RE-REVISITING *AT&T v. CONCEPCION*: YES, WE HEAR YOU NOW (MOSTLY)

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December 27, 2013

Approaching its third anniversary, 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) has seen continued challenges to its contours, but the high court has reiterated its central holding loudly and clearly: the FAA preempts any state rule that interferes with parties' agreements to arbitrate, and Federal Rule 23 is merely a procedural mechanism which parties may agree to arbitrate around via class action waiver.

The message appears to be taking. After essentially reprimanding the Second Circuit Court of Appeals for its creative attempts around the *Concepcion* holding, courts have taken notice. While some courts (particularly those in California) will no doubt continue looking to shape the contours of *Concepcion*, with each subsequent reiteration it gains more *stare decisis* staying power.

Concepcion

As we have reported in prior Special Focus articles,[1] the consumer plaintiffs in *Concepcion* entered into a cell phone service agreement with AT&T that provided for arbitration of all disputes, but prohibited class arbitration. Upon dispute over a sales tax charge, the plaintiffs sued AT&T in California federal court, which suit was consolidated with a putative class action alleging similar claims. AT&T moved to compel individual arbitration pursuant to the service agreement. The district court denied the motion, and the Ninth Circuit Court affirmed, but in a 5-4 decision, split along ideological lines,[2] the U.S. Supreme Court reversed,

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[1] *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); and John Pitblado, "Revisiting Concepcion: Can You Hear Me Now?" ReinsuranceFocus.com (April 9, 2012) (available at: http://02ec4c5.netsolhost.com/blog/wp-content/uploads/2012/04/Special-Focus-4.9.12.pdf

[2] Justice Scalia wrote the majority opinion, joined by Chief Justice Roberts and Justices Alito and Kennedy, while Justice Thomas wrote a separate concurrence to form the five member majority. The Court's liberal block, Justices Ginsburg, Sotomayor and Kagan joined in Justice Breyer's dissent.

holding that California's common law rule finding class waivers "unconscionable" is preempted by the Federal Arbitration Act. It remanded with instructions to compel individual arbitration.

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." In so holding, the majority 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[3] preserves generally applicable contract defenses to arbitrability, it does not preserve any state law rules that contravene the FAA's overriding policy favoring arbitration. The opinion also emphasized that the result would streamline arbitration, as opposed to the opposite effect that class arbitration would have on such proceedings.

***American Express* -- A Rebuke**

Since it was decided, some courts have tried to chip away at the central holding of *Concepcion*, but the Court has reiterated it in subsequent decisions. *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); and *Branch Banking and Trust v. Gordon*, --- U.S. ---, 132 S.Ct. 577, 181 L.Ed.2d 418 (2011) (reversing Eleventh Circuit Court of Appeals).

Despite the fairly clear guidance, however, the Second Circuit Court of Appeals continued a long-running attempt around *Concepcion.* By decision dated June 20, 2013, the Supreme Court let it know in fairly stern terms that it disagreed.

In *American Express Co. v. Italian Colors Restaurant*, --- U.S. ---, 133 S.Ct. 2304, 186 L.Ed.2d 417 (2013), the plaintiffs brought a class action against American Express alleging violations of and seeking treble damages under the Clayton Act. American Express moved to compel individual arbitration. Plaintiffs submitted a declaration from an economist estimating the cost of expert analysis necessary to prove the claims would be "at least several hundred thousand dollars, and might exceed $1 million," while the maximum recovery for an individual plaintiff would be "$12,850, or $38,549 when trebled."

Nevertheless, the District Court compelled arbitration and dismissed the lawsuits. The Second Circuit Court reversed, holding that because respondents had established that "they

[3] 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.

would incur prohibitive costs if compelled to arbitrate under the class action waiver," the waiver was unenforceable. The Supreme Court granted *certiorari* and vacated and remanded with instructions. The Second Circuit Court initially stood by its reversal, but then *sua sponte* reconsidered its ruling in light of the release of the then-newly released *Concepcion* decision.

