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ARBITRATION

TRENDS

In the year following the U.S. Supreme Court's landmark *AT&T v. Concepcion* decision, courts have dissolved many class actions and sent individual claims to arbitration. But the plaintiffs' bar has scored some important victories, and the battle over regulation is just heating up, attorneys tell BNA in this Special Report.

Post-*Concepcion*, Plaintiffs Chalk Up Few Victories, Look to Government for Relief

A year after many called the U.S. Supreme Court's arbitration decision in *AT&T v. Concepcion* the death knell for consumer and employment class actions, experts and advocates disagree about the long term prospects for class actions in the courts, and some tell BNA they are keeping close watch on legislative and regulatory developments that could undermine the decision's effects.

Writing for a 5-4 majority in the April 27, 2011, opinion, Justice Antonin Scalia held in *Concepcion*, 131 S. Ct. 1740 (2011), that the Federal Arbitration Act's liberal policy favoring arbitration preempted a California state law rule that made class action waivers unenforceable in many consumer contracts (12 CLASS 362, 5/13/11).

Report: 76 Class Bans Upheld in a Year. In the year since the opinion, courts have cited *Concepcion* and held class action bans enforceable in 76 cases, according to a report released in April by consumer advocacy groups Public Citizen and the National Association of Consumer Advocates (NACA). Deepak Gupta, a staff attorney at Public Citizen, represented the *Concepcions* before the Supreme Court.

"On a daily basis, NACA attorneys witness the damaging impact *Concepcion* has on the consumers they represent; they are increasingly unable to obtain justice in a court of law," Delicia Reynolds, legislative director with NACA said in a press release accompanying the report, *Justice Denied. One Year Later: The Harms to*

Consumers From the Supreme Court's Concepcion Decision Are Plainly Evident.

"Good class actions, which might have provided needed injunctive relief and curbed bad behavior, are not moving forward," Reynolds said.

But Andrew J. Trask, who defends product liability and consumer fraud class actions as counsel at McGuire Woods LLP in London, told BNA May 3 that *Concepcion* has "definitely had an effect on the way class actions are brought, but it has not killed the consumer class action."

Certain consumer class actions that had been viable in the past are not necessarily viable now, Trask, also co-author of *The Class Action Playbook*, said. Those are the ones that should not have been actionable in the first place: suits that involve low dollar claims and a customer service problem that is not widespread and the company is willing to address, he said.

"Once you get into larger consumer fraud issues, usually there is not the same kind of contract that governs and it is much harder to get things into arbitration," Trask said.

'Consumer-Friendly' Arbitration Clauses Survive Scrutiny. Trask also noted courts still have the power to strike arbitration clauses when they find unconscionable provisions other than class action waivers.

"If [an agreement] appears to be one-sided against the consumer, courts are quick to knock it down re-

Pending Developments

- Petition filed in Second Circuit for en banc rehearing in *In re American Express Merchants' Litigation*, 2d Cir., No. 06-1871, 2/1/12 (13 CLASS 137, 2/10/12)
- Appeal filed in Fifth Circuit in *D.R. Horton Inc.*, 357 N.L.R.B. No. 184, 1/3/12 (13 CLASS 15, 1/13/12)
- Appeal filed in Eighth Circuit in *In re Wholesale Grocery Products Antitrust Litigation*, No. 11-3768 (8th Cir.)
- Comment period open until June 23 for scope and methodology of the Bureau of Consumer Financial Protection's study on the use of arbitration in consumer financial products (13 CLASS 462, 4/27/12)

ardless, and they have room to do that under *Concepcion*," Trask said.

Brian T. Fitzpatrick, associate professor at Vanderbilt Law School who focuses on class action litigation, told BNA May 3 that he lacked confidence that this litigation strategy for avoiding arbitration would survive over time. He said some courts that have stricken arbitration provisions as unconscionable when they "really wish" they could have nixed a class action waiver have run into trouble on appellate review.

Fitzpatrick pointed to the Eleventh Circuit's decision in *In re Checking Account Overdraft Litig.*, No. 11-14316 (11th Cir. March 1, 2012) (13 CLASS 259, 3/9/12), where the appeals court overturned the district court's decision that struck an arbitration clause. The Eleventh Circuit found Georgia unconscionability law permitted the type of provisions the district court found objectionable.

Evan Tager, partner at Mayer Brown LLP in Washington, D.C., said at a May 8 webinar that courts may be more inclined to smile upon arbitration agreements that include an incentive clause. The *Concepcion* contract contained such a provision, allowing a \$7,500 bonus to plaintiffs who received a larger award in arbitration than AT&T's last settlement offer, he said. The Washington Legal Foundation, a public interest law and policy center promoting free enterprise, hosted the webinar, *Arbitration After AT&T Mobility v. Concepcion: Judicial, Regulatory, and Strategic Legal Responses to High Court's 2011 Ruling*.

Tager also suggested that when companies draft arbitration agreements they should make the forum convenient to plaintiffs, and make the arbitration clause clear, prominent and readable in the contract.

Some Plaintiff Victories, But Will They Last? Despite the major hurdles that *Concepcion* presents, some courts and other forums have handed class action plaintiffs significant victories.

