REVISITING *AT&T v. CONCEPCION*: CAN YOU HEAR ME NOW?

By: John Pitblado

Approaching the one year anniversary of the U.S. Supreme Court's decision In *AT & T Mobility, LLC v. Concepcion,* --- U.S. ---, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011), it is noteworthy that the Court has felt it necessary to reiterate its holding, as courts have interpreted it more narrowly than was intended. This paper focuses on the *Concepcion* decision, subsequent decisions that have called into question the breadth of its central holding that the Federal Arbitration Act trumps any state law that directly contravenes its purpose, and the Supreme Court's admonishments to enforce *Concepcion* in subsequent opinions. Has the message been heard clearly?

I. *Concepcion*

The plaintiffs in *Concepcion* purchased a cell phone from AT&T and entered into a service agreement that provided for arbitration of all disputes, but prohibited class arbitration.[1] Upon dispute over a sales tax charge, the Concepcions sued AT&T in California federal court, which suit was consolidated with a putative class action alleging similar false advertising and fraud claims against AT&T. AT&T moved to compel individual arbitration pursuant to the service agreement. The plaintiffs opposed, alleging that the agreement was unconscionable and exculpatory, and the court agreed, relying on the so-called "*Discover Bank* rule" -- a common law rule enunciated by California's Supreme Court finding agreements prohibiting class arbitration unconscionable. The court held the *Discover Bank* rule was not preempted by the Federal Arbitration Act because it was "a refinement of the unconscionability analysis applicable to contract generally in California." On appeal, the Ninth Circuit affirmed. AT&T petitioned for certiorari. In a 5-4 decision, split along ideological lines, the U.S. Supreme Court reversed, holding that California's *Discovery Bank* rule is preempted by the Federal Arbitration Act, and remanding with instructions to compel individual arbitration.

The *Concepcion* decision is noteworthy for the manner of its authorship. Writing for three other justices, Justice Scalia wrote the majority opinion, while Justice Thomas wrote a separate concurrence to form the five member majority. The Court's liberal block, Justices Ginsbury, Sotomayor and Kagan joined in Justice Breyer's dissent. The result was a decision that, in answer to the question presented on *certiorari*, "prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of class wide arbitration procedures."

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[1] For an in-depth analysis of the *Concepcion* decision, *see* John Black, "Supreme Court Holds State Law Invalidation of Arbitration Provision as Unconscionable Preempted by Federal Arbitration Act," ReinsuranceFocus.com (May 11, 2011) (*available at* http://02ec4c5.netsolhost.com/blog/wp-content/uploads/2011/05/Special-Focus-ATT-Concepcion-SC-decision.pdf)

The majority opinion emphasized the liberal federal policy embodied in the FAA favoring arbitration where parties have contracted to do so, and in the manner provided. The opinion notes that while the FAA's saving clause[2] preserves generally applicable contract defenses to arbitrability, it does not preserve any state law rules that contravene the FAA's overriding policy favoring arbitration. Finding the *Discover Bank* rule was not something the parties' bargained for in their contract, the Court held it thus violated a fundamental attribute of arbitration, which is to afford parties the freedom to limit with whom they arbitrate. The opinion also emphasized that the result would streamline arbitration, as opposed to the opposite effect that class arbitration would have on such proceedings.

II. Chipping away at *Concepcion*

Since it was decided, some courts have taken a narrow view of *Concepcion*, chipping away at its central holding. Perhaps most notably, particularly because it involved the same state court system that produced the so-called "*Discover Bank* rule" that was held pre-empted in *Concepcion*, is the decision in *Sanchez v. Valencia Holding Co.,* 132 Cal. Rptr. 3d 517 (Cal. Ct. App. Nov. 23, 2011).

In *Sanchez*, a car buyer filed a putative class action in California state court against a dealer alleging various state law violations. The dealer moved to compel arbitration pursuant to the sales contract, which also contained a class action waiver. The trial court – pre-*Concepcion* – found the class action waiver unenforceable, rendering the entire arbitration provision unenforceable. The Court of Appeals, however, post-*Concepcion*, nevertheless affirmed on the ground that the arbitration provision itself was a product of adhesion and unequal bargaining power and hence unconscionable. It found that *Concepcion* does not prevent state courts from invalidating entire contracts on the basis of unconscionability, despite the fact that California's "*Discover Bank* rule" found preempted in *Concepcion* was premised on a conclusion that the class arbitration waiver was the product of adhesion, which the *Concepcion* Court held was insufficient justification to overcome the policy favoring arbitration embodied in the FAA.

Similarly, in *Carey v. 24 Hour Fitness, USA, Inc.*, 669 F.3d 202 (5th Cir. 2012), the Court affirmed denial of a motion to compel arbitration and permitted a putative class action suit to go forward despite an arbitration agreement prohibiting class arbitration. While the court acknowledged *Concepcion*, it nevertheless found that the underlying arbitration agreement was "illusory" and unenforceable because the employer reserved the right to change the agreement at any time.

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[2] The FAA's so-called "saving clause" preserves traditional contract defenses to questions of arbitrability "upon such grounds as exist at law or in equity for the revocation of any contract." *See* 9 U.S.C. § 2.

