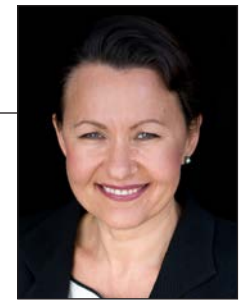
by Tina Wolfson and Bradley King



Even After *Concepcion* and *Italian Colors*, Some Arbitration Agreements Are Not Enforceable

The Supreme Court rulings in *AT&T Mobility v. Concepcion*[1] and *American Express Co. v. Italian Colors Restaurant*[2] overturned long-standing precedent regarding the pre-emptive effect of the Federal Arbitration Act (FAA). As a result, arbitration agreements containing waivers of collective actions, which had been considered unconscionable in contracts of adhesion, became enforceable. Further, the FAA's pre-emptive power was expanded to trump even rights created by other federal laws. Yet, despite these developments, some arbitration agreements are still not enforceable on grounds that are applicable to all contracts and do not single out characteristics inherent to arbitration, such as collective action waivers. Practitioners and the judiciary should not assume that all arbitration agreements are enforceable. Rather, they should carefully analyze arbitration agreements under the precepts summarized in this article to determine their enforceability.

Concepcion and *Italian Colors* Broke Precedent and Resulted in Enforceability of Collective Action Waivers Embedded in Arbitration Provisions in Contracts of Adhesion

Prior to *Concepcion*, a long line of Supreme Court cases held that statutory claims may be arbitrated only "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum," and that "[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[3] This was the "effective vindication rule," which courts had interpreted to mean that an arbitration clause that prevents a party from effectively vindicating her rights is unenforceable—and that the FAA does not pre-empt a state-law rule against enforcing such an "exculpatory" arbitration clause. *Concepcion* overturned this precedent and established that "the FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims."[4]

Specifically, the Supreme Court addressed California's policy against enforcement of exculpatory contracts, even contracts that contained an arbitration clause. It concluded that a contract defense may be pre-empted if it "interferes with fundamental attributes of arbitration"—e.g., requiring classwide arbitration would interfere with the goals of efficient and speedy dispute resolution—and therefore conflicts with the FAA.

Italian Colors further limited the "effective vindication rule," finding that the rule does not require that parties be able to actually vindicate their statutory rights—only that they could, in theory, pursue their claims. An arbitration clause thus invokes this effective vindication exception only if it results in a "prospective waiver" of a party's right to pursue her statutory remedies, by making access to that pursuit entirely impracticable. As long as the party retains a theoretical, formal ability to pursue a statutory right, the fact that a claim is unlikely to be worth the expense to arbitrate does not render the arbitration agreement unenforceable. The Court asserted that the FAA favors the "absence of litigation" and the suppression of claims, finding this to be a legitimate purpose that can trump other federal laws.

Some Arbitration Agreements Are Still Not Enforceable on Grounds Generally Applicable to All Contracts

The practical effect of these two High Court decisions is that arbitration agreements cannot be held unenforceable simply because they contain bans on collective actions, thus drastically limiting the number of class actions that are allowed to proceed. However,

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practitioners and courts should not assume that all arbitration agreements are now enforceable. Rather, arbitration agreements may still be found unenforceable under arbitration-neutral theories applicable to all contracts generally. Each arbitration agreement should be analyzed carefully in light of the particular facts at issue. Here are some recurring themes observed in court decisions throughout the nation dealing with challenges to the enforceability of arbitration agreements in the wake of *Concepcion* and *Italian Colors*.

