Court also offered comment on the amount of a plaintiff's damages in circumstances in which injury has been established. *Id.* at 504 n.20. Where the plaintiff has received promotional materials as a result of supplying her zip code, the Court stated that, while difficult to quantify in monetary terms, the privacy invasion causes harm of "more than a penny," and therefore entitles the plaintiff to recover the minimum statutory award of $25. *Id.* Perhaps more troubling, where a retailer has sold zip codes to a third party, "[d]isgorgement of the merchant's profits may be an appropriate remedy." *Id.*

Tyler's impact on retailers

The incidence of putative class actions based on consumer protection act violations, like those in *Tyler*, have increased exponentially over the last decade. The plaintiff's bar has gravitated toward Chapter 93A in particular because, in addition to permitting the recovery of compensatory damages (where they are measurable), the statute permits a minimum statutory award of $25 to each member of the class, makes available double and treble damages for willful violations,[2] and automatically awards a plaintiff her reasonable attorneys' fees upon a finding of liability. Thus, the economic incentives for bringing suit are ample. Moreover, like many other consumer protection acts, Chapter 93A relaxes the plaintiff's burden of proof by eliminating the elements of intent and reliance which are otherwise necessary to establish common law fraud. In so doing, the statute not only affords an easier path for establishing liability, it removes at least two individualized issues that have traditionally served as impediments to class certification. Thus, it is not at all surprising that, within days of the *Tyler* decision, there was a cascade of demand letters to retailers, often enclosing a courtesy copy of the Supreme Judicial Court's opinion. More are sure to follow.

While *Tyler* certainly affords something of a road map to class counsel, the broad parameters of its framework do not presage inescapable liability in every circumstance, nor do they guarantee class certification. Indeed, despite its ultimate holding, in *Tyler*, the Supreme Judicial Court has taken another significant step in distancing itself from *Leardi* and, in so doing, reaffirms the need for a plaintiff to establish causation. Therefore, careful consideration not only must be given to what use the retailer made of its customers' zip codes, but also the specific purchasing behavior of the proposed class representative. In the right circumstances, an early dispositive motion may also be a viable strategy for the defense.

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[2] Minimum statutory damages cannot be multiplied. *Leardi*, 394 Mass. at 163. Thus, the availability of double or treble damages only arises where the plaintiff has established compensatory damages.

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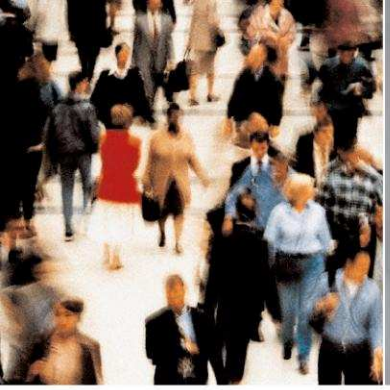

Class Action Alert
Recent developments in class action law

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AUGUST 8, 2013

UPDATE: Massachusetts SJC clarifies rule on class waivers in light of Amex III

By Scott O'Connell, Daniel Deane, and Morgan Nighan

As we reported in a prior alert, the Massachusetts SJC attempted to avoid the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*[1] that prohibits courts from invalidating class waivers.[2] Notwithstanding *Concepcion*, the SJC in *Feeney v. Dell, Inc.* ("*Feeney II*")[3] held that a consumer-facing arbitration clause is unenforceable because its class waiver provision prevents customers from effectively vindicating their rights under Massachusetts's consumer protection statute.[4]

That decision was abrogated just a few days later by the Supreme Court's decision in *Am. Express Co. v. Italian Colors Restaurant* (*Amex III*),[5] where the majority of the Court specifically held that the FAA does not allow the invalidation of class waivers merely because the costs of arbitrating claims individually may outweigh the potential recovery.[6]

On petition for rehearing in *Feeney II*, the SJC concluded that its analysis "no longer comports with the Supreme Court's interpretation of the FAA."[7] The SJC's decision makes clear its disagreement with the Supreme Court's analysis of *Concepcion*, characterizing as "untenable" the Supreme Court's view that the FAA trumps any interest in ensuring the prosecution of low-value claims, but concedes that "we are bound to accept that view as a controlling statement of Federal law."

This decision further affirms our prior advice that clients should review their arbitration and dispute resolution clauses and strategies. Although parties and courts may continue to find ways to invalidate arbitration provisions, the Supreme Court has reiterated a clear preference favoring parties' preferences for arbitration and traditional bilateral dispute resolution.

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[1] 131 S. Ct. 1740 (2011)
[2] For a summary of *Concepcion*, see our prior alert, "U.S. Supreme Court upholds class action waivers in consumer contracts: *AT&T Mobility v. Concepcion*," April 27, 2011, available here.
[3] 465 Mass. 470, 2013 WL 2479603 (June 12, 2013)
[4] See "Massachusetts SJC rules on class waivers days before United States Supreme Court issues *Amex* decision," June 19, 2013, available here.
[5] No. 12-133, 2013 U.S. LEXIS 4700 at *16-17 (2013)
[6] See "SCOTUS upholds class action waiver again: *Amex III* significantly limits the 'effective vindication' of statutory rights doctrine," June 24, 2013, available here.
[7] See *Feeney, et al v. Dell, Inc.,* et al, Lawyers Weekly No. 10-142-13 (August 1, 2013).

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Scott O'Connell is deputy chair of Nixon Peabody's Litigation department as well as the practice group leader of the Commercial Litigation team and the Class Action & Aggregate Litigation team. He represents integrated financial service companies—including banks, securities firms, insurance companies, and regulated subsidiaries of nonfinancial parents—in federal and state court litigation and before regulatory agencies.

Scott has extensive experience defending financial institutions in class actions concerning lender liability, breach of contract, breach of fiduciary duty, breach of good faith, unfair and deceptive trade practices, fraud, misrepresentation, fair debt collection practices, and civil RICO. He has particular trial experience litigating complex financial relationships between parties, unfair and deceptive trade practices claims, corporate control issues including corporate freeze-out, lender liability, and civil RICO.

While at law school, Scott served as an editor of the Cornell Law Review and as chancellor of the Moot Court Board. He was also an instructor in the Cornell undergraduate government course, "Law: Its Nature and Function."

U.S. News/Best Lawyers named Scott O'Connell 2013 "Lawyer of the Year" in Litigation–Securities Law (Boston). Scott has been recognized for exceptional standing in the legal community for litigation in Chambers USA: America's Leading Lawyers for Business 2013, which describes him as "a very good lawyer who is very interested in his clients." He has also been recognized by Chambers USA in previous years. In addition, he has been recognized as a "New England Super Lawyer" in Securities Litigation and/or Class Action-Mass Torts based on a peer-review survey by Thomson Reuters (2007 to present). Scott has been included in The Best Lawyers in America from 2010 through 2013 for Commercial Litigation, Litigation-Banking & Finance, Litigation-Securities, Product Liability Litigation-Defendants, and Mass Tort Litigation/Class Actions-Defendants. Scott was recognized as a local litigation star in the 2011 and 2012 edition of Benchmark Litigation, the definitive guide to America's leading litigation firms and attorneys. Scott has also earned an AV peer rating from Martindale-Hubbell. Additionally, Scott has been named the Best Lawyers' 2013 Boston Litigation – Securities "Lawyer of the Year."

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