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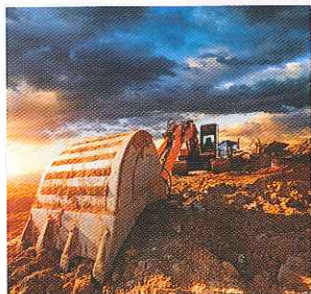
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AT&T Mobility LLC v. Concepcion

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While most efforts to circumscribe *Concepcion* have failed, there is no doubt that new attacks on the decision will continue.

A One Year Retrospective

One year ago, the U.S. Supreme Court decided *AT&T Mobility LLC v. Concepcion*, invalidating a California rule that prohibited mandatory arbitration clauses unless the clauses also permitted class actions, holding that the

Federal Arbitration Act (FAA) preempted the rule. *AT&T Mobility LLC v. Concepcion*, ___ U.S. ___, 131 S. Ct. 1740 (2011). Since the decision, many courts across the country have had the opportunity to interpret this arbitration-favoring opinion while facing a plethora of challenges by plaintiffs. Most challenges have failed, but a few have managed to prevail at least temporarily.

AT&T Mobility LLC v. Concepcion—The Decision

In 2002, the Concepcions took advantage of an AT&T Mobility promotion that offered a customer a free cellular phone in exchange for agreeing to a service contract. 131 S. Ct. at 1744. The service contract included a provision mandating that a customer submit all disputes to arbitration and that he or she waived the right to pursue a class action. *Id.* Though under the promotion a customer received the cellular phone for free, as required by California law, the customer had to pay a sales tax on the phone. *Id.* The Concepcions agreed to the service contract, re-

ceived their free phones, and paid the sales tax on the phones under the promotion, but then they sued AT&T alleging that the company “had engaged in false advertising and fraud by charging sales tax on ‘free’ phones.” *Id.* Their lawsuit was subsequently consolidated with a class action asserting the same claims. *Id.* AT&T moved to compel arbitration as specified in the terms of the service contract, which the district court denied based on the California Supreme Court *Discover Bank* decision. *Laster v. T-Mobile United States, Inc.*, 407 F. Supp. 2d 1181 (S.D. Cal. 2005). In *Discover Bank*, the California Supreme Court held that

when 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



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exemption of the party 'from responsibility for its own fraud, or willful injury to the person or property of another'.

Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (Cal. 2005).

So under California law, "such waivers are unconscionable." *Id.* The Ninth Circuit affirmed the California Supreme Court holding, holding itself that the AT&T service contract's class action waiver was unconscionable under the *Discover Bank* rule because "not every aggrieved customer will file a claim," and it further held that the Federal Arbitration Act (FAA) did not preempt the *Discover Bank* rule. *Laster v. T-Mobile USA, Inc.*, 584 F.3d 846, 856 n.9 (9th Cir. 2009).

The U.S. Supreme Court granted certiorari. *Concepcion*, 131 S. Ct. at 1745. The Court's review focused on two things: (1) section 2 of the FAA, which makes agreements to arbitrate "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.; and (2) whether the FAA "prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of class-wide arbitration procedures." *Concepcion*, 131 S. Ct. at 1744.

The Court first analyzed the objectives of the FAA and noted that its enactment reflects both a "liberal federal policy favoring arbitration" and "the fundamental principle that arbitration is a matter of contract." *Id.* at 1745. As such, courts had a duty to place arbitration agreements on equal footing with similar contracts and to "enforce them according to their terms." *Id.* Though the FAA includes a savings clause generally preserving contract defenses, the Court noted that Congress never intended that the savings clause would preserve state laws "that stand as an obstacle to the accomplishment of the FAA's objectives;" and these state laws could not "be construed as allowing a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act... in other words, the act [could not] be held to destroy itself." *Id.* at 1748.