Attempts to Enforce Arbitration Agreements by Nonsignatories Usually Fail

Corporate defendants, such as technology service providers or manufacturers, have sought to enforce end user arbitration agreements against consumers, even if the defendants were not parties to the end user agreement. Courts remain in large part resistant to such attempts absent a showing that the consumer claims rely on or are intertwined with the third-party contract containing the arbitration provision and that equitable estoppel compels enforcement of arbitration.[5]

Numerous post-*Concepcion* cases also have dealt with contract formation issues related to a nonparty signing the subject arbitration agreement on behalf of a vulnerable plaintiff, commonly someone who is incapacitated, a dependent minor, or a decedent. Defendants in these cases often seek to enforce the agreement under theories of agency, equitable estoppel, or intended third-party benefit. Courts have demonstrated reluctance to grant defendants' motions to compel arbitration absent a clear correlation between the arbitration clause and the signatories' authority or intended benefit at the time of execution.[6]

Courts Do Not Enforce Arbitration Agreements Where the Party Seeking to Compel Fails to Provide Sufficient Evidence of Agreement or Where There Is a Lack of Consideration

Courts have declined to compel arbitration where the compelling party fails to provide adequate evidence of the executed arbitration contract or where there is no adequate consideration for agreeing to arbitrate.

Placing the burden on defendants to prove the existence of an enforceable arbitration agreement, courts have found affidavits declaring the prior existence of an executed contract insufficient absent some other evidence of agreement.[7] Courts have likewise denied motions to compel by sellers who failed to present their arbitration provisions with the sale contract or failed to provide adequate opportunity for the buyers to understand the nature of these provisions.[8] A lack of mutual consideration, especially where one party retains sole discretion to modify the terms of an arbitration clause,[9] also typically results in denials of motions to compel arbitration.[10]

"Click-Through" Agreements Are Not Enforceable If They Do Not Provide Adequate Notice

Courts have denied motions to compel arbitration due to inadequate notice of the arbitration agreements linked to consumers' online purchases. Many of these cases deal with so-called "click-through" agreements on company websites and consider whether these agreements sufficiently put the purchaser on notice of the arbitration terms they contain.

Courts typically require an arbitration provision to be prominently displayed on the website so as to provide consumers with reasonable

notice at the time of purchase that they are entering into an agreement to arbitrate.[11] These decisions favor conspicuously displayed arbitration terms that require affirmative consent to complete the purchase, in contrast to a hyperlink to the arbitration terms at the bottom of each page, sometimes referred to as a "browsewrap" agreement.

Arbitration Agreements May Still Be Struck Down on Grounds That They Are Unconscionable Independent of Fundamental Arbitration Attributes

Even after *Concepcion* and *Italian Colors*, courts may strike down arbitration provisions on grounds of unconscionability that are independent of fundamental arbitration attributes. Both procedural and substantive unconscionability are typically required.

Contracts of adhesion that involve oppression, surprise, or unequal bargaining power may be procedurally unconscionable. A procedurally unconscionable arbitration clause may be presented in confusing and even conflicting terms,[12] with insufficient explanation or legal advisement,[13] and often in a "take it or leave it" fashion.[14] California courts also have maintained that certain employment qui tam actions are outside the scope of the FAA because it would be contrary to public policy to require employees to waive their right to bring an action for civil penalties under the California Labor Code.[15]

Substantive unconscionability, on the other hand, typically involves unfairly one-sided arbitration clauses that lack mutual consideration. Examples of substantively unconscionable provisions include fee-shifting provisions, reservations of arbitrator selection or litigation rights by only one party,[16] and unreasonable reductions of statutes of limitations.[17] As discussed in *Italian Colors,* a plaintiff can present evidence that the arbitration provision renders dispute resolution via arbitration entirely impracticable due to the exorbitant costs mandated by the unconscionable provision.[18]

Unconscionability can be found in many aspects of contract law independent of attributes fundamental to arbitration, and courts continue to deny motions to compel arbitration based on procedurally and substantively unconscionable contract terms.

