by Brian J. Murray

I Can't Get No Arbitration: The Death of Class Actions That Isn't, at Least So Far

Many commentators expected that *AT&T v. Concepcion,*[1] would largely eliminate class actions in contexts where the plaintiff has a preexisting relationship with the defendant (such as consumer class actions, employment class actions, and the like). Class actions have proven resilient, however, marching onward with the assistance of courts and agencies working to winnow *Concepcion*'s scope. For example, California's state courts have capitalized on *Concepcion*'s preservation of "general" defenses to enforcement of contractual provisions to preserve applications of the unconscionability doctrine that (in effect) invalidates class action waivers. Several federal agencies have also joined in the fun, issuing administrative decisions and promulgating regulations that seek to preserve class actions in the arbitration context. As these decisions demonstrate, more will be required before the promise of *Concepcion* is fulfilled.

Class Actions and *Concepcion*

Defendants, particularly corporate defendants, have long preferred arbitration for resolving disputes with private plaintiffs due to its relative ease and efficiency. Class actions—which are cumbersome and complex—detract from that efficiency. Therefore, companies and their counsel frequently draft arbitration provisions requiring potential plaintiffs to arbitrate disputes individually and waive their procedural right to bring claims on behalf of an absent class.

In *Concepcion*, the U.S. Supreme Court held that the Federal Arbitration Act preempts state legal doctrines that disfavor or invalidate class action waivers in arbitration provisions. The case began with the Concepcions signing a cellular service contract with AT&T purporting to offer them "free phones." The contract included an arbitration provision with a class action waiver. When AT&T later charged the Concepcions sales tax for their "free phones," the Concepcions attempted to file a false advertising class action on behalf of hundreds of customers. AT&T moved to compel individual arbitration, but both a federal district court and the Ninth Circuit denied the motion, invoking a California legal rule (the *Discover Bank* rule) that deemed class action waivers in adhesive consumer contracts—basically all consumer contracts—to be unenforceable.

In the Supreme Court, the Concepcions argued that the final clause of the Act's Section 2—which states that written arbitration provisions "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract,"[2]—preserved the *Discover Bank* rule as a "general" defense applying to "any contract." Although the Court agreed that the act's "saving clause preserves generally applicable contract defenses," it rejected the Concepcions' argument, explaining that "nothing in [the FAA] suggests an intent to preserve state-law rules that," like the *Discover Bank* rule, "stand as an obstacle to the accomplishment of the FAA's objectives." Because "[t]he principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms"—and because California's *Discover Bank* rule impedes that purpose—the Court held that the act preempts the *Discover Bank* rule.

In so holding, *Concepcion* made clear that, while the act preserves truly general contract defenses, it does not preserve anti-arbitration rules masquerading as general defenses. The Court said so repeatedly, explaining that "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." The opinion thus appeared to strike the death knell for consumer class actions.

California's Undaunted Unconscionability Doctrine

But appearances can be deceiving. Foremost, the California courts—which were the direct target of *Concepcion*—have largely resisted the Supreme Court by simply characterizing rules that are anti-arbitration in practice as being "general" in theory. The California Court of Appeal's decision in *Sanchez v. Valencia Holding Company, LLC*,[3] illustrates the point. The plaintiff had

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purchased a "certified" vehicle through a car dealership, signing a contract that included an arbitration provision and class action waiver. Rather than decide whether the class action waiver was enforceable, the court held that the entire arbitration clause was procedurally and substantively unconscionable, explaining that arbitration provisions deserve no special consideration post-*Concepcion*, since "the doctrine of unconscionability remains a basis for invalidating arbitration provisions."

The battle in California continues, with the California Supreme Court recently hearing arguments in two class action waiver cases. It will presumably use these to clarify its understanding of *Concepcion* and (perhaps) fully implement the decision. The Court could issue its opinions as early as September 2013.

Agencies Join the Fun

But California is not alone. Foremost, the National Labor Relations Board has attempted to open an escape hatch from *Concepcion* for purposes of federal labor law. Section 7 of the National Labor Relations Act provides that "[e]mployees shall have the right ... to engage in ... concerted activities for the purpose of collective bargaining or other mutual aid or protection."[4] In *In re D.R. Horton, Inc.*,[5] the board held that the section protects and preserves class actions in all contexts—arbitration included—as Section 7 "concerted activities." In so holding, the board rejected *Concepcion* by declaring this right to be nonwaivable.

Numerous district courts have rejected the board's construction of the National Labor Relations Act. For instance, in *LaVoice v. UBS Financial Services, Inc.*,[6] the court granted the defendant's motion to compel arbitration, explicitly rejecting the board's analysis. It reasoned that *Concepcion* stood "against any argument that an absolute right to collective action is consistent with the FAA's 'overarching purpose.'" *D.R. Horton* is currently pending before the Fifth Circuit, which may likewise reject its attempted circumvention.[7]

Finally, the Consumer Financial Protection Bureau has also jumped into the fray, specifically by issuing "Regulation Z,"[8] which prohibits mandatory arbitration clauses and waivers of certain consumer rights in all mortgage-related consumer transactions. That provision is set to take effect on June 1, 2013, and litigation will surely follow.