The Court found several factors probative in determining the enforceability of these agreements. First, the Court noted that arbitration aimed to make litigation a more efficient, streamlined process. *Id.* at 1749. Initiating class arbitration proce-

dures would stand in the way of this general aim and "make[] the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 1743. Second, class arbitration would also hamper arbitration's characteristic informality. *Id.* at 1751. The Court noted that class action arbitration involved certain procedural requirements that bilateral arbitration did not. *Id.* It found it unlikely that Congress intended "to leave the disposition of these procedural requirements to an arbitrator." *Id.* Finally, the Court found that class arbitration "greatly increases risks to defendants." *Id.* at 1752. Because a class action proceeding compounds the potential payment that a defendant may eventually have to make several times over, defendants may feel more pressure to settle questionable claims in class action arbitrations than in bilateral arbitrations. *Id.* Arbitration, the Court concluded, "is poorly suited to the higher stakes of class litigation." *Id.* Because the California *Discover Bank* rule stood "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," the Court held that the rule was "preempted by the FAA." *Id.* at 1753.

The dissenting opinion by Justice Breyer, joined by Justices Ginsburg, Kagan, and Sotomayor, argued that the states should determine whether or not an arbitration agreement was valid as long as all contracts received equal treatment. *Id.* at 1762. Justice Thomas, in a concurring opinion, took the position that the circumstances under which parties formed an arbitration agreement should determine the agreement's validity, not an agreement's provisions. *Id.* at 1756. Thus, under Justice Thomas's analysis the section 2 savings clause in the FAA should only apply when a party asserts "defects in the making of an agreement." *Id.*

Immediate Reaction

Many litigants construed *Concepcion* as an opportunity to transfer pending litigation to an arbitration forum. Courts received a number of motions to compel arbitration in the immediate wake of the decision, particularly in California. Plaintiffs' attorneys initially responded to these motions to compel by arguing that because defendants had not immediately sought arbitration, the defendants had waived their rights to arbitrate. In *Villegas v. US Bancorp*, for

example, the defendants moved to compel arbitration approximately 13 months after the plaintiff filed its initial complaint. *Villegas v. US Bancorp*, No. C 10-1792, 2011 U.S. Dist. Lexis 65032, at *1 (N.D. Cal. June 20, 2011). The standard for a party seeking to prove waiver of a right to arbitrate is to demonstrate "(1) knowledge of an existing right to compel arbitration; (2) acts

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inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts." *Id.* at *2. The court in *Villegas* held that although the arbitration agreement existed at all times, "[the] defendants cannot be said to have had knowledge of an existing right to compel arbitration until the *Concepcion* decision issued;" further, "[p]rior to that date, [the] defendants had every reason to believe that any motion to compel arbitration would have been soundly rejected," given the *Discover Bank* rule. *Id.* Thus the plaintiff could not satisfy the first element of proving that the defendants had waived their rights to arbitrate. *Id.* Several other California courts applied the same rationale when faced with similar motions to compel arbitration in pending litigation and reached the same conclusion as the court did in *Villegas*. See *In re Cal. Title Ins. Antitrust Litig.*, No. 08-01341, 2011 U.S. Dist. Lexis 71621 (N.D. Cal. June 27, 2011). See also *Estrella v. Freedom Fin.*, No. C 09-03156, 2011 U.S. Dist. Lexis 71606 (N.D. Cal. July 5, 2011); *Bryant v. Serv. Corp. Int'l*, No. C 08-01190, 2011 U.S. Dist. Lexis 74805 (N.D. Cal. July 12, 2011).

Challenges to *Concepcion*

The U.S. Supreme Court's sweeping endorsement of arbitration in *Concepcion* has caused plaintiffs' attorneys to try to devise



new arguments to avoid arbitration. The success of those challenges has varied.