Courts Decline to Apply Newly Formed Arbitration Agreements to Existing Litigation

Courts disfavor attempts by defendants to form arbitration agreements with new customers or employees to enforce arbitration in existing litigation.[19] These practices have drawn the ire of courts already engaged in the adjudication of class claims because they interfere with the courts' duties and abilities to control communications with class members.[20]

Waiver of the Right to Compel Arbitration Is Still a Valid Ground to Deny Arbitration

Some defendants have sought to compel arbitration only after unsuccessful litigation. Plaintiffs have successfully argued waiver in such instances, especially where the presiding court already raised the arbitration issue.[21] Some courts have established factors under which a plaintiff can make a showing of prejudice to establish a defendant's waiver of its arbitration right.[22] Other courts have not decided whether prejudice is required for waiver or only one factor to be considered in determining waiver.[23] Blatant examples of waiver involve defendants who pursue arbitration only as a last resort after it becomes clear, through significant litigation, that they cannot obtain dismissal on the merits.[24] Attempts to preserve the right to compel arbitration as an affirmative defense while continuing to litigate may nevertheless result in a waiver of that right.[25]

Conclusion

Do not assume that every arbitration agreement that includes a class action waiver is enforceable. Instead, ask questions:

- Were all parties signatories to the arbitration agreement?
- Can the party compelling arbitration actually produce the executed agreement?
- Was there adequate consideration for agreeing to arbitrate?
- Was the plaintiff given adequate notice of the arbitration agreement?
- Is the arbitration clause confusing or conflicting?
- Was it presented on a take-it-or-leave-it basis?
- Does the arbitration clause include fee-shifting provisions or impose unreasonable costs on the plaintiff?
- Does it include reservations of arbitrator selection or litigation rights by only one party or reduce the applicable statute of limitations?
- Has the party compelling arbitration engaged in litigation or other activity that might have waived its right to compel arbitration?

The answers to such questions can reveal grounds under which arbitration agreements may be found unenforceable, despite *Concepcion*, *Italian Colors*, and other cases following such Supreme Court authority. ⊙

Endnotes

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

[2]133 S. Ct. 2304 (2013).

[3]*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,* 473 U.S. 614, 628, 637 (1985).

[4]*Italian Colors*, *supra*, 133 S. Ct. at 2312 n.5.

[5]*See Murphy v. DirecTV Inc.,* 724 F.3d 1218 (9th Cir. 2013) (holding Best Buy could not "piggy-back" onto DirecTV's arbitration clause); *In re Carrier IQ, Inc. Consumer Privacy Litig.*, No. 12-md-2330, 2014 U.S. Dist. LEXIS 42624 (N.D. Cal. Mar. 28, 2014) (mobile telephone manufacturer and tracking application developer could not enforce arbitration provisions in wireless provider contracts); *Kramer v. Toyota Motor Corp.,* 705 F.3d 1122 (9th Cir. 2013) (automotive manufacturer could not enforce arbitration clauses between buyers and dealers); *Galitski v. Samsung,* No. 12-cv-4782, 2013 WL 6330645 (N.D. Tex. Dec. 5, 2013) (Samsung, a mobile telephone manufacturer, could not enforce arbitration contract between consumers and their mobile carriers); *Rajagopalan v. NoteWorld, LLC,* 718 F.3d 844 (9th Cir. 2013) (payment processor could not enforce arbitration agreement between debtor and debt-settlement program); *Laumann v. NHL,* 989 F. Supp. 2d 329 (S.D.N.Y. 2013) (Comcast could compel arbitration against only its own subscribers' disputers, not those of DirecTV customers); *Jay Wolfe Used Cars of Blue Springs, LLC v. Jackson,* 428 S.W.3d 683 (Mo. Ct. App. 2014) (defendant's motion to compel arbitration denied when defendant was a separate legal entity, registered to do business in a different state, from the entity that was party to plaintiff's contract; contractual rights and obligations could not be imputed to defendant); *Allscripts Healthcare Solutions Inc. v. Pain Clinic of Northwest Fla. Inc.,* No. 3D13-716, 2014 WL 3930150 (Fla. Ct. App. Aug. 13, 2014) (defendant-software firm could not compel arbitration of plaintiff-doctors' claims because their claims did not rely on or require reference to plaintiffs' agreements with defendant's subsidiary).