Conclusion

The legal developments post-*Concepcion* make clear that the obituary for consumer and employee class actions remains to be written. Various legal actors from courts to agencies have resisted the decision in a battle that continues today. This debate shows that although *Concepcion* took a big step toward fully enforcing the Federal Arbitration Act in the class action context, more work remains to be done.

That being said, recent events indicate the Supreme Court may be aware that *Concepcion* requires reinforcing. Just a few months ago, the Court issued a decision in *American Express v. Italian Colors Restaurant*,[9] which reaffirmed its commitment to enforcing class action waivers in arbitration provisions, even where the plaintiff's legal claim may be too small to justify the expense of

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court relied on the general reluctance of district courts to allow the reading of deposition testimony when the witness is available to testify live, but the complications associated with allowing live testimony may outweigh the benefit. ⊙

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Endnotes

[1]In addition to corporate parties, the rule also applies to partnerships, associations, government agencies, and other entities. For simplicity, references in this article are to corporations alone.

[2]Fed. R. Civ. P. 30(b)(6).

[3]*Great Am. Ins. of N.Y. v. Vegas Constr. Co.,* 251 F.R.D. 534, 543 (D. Nev. 2008).

[4]*Id.* at 538; *Harris v. New Jersey,* 259 F.R.D. 89, 92 (D.N.J. 2007).

[5]*Brazos River Author. v. GE Ionics, Inc*., 469 F.3d 416, 433 (5th Cir. 2006).

[6]An excellent and more complete compendium of the guiding principles of Rule 30(b)(6) depositions from the case law appears in the recent case of *QBE Ins., Corp. v. Jorda Enter., Inc*., 277 F.R.D. 676, 687-92 (S.D. Fla. 2012).

[7]*See Brazos*, 469 F.3d at 434.

[8]*Brazos*, 469 F.3d at 434.

[9]This does not mean that a corporate party can be compelled to produce a designee to testify for the first time at trial in response to a Rule 30(b)(6) notice. A notice may only be issued for a deposition, not for the appearance of a corporate representative at trial. *Hill v. Nat'l R.R. Passenger Corp*., 88-5277, 1989 WL 87621 (E.D. La. July 28, 1989).

[10]276 F.R.D. 500 (N.D. Ill. 2011)

[11]The author was lead counsel for Kraft Foods Global, Inc., in the case of *Sara Lee Corp v. Kraft Foods, Inc*., 276 F.R.D. 500 (N.D. Ill. 2011).

[12]*QBE Ins*., 277 F.R.D. at 688.

[13]Fed. R. Evid. 801 (d)(2)(A).

[14]Fed. R. Evid. 802(d)(2)(C).

[15]*See U.S. v. Southbend Corp*., 760 F.2d 1366, 1376 n.4 (2d Cir. 1985), *cert. denied*, 474 U.S. 825 (1985) noting that the Third, Seventh, and Eighth Circuits have not required personal knowledge for a statement to qualify as an admissions by a party opponent. *See also Brookover v. Mary Hitchcock Memorial Hosp*., 893 F.2d 411, 418 (1st Cir. 1990).

[16]*See Stalbowsky v. Belew*, 205 F.3d 890, 894 (6th Cir. 2000).

[17]*See Cuff v. Trans States Holdings, Inc*., 816 F. Supp. 2d 556, 559 (N.D. Ill. 2011) and cases cited therein.

[18]*See* Fed. R. Civ. P. 26(e).

[19]693 F. Supp. 2d. 767, 790 (N.D. Ohio 2010).

[20]*Id*. at 790–92.

[21]*Id*.

[22]*Id.*

[23]Rule 30(b)(6) has been held applicable to third parties as it permits a party to name any corporation as a deponent and to so through use of either a "notice or subpoena." In fact, using a Rule 30(b)(6) subpoena is particularly valuable in the third-party context where the party serving the subpoena is less likely to know which employees of the third party have relevant knowledge.

[24]276 F.R.D. at 503.

[25]*Id*.

[26]*Id.*

[27]*Id*.

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individual litigation. As the Court explained, "[t]ruth to tell, our decision in *AT&T Mobility* all but resolves this case," given that "[w]e specifically rejected the argument that class arbitration was necessary to prosecute claims 'that might otherwise slip through the legal system.'"[10] Perhaps now that the Court has said it twice, other legal actors will begin to get the message.

Endnotes

[1]131 S. Ct. 1740 (2011).

[2]9 U.S.C. § 2.

[3]201 Cal. App. 4th 74 (Cal. Ct. App. 2011).

[4]29 U.S.C. § 157.

[5]357 NLRB No. 184 (2012).

[6]2012 WL 124590 (S.D.N.Y. 2012).

[7]*D.R. Horton* may also be invalidated because the board issued it at a time that one of its members, Craig Becker, was serving pursuant to an intrasession "recess" appointment that was invalid under the D.C. Circuit's decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013).

[8]12 CFR § 1026.36.

[9]Case No. 12-133 (June 20, 2013).

[10]*Id.*, slip op. at 8-9.