Arbitration Agreements and the Denial of Fundamental Rights

One argument that plaintiffs' attorneys present is that compelling an individual to arbitrate denies that plaintiff a fundamental right. The Second Circuit recently

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found this argument persuasive in *Italian Colors Rest. v. American Express Travel Related Services Co.*, 667 F.3d 204 (2d Cir. 2012). In *Italian Colors*, the Second Circuit addressed whether arbitration could vindicate the plaintiffs' statutory rights effectively. *Id.* at 212. Because the evidence presented by the plaintiffs established "that the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of their statutory protections of the anti-trust laws," the court found the arbitration agreement at issue unenforceable. *Id.* at 217. The court specifically stated that the holding did not mean that all class action waivers in arbitration agreements were "per se unenforceable," but rather "that each waiver must be considered on its own merits, based on its own record, and governed with a healthy regard for the fact that the FAA 'is a congressional declaration of a liberal federal policy favoring arbitration agreements.'" *Id.* at 219. Notably the rights involved in the case were federal statutory rights under the Sherman Act and the Clayton Act, 15 U.S.C. §1 *et seq.* We question whether state statutory rights would fare as well.

Other courts have not found this argument convincing. For example, in *D'Antuono v. Serv. Rd. Corp.*, the plaintiffs argued that an arbitration agreement was unconscionable because it imposed "prohibitively expensive costs on them," and thus precluded

them "from vindicating their federal statutory rights under the FLSA." 789 F. Supp. 2d 308, 331 (D. Conn. 2011). The court did not find this argument persuasive, however, and determined that based on Second Circuit precedent, the plaintiffs did not meet their burden to demonstrate that requiring arbitration would deprive them of the opportunity to assert their federal statutory rights because each plaintiff's potential recovery far exceeded the total out-of-pocket cost that each plaintiff would face in arbitration. *Id.* at 344. Likewise, in *Coneff v. AT&T Corp.*, the plaintiff argued that the cost of arbitration prohibited him from effectively vindicating his federal statutory rights in the arbitral forum. No. 09-35563, 2012 U.S. App. Lexis 5520, at *7 (9th Cir. Mar. 16, 2012). The court disagreed, finding that the arbitration agreement at issue resembled the arbitration agreement that the U.S. Supreme Court examined in *Concepcion* and contained "a number of fee-shifting and otherwise pro-consumer provisions." *Id.* Thus, the court determined, the "aggrieved customers who filed claims would be essentially guaranteed to be made whole again." *Id.* Further, in *Opalinski v. Robert Half International, Inc.*, the plaintiffs argued that the arbitration agreement would preclude the vindication of their statutory right by requiring them to submit their claims to arbitration rather than to a jury. No. 10-2069, 2011 U.S. Dist. Lexis 115534 (D. N.J. Oct. 6, 2011). The court found no merit in the argument and held that the arbitration agreement was "valid and clearly appl[ied] to their FLSA claims." *Id.* at *13. As *Opalinski*, *Coneff*, and *D'Antuono* demonstrate, the courts have received the "denial of rights" argument with mixed outcomes.

Discovery Challenges

Another way that plaintiffs' attorneys have recently attempted to avoid having to arbitrate on individual bases is to argue that discovery is essential, and arbitration does not allow it. This argument has proven largely unsuccessful. For example, the U.S. District Court for the Northern District of California denied a plaintiff's request to conduct discovery noting that "post-*Concepcion* decisions have rejected the cost of litigation as a basis for invalidating a class action waiver." *Khan v. Orkin Exterminating Co., Inc.*, No. 10-02156, 2011

U.S. Dist. Lexis 118486, at *10 (N.D. Cal. Oct. 12, 2011). Likewise, a Nevada district court denied a plaintiff's request to stay its determination on the defendant's motion to compel arbitration so that the plaintiff could "propound discovery" to determine whether the arbitration agreement was unconscionable and held that "whether the arbitration agreement is enforceable against [the plaintiff] is a straightforward matter of contract law." See *Giles v. GE Money Bank*, No. 2:11-CV-434, 2011 U.S. Dist. Lexis 111018, at *5 (D. Nev. Sept. 27, 2011). Additionally, a Tennessee district court disagreed with a plaintiff's argument that he needed to conduct discovery to "fully challenge the validity of the Agreement," particularly because the plaintiff previously admitted that the "agreement was a valid and enforceable contract." No. 3-11-0573, 2011 U.S. Dist. Lexis 76367, at *3 (M.D. Tenn. July 14, 2011). Because the plaintiff was unable to carry his burden to establish his need for discovery, the court denied his request. *Id.*