[6]*GGNSC Omaha Oak Grove, LLC v. Payich,* 708 F.3d 1024 (8th Cir. 2013) (contract signed by son when admitting decedent-mother to defendant-nursing home could not be enforced against decedent's estate, as no valid contract was formed between decedent and defendant and son lacked authority to act on her behalf); *SSC Montgomery Cedar Crest Operating Co., LLC v. Bolding,* 130 So. 3d 1194 (Ala. 2013) (plaintiff-resident's status as incompetent ruled out theory of apparent authority when daughter purported to be plaintiff's legal representative and signed arbitration agreement with defendant); *Walton v. Johnson,* 66 A.3d 782 (Pa. Sup. Ct. 2013) (plaintiff-patient's negligence claims for post-surgery treatment were not subject to arbitration agreement signed by plaintiff's mother at time of admission to hospital, as mother was not plaintiff's agent and plaintiff did not know or should have known mother signed agreement); *Ping v. Beverly Enters.,* 376 S.W.3d 581 (Ky. 2012) (decedent's child's power of attorney limited to financial and health care decisions, thus long-term care facility could not compel arbitration under optional agreement with regard to estate's wrongful death claims); *State ex rel. AMFM, LLC v. King,* 740 S.E.2d 66 (W. Va. 2013) (same); *Barrow v. Dartmouth House Nursing Home Inc.,* 14 N.E.3d 318 (Mass. Ct. App. 2014) (same).

[7]*See, e.g.*, *Barkley v. Pizza Hut of Am. Inc.,* No. 14-cv-376, 2014 WL 3908197 (M.D. Fla. Aug. 11, 2014) (court refused to compel arbitration of claims of employee-delivery drivers whose executed arbitration agreements could not be located, notwithstanding defendant's declaration that these drivers must have signed identical agreements as required by company policy); *Bachenheimer v. Wells*

Fargo Bank, N.A., No. B251980, 2014 WL 3585061 (Cal. Ct. App. July 21, 2014) (ordered not published) (declarations that plaintiff "couldn't have opened an account without agreeing to arbitration" insufficient when defendant did not have original or copy of the arbitration agreement supposedly signed by plaintiff); *Baier v. Darden Rests.*, 420 S.W.3d 733 (Mo. Ct. App. 2014) (separate signature line for arbitration clause not executed by plaintiff).

[8]*Knight v. Springfield Hyundai,* 81 A.3d 940 (Pa. 2013) (arbitration provision only mentioned in separate buyer's order and not included in the retail installment sale contract); *Greene v. Alliance Auto. Inc.,* 435 S.W.3d 646 (Mo. Ct. App. 2014) (no mutual consideration for arbitration clause when video evidence by dealer actually showed it rushed buyer through the closing and she didn't understand what she was signing); *Basulto v. Hialeah Auto.,* 141 So. 3d 1145 (Fla. 2014) (no arbitration agreement existed where buyers didn't speak English, dealer lacked basic understanding of nature of arbitration, and the contract contained two separate and irreconcilable arbitration clauses).

[9]*See* also Arbitration Agreements May Still Be Struck Down on Grounds That They Are Unconscionable Independent of Fundamental Arbitration Attributes, at 20 (discussing lack of mutual consideration in the context of substantive unconscionability).

[10]*Noohi v. Toll Bros.,* 708 F.3d 599 (4th Cir. 2013) (no mutual consideration where arbitration clause required homebuyers to submit all disputes with seller to arbitration and notify seller in advance of filing, with no such requirements on seller); *Caire v. Conifer Value-Based Care, LLC,* 982 F. Supp. 2d 582 (D. Md. 2013) (employment or continued employment was inadequate consideration for arbitration agreement where employer retained sole discretion to change provision's terms); *Baker v. Bristol Care Inc.,* No. SC93451, 2014 WL 4086378 (Mo. Aug. 19, 2014) (continued at-will employment no consideration when employer could retroactively modify, amend, or revoke arbitration agreement).