However, even *after* considering *Concepcion*, the Second Circuit reversed (as the Supreme Court later put it, with biblical flair) for "the third time." Thus, thrice denied, the Supreme Court again granted *certiorari*.

In its June 20, 2013 ruling, the Supreme Court started off its analysis quoting *Concepcion* and the FAA and reiterating that courts must "rigorously enforce" arbitration agreements. It finished the not-too-lengthy analysis thus: "[t]ruth to tell, our decision in [*Concepcion*] all but resolves this case." It disregarded the Second Circuit's attempt at an "effective vindication" exception to the overarching command of *Concepcion*, holding that individual arbitration could be compelled under the FAA based on a class waiver contract provision, notwithstanding that the cost of proving a case in individual arbitration exceeded the likely amount of any potential recovery.

Getting the Picture?

Courts in West Virginia and Massachusetts took note after the *American Express* ruling. In *West Virginia v. Webster*, No. 13-0151 (W. Va. Nov. 13, 2013), the West Virginia Supreme Court discussed the running dialectic between it and the U.S. Supreme Court in the *Marmet Health Care Center Inc. v. Brown*, 132 S. Ct. 1201 (2012) saga, which resulted in two Supreme Court reversals, the second an admonishment to follow *Concepcion*. Looking to avoid a third strike like the one thrown at the Second Circuit, the Court's analysis in *Webster* centered on *Concepcion*.

In *Webster*, the Court heard an appeal from an order denying a motion to compel individual arbitration in a case arising from a dispute between Ocwen Loan Servicing, LLC ("Ocwen") and plaintiff mortgage holders. Ocwen sought to compel arbitration of a dispute about certain fees Ocwen charged, pursuant to an arbitration provision contained in the parties' relevant agreement. The trial court found the agreement unenforceable under the Dodd-Frank Act, and also unconscionable under West Virginia state law contract principles.

However, the high court reversed, citing both *Concepcion* and *American Express* at length. It found Dodd-Frank inapplicable because the agreement was formed before the Act took effect. It also disagreed with the trial court's conclusion that the contract was unconscionable, noting that the various grounds offered – including lack of procedural safeguards in discovery – did not override the strong federal policy favoring enforcement of arbitration agreements as written.

Likewise, after the *American Express* decision, the Massachusetts Supreme Judicial Court reversed itself *en banc*. After having issued a decision eight days prior to the release of the *American Express* ruling, attempting to distinguish *Concepcion*, and invalidating an arbitration provision, it reconsidered after petition for rehearing en banc in light of *American Express*. Also citing *Concepcion* and *American Express* at length, the Massachusetts high court conceded "the Supreme Court explicitly rejected our [previous] reading of *Concepcion.*" It reversed its prior holding and remanded with instructions consistent with *Concepcion* and *American Express*.

But wait, a hold out?

One of the cases in which the U.S. Supreme Court issued "reminders" about *Concepcion* was *Sonic-Calabasas A, Inc. v. Moreno*, --- U.S. ---, 132 S.Ct. 496, 181 L.Ed.2d 343 (Oct. 31, 2011). Nearly two years after that "reminder," the California Supreme Court issued another opinion in that case which to some may seem to be at odds with *Concepcion*.

In *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184 (Cal. Oct. 17, 2013) ("*Sonic II*") the California Supreme Court distinguished both *Concepcion* and *American Express*. In *Sonic II*, the dispute arose from an employment wage dispute. The main issue was whether California's statutory employment dispute mandatory 'pre-screening' process (referred to as a "Berman hearing") could be waived by an arbitration agreement, such as the one in the employment contract at issue. The Court held that this was not inconsistent with *Concepcion*, as it recognized that "the FAA preempts our state-law rule categorically prohibiting waiver of a Berman hearing." However, it allowed that the trial court might nevertheless find the agreement unconscionable on remand, noting (and citing *Concepcion*) that "state courts may continue to enforce unconscionability rules that do not interfere with fundamental attributes of arbitration." It appears that the final chapter has not yet been written in this case.

Although there appears to be clearer harmony in cases in this area than previously, there are still interesting issues being litigated in this area.

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