In *Feeney v. Dell, Inc.*, Case No. MICV 2003-01158 (Mass. Super. Ct. Sept. 30, 2011), a Massachusetts trial court found that arbitration agreements that precluded class arbitration were void as against public policy, distinguishing *Concepcion* on its facts, which it noted involved larger individual claims and a favorable procedure in place to arbitrate individual claims, whereas the plaintiffs in *Dell* had small individual claims and no favorable individual claim resolution procedure. State policy against a class waiver prevailed, the Court found, because arbitration of individual claims was "infeasible as a matter of fact" leaving no "federal interest with which the state law might conflict."

The issue has centered on state unconscionability doctrine, and whether or to what extent *Concepcion* carved that out from the FAA's saving provision. Courts such as those above have treated it as a case-by-case factual issue. The U.S. Supreme Court, however, was quick to issue some follow up guidance.

III. SCOTUS Strikes Back

The U.S. Supreme Court has sent a few signals that *Concepcion* should not be ignored, citing it in summary orders on various post-*Concepcion* petitions for certiorari. *See e.g. Missouri Title Loans, Inc. v. Brewer*, --- U.S. ---, 131 S.Ct. 2875, 179 L.Ed.2d 1184 (May 2, 2011) (reversing Missouri Supreme Court); *Sonic-Calabasas A, Inc. v. Moreno*, --- U.S. ---, 132 S.Ct. 496, 181 L.Ed.2d 343 (Oct. 31, 2011) (reversing California Supreme Court); *Branch Banking and Trust v. Gordon*, --- U.S. ---, 132 S.Ct. 577, 181 L.Ed.2d 418 (2011) (reversing Eleventh Circuit Court of Appeals).

The Court has even signaled some expansion of *Concepcion*. In *CompuCredit Corp. v. Greenwood*, 565 U.S. ---, 132 S.Ct. 665 (Jan. 10, 2012), the Court seemed to go out of its way to interpret a federal statute, the Credit Repair Organizations Act (CROA), in a way that does not interfere with the parties' contract requiring arbitration, despite CROA's "right to sue" language. In an 8-1 decision authored by Justice Scalia (Justices Sotomayor and Kagan in a separate concurrence, Justice Ginsburg dissenting), the Court held that the cited language -- which was contained in a provision of CROA requiring certain disclosures (including that "credit repair organizations" disclose to consumers their "right to sue" under CROA) -- did not unambiguously provide a right that supersedes the strong public policy embodied in the FAA of enforcing arbitration agreements.

However, the Court's strongest signal yet came in its *per curiam* opinion in *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. --- (Feb. 21, 2012). There, the Court reviewed a West Virginia Supreme Court's decision which invalidated an arbitration agreement on "public policy" grounds, where the underlying claims were personal injury claims against a nursing home. As an opening salvo, it cited the U.S. Constitution's Supremacy Clause, and then curtly stated "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." It vacated and remanded.

The *Marmet* decision is telling, and signals strong push back by the Supreme Court against any state law -- whether quasi-contract based unconscionability law, or loosely defined "public policy" -- that would contravene the broad command of the FAA favoring arbitration as bargained-for. It is notable that, after a 5-4 decision in *Concepcion*, the Supreme Court coalesced to form an 8-1 majority decision in CompuCredit, and a *per curiam* (unanimous and anonymous) opinion in *Marmet*. But the story does not end here.

IV. Can You Hear Me Now?

The California Supreme Court has granted *certiorari* to review the intermediate appellate court's decision in the *Sanchez* case discussed above. It will have to consider the U.S. Supreme Court's various pronouncements, including its blunt opinion in *Marmet*. But there is at least one indication that the message has not been clearly received. In *Brewer*, discussed above, the Missouri Supreme Court -- having been reversed once already by the U.S. Supreme Court's summary order citing *Concepcion* -- has just issued a new decision a month after *Marmet* that still invalidates the arbitration agreement, albeit on other grounds. Noting the fact of reversal for "further consideration" in light of *Concepcion*, the court stated:

> Applying *Concepcion,* this Court finds that the presence and enforcement of the class arbitration waiver does not make the arbitration clause unconscionable. This Court instead applies traditional Missouri contract law in looking at the agreement as a whole to determine the conscionability of the arbitration provision. This Court holds that Brewer has demonstrated unconscionability in the formation of the agreement. The appropriate remedy is revocation of the arbitration clause contained within the agreement.

Brewer v. Missouri Title Loans, No. SC 90647, --- S.W.3d ---- (Mo. March 6, 2012). Like the Massachusetts trial court in *Feeney*, the Missouri high court distinguished *Concepcion* on its facts, noting that unlike the contract at issue in *Concepcion*, the loan agreement's arbitration provision stated that "[t]he parties agree to be responsible for their own expenses, including fees for attorneys, experts and witnesses," and also noting that it did not provide an attorney fee multiplier or guaranteed minimum recovery if the consumer is awarded more than the title company's last offer, as was the case in *Concepcion*.

We'll soon see whether the *Brewer* opinion is an outlier -- the flail of courts' sometimes strong tendency to sympathize with consumers perceived to be outmatched in bargaining power, or whether it ushers in a new phase of attack by state courts seeking to chip away at the *Concepcion* holding. The California Supreme Court's review of *Sanchez*, and the U.S. Supreme Court's potential *second* review of *Brewer* should prove to be informative, and quite possibly entertaining, and when the dust clears it will be interesting to see what, if anything, is left of the FAA's saving clause and traditional contract defenses to arbitrability.