Other courts, however, have found the discovery argument persuasive. The U.S. District Court for the Southern District of California, for example, granted a plaintiff's motion to conduct discovery on whether the arbitration agreement and the class action waiver at issue were unconscionable by finding that Ninth Circuit precedent dictated "that a party opposing a motion to compel arbitration is entitled to discovery relevant to the issue of unconscionability." *Hamby v. Power Toyota Irvine*, No. 11cv544, 2011 U.S. Dist. Lexis 77582, at *2 (S.D. Cal. July 18, 2011). Interestingly however, the defendant did not challenge the plaintiff's right to discovery, and instead, only focused on whether the plaintiff could prevail with the argument that the arbitration clause was unconscionable. *Id.* Again, arguments made by plaintiffs' attorneys related to discovery have met varying degrees of success.

Defects in the Formation of Arbitration Agreements

In his concurring opinion in *Concepcion*, Justice Thomas took the position that "the FAA requires that an agreement to arbitrate be enforced unless a party successfully challenges the formation of the arbitration agreement." *Concepcion*, 131 S. Ct. at 1753

(emphasis added). Plaintiffs' attorneys have used this language to challenge enforcement of arbitration agreements requiring individual arbitration. For example, in *Reeners v. Verizon Communications, Inc.*, the plaintiff argued that the contract containing the arbitration agreement was never properly formed. *Reeners*, 2011 U.S. Dist. Lexis, at *5. The court found no merit in this argument, however, because the plaintiff previously admitted that the agreement was "a valid and enforceable contract." *Id.* at *3. In *Saincome v. Truly Nolen of America*, the plaintiff challenged the enforceability of an arbitration agreement contending that the agreement had not been negotiated and was presented to the plaintiff on a take-it-or-leave-it basis making the agreement unconscionable. *Saincome v. Truly Nolen of Am.*, No. 11-CV-825, 2011 U.S. Dist. Lexis 85880, at *12 (S.D. Cal. Aug. 3, 2011). The court noted that the lack of negotiation indicated procedural unconscionableness but granted the motion to compel arbitration finding that the plaintiff had not met its burden to establish the arbitration agreement as a whole was unconscionable. *Id.* at *29.

Courts do not appear to find the improperly formed contract argument particularly persuasive, but in *Cruz v. Cingular Wireless*, the court noted that the plaintiffs did not allege irregularities in the contract formation and quoted Justice Thomas's concurrence in *Concepcion* that "the FAA requires that an agreement to arbitrate be enforced unless a party successfully challenges the formation of the arbitration agreement, such as by proving fraud or duress." 2011 U.S. App. Lexis 16811, at *31 (11th Cir. Aug. 11, 2011) (quoting *Concepcion*, 131 S. Ct. at 1753 (Thomas, J., concurring)). The argument was successful in *Palmer v. Info-systems Technologies*; the plaintiff argued that because of the inequity in bargaining power between it and the defendant and a lack of mutuality, the arbitration agreement at issue was unconscionable due to formation problems. 2011 U.S. Dist. Lexis 130104, *10-11 (M.D. Ala. Nov. 9, 2011). The court agreed and declined to enforce the arbitration agreement. *Id.* at *11-12.

To What Does *Concepcion* Apply?