[11]*Schnabel v. Trilegiant Corp.,* 697 F.3d 110 (2d Cir. 2012) (no arbitration agreement where the users enrolled in defendant's online discount program after making a purchase from another merchant, without having to re-enter payment information, and only receiving the agreement terms in an email postenrollment); *In re Zappos.com, Inc., Customer Data Sec. Breach Litig.,* 893 F. Supp. 2d 1058 (D. Nev. 2012) (no arbitration agreement despite hyperlink to defendant's "terms of use" on every page of website because hyperlink was inconspicuous and buried towards the bottom of every page among other links, and defendant's included a one-sided modification clause); *Nguyen v. Barnes & Noble Inc.,* 763 F.3d 1171 (9th Cir. 2014) (inconspicuous browsewrap agreement never required purchasers to affirmatively acknowledge it before purchase; proximity of hyperlink to purchase button insufficient to form arbitration agreement); *Hines v. Overstock.com Inc.,* 668 F. Supp. 2d 362 (E.D.N.Y. 2009) (no arbitration agreement where website did not prompt plaintiff to review terms and conditions and hyperlink to terms and conditions was not prominently displayed); *Lee v. Intelius Inc.,* 737 F.3d 1254 (9th Cir. 2013) (requiring purchasers to click "yes" that they were bound by "offer details" failed to notify them of terms embedded in other hyperlinks, including arbitration clause); *Specht v. Netscape Communs. Corp.,* 306 F.3d 17 (2d Cir. 2002) ("[A] reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms."); V*an Tassell v. United Mktg. Grp., LLC,* 795 F. Supp. 2d 770 (N.D. Ill. 2011) (same); *Koch Indus. Inc. v. Doe,* No. 10-cv-1275, 2011 WL 1775765 (D. Utah May 9, 2011) (same); *Cvent Inc. v. Eventbrite Inc.,* 739 F. Supp. 2d 927 (E.D. Va. 2010) (same).

[12]*Lou v. MA Labs. Inc.,* No. 12-cv-5409, 2013 WL 2156316 (N.D. Cal. May 17, 2013) (procedurally unconscionable arbitration agreement that contained confusing language and conflicting rules that were referenced but not provided to plaintiffs); *Brown v. MHN Gov't Servs. Inc.*, 306 P.3d 948 (Wash. 2013) (en banc) (arbitration agreement amounted to unconscionable procedural surprise, as provision failed to state which AAA rules applied and defendant had indicated inconsistent positions).

[13]*See, e.g.*, *Jackson v. Payday Financial, LLC,* 764 F.3d 765 (7th Cir. 2014) (high-interest consumer loans presented to debtors on Native American reservation without any apparent tribal rules, an inconsistent jurisdictional statement, while deceptively leading the debtors to believe they had no choice but to arbitrate on the reservation; forum selection clause illusory because dispute resolution mechanisms indicated did not actually exist); *Kelker v. Geneva-Roth Ventures, Inc.*, 303 P.3d 777 (Mont. 2013) (debtors presented the arbitration clause without explanation and under economic duress, compelling them to enter loan contract at 780 percent APR); *Atalese v. U.S. Legal Servs. Grp., L.P.,* No. A-64-12, 2014 N.J. LEXIS 906 (N.J. Sept. 23, 2014) (holding that an arbitration provision must clearly and unambiguously notify consumers that they are waiving their right to seek relief in a court of law).

[14]*Carmona v. Lincoln Millennium Car Wash Inc.,* 226 Cal. App. 4th 74 (Ct. App. 2014) (procedural unconscionability where car wash presented employees arbitration agreement as "take it or leave it," not giving them ample time to review it, and only presented some parts of the agreement in Spanish to monolingual Spanish employees); *Merkin v. Vonage Am. Inc.,* No. 13-cv-8026, 2014 WL 457942 (C.D. Cal. Feb. 3, 2014) ("take it or leave it" agreement with nonmandatory government fees).