Plaintiffs' attorneys in cases involving the laws of states other than California's have also attempted to curtail *Concepcion* by

arguing that *Concepcion* found that the FAA preempted a California law that differed from the laws of other states, and therefore, *Concepcion* did not apply. This argument has proven largely unsuccessful. In the previously cited *Cruz* decision, the plaintiffs argued that Florida law, unlike California law, "invalidates class action bans only when the individualized facts of the case demonstrate that the ban is functionally exculpatory." *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1213 (11th Cir. 2011). The Eleventh Circuit rejected this argument and followed *Concepcion*, holding that insofar as Florida law would "invalidate the class waiver simply because the claims are of small value, the potential claims are numerous, and many consumers might not know about or pursue their potential claims absent class procedure, such a state policy stands as an obstacle to the FAA's objective of enforcing arbitration agreements according to their terms, and is preempted." *Id.* Further, in *Murphy v. DirecTV, Inc.*, the plaintiff argued that an Illinois state act provided an "independent basis for affirming the denial of [a] motion to compel." No. 2:07-cv-06465, 2011 U.S. Dist. Lexis 87625, at *11 (C.D. Cal. Aug. 2, 2011). However, the court wrote that *Concepcion* made it clear that "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." *Id.*

The plaintiff had greater success in *Feeney v. Dell*, in which the Massachusetts Superior Court found the arbitration agreement at issue to stand "in stark contrast to the AT&T agreement in *Concepcion*, which had so many pro-consumer incentives that an individual might be better off in arbitration than in class litigation." 28 Mass. L. Rep. 652 (Mass. Sup. Ct. 2011). Unlike *Concepcion*, the arbitration agreement in *Feeney* provided "no incentives and simply require[d] arbitration of all disputes, even those that could not possibly justify the expense in light of the amount in controversy." *Id.* Despite *Concepcion* and that Massachusetts law "strongly favors class actions," the court determined that the arbitration agreement was unconscionable, which made it unenforceable. *Id.* It seems doubtful that other individual state laws or rules will ultimately prevail in light of *Concepcion*.

Other Government Entities

Though the U.S. Supreme Court has made it clear that arbitration agreement language prohibiting class arbitration does not alone invalidate an arbitration agreement some government agencies recently have drawn different conclusions. In *D.R. Horton and Michael Cuda*, the National Labor Relations Board (NLRB) considered whether a mandatory arbitration agreement prohibiting employees from jointly filing employment claims violated federal labor laws. *D.R. Horton, Inc. and Michael Cuda*, 357 N.L.R.B. 184 (Nat'l Labor Relations Bd. Jan. 3, 2012). The NLRB determined that the employer violated the National Labor Relations Act (NLRA) by requiring employees to sign an agreement that prevented them from filing joint, collective, or class action claims in any type of forum, judicial or arbitral, related to wages, hours, or other work conditions grievances. *Id.* at *1. In the decision, the NLRB first discussed which employee rights the NLRA protected and noted that the NLRA protected "employees' ability to join together to pursue workplace grievances, including through litigation," and section 7 specifically protected joint litigation addressing wages, hours, or working conditions. *Id.* at *6. Therefore, the NLRB concluded, the arbitration agreement in *D.R. Horton* prohibited the employee from exercising rights protected under the NLRA and amounted to an unfair labor practice. *Id.*

Addressing *Concepcion*, the NLRB rejected the argument that the *D.R. Horton* holding was contrary to *Concepcion*, explaining that unlike the arbitration agreement in *D.R. Horton*, the AT&T arbitration agreement in *Concepcion* did not involve a waiver of rights protected by the NLRA and instead only involved a waiver to participate in a consumer class action. *Id.* at *49. The NLRB did limit the *D.R. Horton* holding, however, by noting that if an agreement required an employee to arbitrate individual employment-related claims rather than flatly prohibiting the employee from using a judicial forum to resolve class or collective claims, the agreement would not violate the NLRA. *Id.* at *57.

We can't predict whether courts will follow the *D.R. Horton* NLRB decision; however, a California court recently ruled that an employee had to arbitrate her claims

and found that *D.R. Horton* did not apply to a wage-and-hour class action because the employee voluntarily signed the arbitration agreement. *Fatemah Johnmoham-madi v. Bloomingdale's Inc.*, No. 11-cv-6434 (C.D. Cal. 2012).

Another government agency, the Financial Industry Regulatory Authority (FINRA), recently also decided a case involving a class action waiver in an arbitration agreement. FINRA, which regulates securities firms doing business in the United States and administers a dispute-resolution process for investors and investment firms, has enacted rules prohibiting investment firms from including class action waivers in their customer agreements. Charles Schwab, FINRA alleged, violated the FINRA rules by requiring customers to waive their rights to pursue class actions against the firm. The FINRA complaint against Charles Schwab has prompted formal proceedings that will allow the company to file a response and to request a hearing before a FINRA disciplinary panel.

Arbitration Fairness Act

In response to *Concepcion*, several congressional members recently introduced the Arbitration Fairness Act to Congress. The bill would ban forced arbitration clauses, and in its current form would ensure that “no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, or civil rights dispute.” It seems unlikely given the current makeup of Congress that this bill will become law.

Three “Hot off the Press” Court of Appeals Decisions

Although they do not settle all of the *Concepcion* counterarguments, three very recent court of appeals decisions appear indicative of court trends. The courts issued these decisions as we readied this article for publication.

In *In Re Checking Account Overdraft Litigation*, the Eleventh Circuit rejected arguments that an arbitration clause precluding class actions was unconscionable under Georgia law because the defendant was permitted to recover arbitration expenses if it prevailed. 2012 WL 660974, at * 2–3 (11th Cir. Mar. 1, 2012). *Accord In Re Checking Account Overdraft Litigation*, 2012 WL 686311, at *3–4 (11th Cir. Mar. 5, 2012).

In March 2012, the Ninth Circuit, from which *Concepcion* originated, rejected the argument that the California *Broughton-Cruz* rule, which prohibited the arbitration of claims for “broad public injunctive relief,” survived *Concepcion*, 2012 WL 718344, at *10–11 (9th Cir. Mar. 7, 2012). The Ninth Circuit also rejected the public policy argument that the courts are better equipped than arbitrators to administer public injunctions as irrelevant under *Concepcion*. *Id.* at *11.

Finally, in *Quillon v. Tenet Healthsystem Philadelphia, Inc.*, the Third Circuit invalidated a Pennsylvania law that made class action waivers unconscionable when class action litigation was “the only effective remedy” because of the high cost of arbitration compared to the small value of individual damages. 2012 WL 833742, at *9 (3d Cir. Mar. 14, 2012). The court likewise rejected the argument that the disparity of bargain-

ing power between Tenet, the employer, and Quillon, the employee rendered the agreement unconscionable. *Id.* at *11–12.

The Marmet Decision

Although it did not involve a class action arbitration waiver issue, the recent U.S. Supreme Court decision in *Marmet Health Care Center, Inc. v. Brown*, ___ U.S. ___, 132 S. Ct. 1201 (2012), does illuminate the Court’s belief in the FAA’s preeminence. Relying on state public policy that did not allow compelling predispute arbitration of nursing home negligence claims, the West Virginia Supreme Court invalidated an arbitration clause in a nursing home admission contract. *Id.* at 1203. In a per curiam opinion, the Court noted that the FAA does not make exceptions “for personal injury or wrongful death cases.” *Id.* Rather the FAA “reflects an *emphatic* federal policy in favor of arbitration dispute resolution.” *Id.* (*emphasis added*).

Conclusion

Since the U.S. Supreme Court decided *AT&T Mobility LLC v. Concepcion*, courts have struggled with a myriad of arguments attempting to avoid or to limit the force and impact of that decision. While some arguments have succeeded, most efforts to circumscribe *Concepcion* have failed. No doubt litigants will continue to formulate new ways to attack the decision’s scope and will exert effort to have regulatory agencies or Congress act to limit the decision. For the foreseeable future, however, *Concepcion* remains a formidable obstacle to efforts to avoid arbitration. 