[15]*See generally Iskanian v. CLS Transportation Los Angeles LLC,* 327 P.3d 129 (Cal. 2014).

[16]*Day v. Fortune Hi-Tech Marketing Inc.,* 536 Fed. Appx. 600 (6th Cir. 2013) (substantively unconscionable agreement permitted defendant to modify any term of the contract, at any time); *Lou*, *supra*, 2013 WL 2156316 (substantively unconscionable arbitration agreement in which defendants could seek injunctive relief but plaintiffs could not, along with an unfair fee-shifting provision); *Zaborowski v. MHN Gov't Servs.*, 936 F. Supp. 2d 1145 (N.D. Cal. 2013) (substantively unconscionable arbitrator selection involved plaintiff choosing from three arbitrators selected by defendant); *Alltel Corp. v. Rosenow*, 2014 Ark. 375 (2014) (substantive unconscionability where defendant reserved the right to pursue other remedies without waiving its right to pursue arbitration); *Reg'l Care of Jacksonville, LLC v. Henry,* 2014 Ark. 361 (2014) (substantively unconscionable agreement in which defendant reserved the right to pursue billing and collections claims in court, its most likely claims against plaintiff-residents, while exclusively binding residents to arbitrate claims); *Carmona*, *supra*, 226 Cal. App. 4th 74 (substantively unconscionable agreement where employer could bring claims for damages but car wash employees restricted to arbitration).

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insurer has been incorporated and (C) the State or foreign state where it has its principal place of business; and (2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

[32]H.R. Rep. No. 112-10, at 10-11 (2011) (discussing these types of actions).

[33]692 F.3d 42, 45-51 (2d Cir. 2012).

[34]*Id.* at 49-51.

[35]*See Thomas v. Guardsmark, LLC,* 487 F.3d 531, 534-35 (7th Cir. 2007).

[36]*See Fellowes Inc. v. Changzhou Xinrui Fellowes Office Equipment Co.,* No. 12-3124, 2014 WL 3583082, at *2-3 (7th Cir. July 22, 2014); *White Pearl Inversiones S.A. (Uruguay) v. Cemusa Inc.,* 647 F.3d 684, 686-87 (7th Cir. 2011).

[37]*Heinen v. Northrop Grumman Corp.*, 671 F.3d 669, 670 (7th Cir. 2012).

[38]*Newman-Green Inc. v. Alfonzo-Larrain,* 490 U.S. 826, 828 (1989); *Buchel-Ruegsegger v. Buchel,* 576 F.3d 451, 455 (7th Cir. 2009).

[39]*Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 569-70 (2004); *Freeport-McMoran Inc. v. K N Energy Inc.,* 498 U.S. 426, 428 (1991).

[40]*See, e.g., Am. Fiber & Finishing, Inc. v. Tyco Healthcare Grp, LP,* 362 F.3d 136, 140 (1st Cir. 2004) (collecting cases); *Estate of Alvarez v. Donaldson Co.,* 213 F.3d 993, 994-95 (7th Cir. 2000).

[41]*Grupo,* 541 U.S. at 572.

[42]*See Smith v. Sperling,* 354 U.S. 91, 93 n. 1 (1957).

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[17]*Brown*, *supra,* 306 P.3d 948 (shortening statute of limitations from three years to six months); *Gandee v. LDL Freedom Enters. Inc.,* 293 P.3d 1197 (Wash. 2012) (en banc) (shortening statute of limitations from four years to 30 days).

[18]*Clark v. Renaissance W. LLC*, 307 P.3d 77 (Ariz. Ct. App. 2013) (plaintiff presented evidence that it would cost him approximately $22,800 to arbitrate under defendant's agreement, which was impossible on plaintiff's low, fixed income); *see also Chavarria v. Ralphs Grocery Co.,* 733 F.3d 916 (9th Cir. 2013) (defendant-employer required apportionment of fees between it and employee regardless of merits, effectively pricing out almost any employee from dispute resolution).

[19]*Russell v. Citigroup Inc.,* 748 F.3d 677 (6th Cir. 2014) (arbitration agreement governing "all employment-related disputes" did not require the employee to arbitrate a case already pending in court when he signed the agreement); *Tomkins v. Amedisys Inc.,* No. 12-cv-1082, 2014 WL 129401 (D. Conn. Jan. 13, 2014) (invalidating a self-executing arbitration agreement containing a class action ban sent to a group of employees after they had filed a putative class action against their employer).

[20]*Piekarski v. Amedisys Ill. Inc.,* 4 F. Supp. 3d 952 (N.D. Ill. 2013) (nullifying self-executing arbitration agreement that defendant sent to class members during stay of case in attempt to moot class claims); *see also O'Connor v. Uber Techs. Inc.,* No. 13-cv-3826, 2014 WL 1724503 (N.D. Cal. May 1, 2014) (refusing to enforce arbitration agreement issued after the commencement of litigation that would require drivers to accept it in order to continue participation in car service).

[21]*Garcia v. Wachovia Corp.,* 699 F.3d 1273 (11th Cir. 2012) (holding that defendant waived its right to arbitration because the district court twice invited it to file motions to compel arbitration but defendant did so only after *Concepcion* was decided, defendant substantially invoking the litigation machinery and conducting extensive discovery, and plaintiffs would suffer substantial prejudice if the case was sent to arbitration).

[22]*In re Pharm. Benefit Managers Antitrust Litig.,* 700 F.3d 109 (3d Cir. 2012) (factors determining waiver include the length of time between filing of complaint and motion to compel arbitration; whether defendant sought resolution on the merits prior to moving to compel; whether defendant gave prior notice of its intent to arbitrate or raise it as a defense in answering the complaint; whether defendant attended pre-trial conferences without objection) (citing *Hoxworth v. Blinder, Robinson & Co.,* 980 F.2d 912 (3d Cir. 1992)).

[23]*Cole v. Jersey City Med. Ctr.,* 72 A.3d 224 (N.J. 2013) (finding defendant waived arbitration by litigation for nearly two years, participating in extensive discovery, filing a dispositive motion, and failing to raise the arbitration issue until only a few days before trial, the court found the delay and additional cost plaintiff would have faced by switching to arbitration on the eve of trial was sufficient to constitute prejudice).

[24]*See, e.g., Edwards v. First Am. Corp.,* 289 F.R.D. 296 (C.D. Cal. 2012) (holding that defendants waived arbitration right by litigating the case for several years, including two motions to dismiss, two class certification motions, a Ninth Circuit appeal, a petition for certiorari, and extensive discovery); *Lewis v. Fletcher Jones Motor Cars Inc.,* 205 Cal. App. 4th 436 (Ct. App. 2012) (holding that defendant-dealer waived right to compel arbitration by failing to raise arbitration issue until five months after plaintiff-customer commenced the action, and after defendant filed three demurrers and two motions to strike, responded to four sets of discovery and refused to extend plaintiff's motion to compel deadline); *In re Cox Enters. Inc. Set-Top Cable Television Box Antitrust Litig.,* No. 12-md-2048, 2014 WL 2993788 (W.D. Okla. July 3, 2014) (finding defendant's motion to compel arbitration was untimely because it was brought after defendant made ample use of discovery and sought summary judgment in an attempt to dispose of the case).

[25]*Sacks v. DJA Auto.*, No. 12-cv-284, 2013 WL 210248 (E.D. Pa. Jan. 18, 2013) ("Defendant... seeks to have both its proverbial cake and eat it too: it only wants arbitration if it does not win on summary judgment. Taken together, I find that defendant's failure to move to compel arbitration, its motion for summary judgment seeking dismissal of plaintiff's claims on their merits and its participation in discovery and settlement negotiations are sufficient to constitute a waiver of its right to elect arbitration.").