For example, in *D.R. Horton Inc.*, 357 N.L.R.B. No. 184, 1/3/12 (13 CLASS 15, 1/13/12), the National Labor Relations Board said the employer's mandatory arbitration procedure violated the National Labor Relations Act because it interfered with the statutory right of employees to engage in "concerted activity" for their mutual aid or protection.

The defendant has appealed to the Fifth Circuit.

In the highly anticipated decision in *In re American Express Merchants' Litigation*, 2d Cir., No. 06-1871-cv, 2/1/12 (13 CLASS 137, 2/10/12), the Second Circuit found that *Concepcion's* reasoning did not apply, and held a class action waiver is unenforceable when it precludes plaintiffs from vindicating their federal statutory rights.

The Second Circuit said that the cost of hiring an expert to conduct the required economic analysis needed to prove the plaintiffs' case would dwarf the potential award for any single class member, and, therefore, individual arbitration would deprive plaintiffs of the federal antitrust laws' protections.

Andrew J. Pincus, partner at Mayer Brown LLP in Washington, D.C., argued the *Concepcion* case before the Supreme Court. Pincus said at the May 8 webinar that the Second Circuit's reasoning, based on the vindication of statutory rights concept, has also appeared in some Fair Labor Standards Act cases including *Raniere v. Citigroup Inc.*, No. 1:11-cv-02448-RWS (S.D.N.Y. Nov. 22, 2011) (12 CLASS 1117, 12/9/11).

But Trask said the vindication of rights theory has not gained much traction outside the Second Circuit.

The defendants in the *American Express* case have petitioned for rehearing en banc in the Second Circuit, and parties have also briefed the issue for the Eighth Circuit's review of *In re Wholesale Grocery Products Antitrust Litigation*, No. 11-3768 (8th Cir.). In that case, three plaintiff grocers in an antitrust class action against two wholesalers are appealing the district court's dismissal of their claims from the suit. The plaintiffs argue they should not have to individually arbitrate their claims because the high costs of proving their cases individually would make them not feasible to pursue.

Fitzpatrick said the vindication of rights theory may catch on in other courts in the short term, but he remained pessimistic about the long term use of the theory for two reasons.

First, he said that although the Supreme Court articulated in *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), that "large arbitration costs could preclude a litigant from effectively vindicating her federal statutory rights in the arbitral forum," the Justices have never applied this reasoning to keep a case out of arbitration. "It is something hypothetical that might exist," Fitzpatrick said.

Second, the possible doctrines supporting the theory are shaky, he said. The Second Circuit and other courts consider it a doctrine of federal common law, Fitzpatrick said. But federal common law has long been out

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of favor, and the Supreme Court would not uphold the theory on this ground, he predicted.

“[Legislation and regulation is] where the plaintiff’s bar has turned its attention in order to agitate against arbitration, recognizing that they have not done well in the judicial forum, and also I think to use the policy arena to put pressure on the courts to rule their way,” Andrew J. Pincus, partner at Mayer Brown LLP, said.

Fitzpatrick suggested plaintiffs could also frame the issue as a conflict between two federal statutes: the FAA, with its policy favoring arbitration, and the statute under which plaintiffs seek class action relief, such as the antitrust statutes in the *American Express* case.

The Supreme Court may be more likely to embrace a textualist approach like this, Fitzpatrick posited, but plaintiffs may struggle to point to an actual conflict between the statutes. Federal statutes generally do not require that potential plaintiffs have the right to bring a class action, he said.

“It’s hard to say that Congress intended that plaintiffs should be able to bring class actions when some of these statutes were passed before class actions were invented,” he said. “I think at the end of the day this vindication of rights theory is not going to get us very far.”

Will Class Action Waivers Take Down Shareholder Actions? Trask said *Concepcion* will continue to have the greatest impact in areas where arbitration has always been a feasible alternative, such as in disputes arising from cell phone contracts.

But Trask said courts do not necessarily respect arbitration clauses when they appear in other types of contracts. “Attempts to move the arbitration clause out of the areas where it has traditionally been used have been rebuffed,” he said.

He noted the Carlyle Group’s Feb. 3 decision, under pressure from the U.S. Securities and Exchange Commission, to withdraw a provision in its registration statement for its initial public offering that would have required shareholders to arbitrate all disputes (13 CLASS 161, 2/10/12).

But Fitzpatrick disagreed about the limits of *Concepcion*’s impact.

Sometime down the line, *Concepcion* could lead to the end of shareholder class actions, he said. The SEC does not like mandatory arbitration clauses, he said, and it has leverage through the initial public offering process to keep them out of registration statements.

But someday someone will take the SEC to court on this issue, Fitzpatrick predicted, and the SEC will lose based on *Concepcion* and a line of cases dealing with what types of causes of action are arbitrable.

“[T]hen companies will be allowed to put arbitration provisions [with class action waivers] in their corporate

charters, and that will be the end of securities fraud class actions,” he said.

Legislative and Regulatory Outlook. Plaintiffs’ best prospect for undoing the effects of *Concepcion* may be through legislation and regulations, the experts said.

“[This is] where the plaintiff’s bar has turned its attention in order to agitate against arbitration, recognizing that they have not done well in the judicial forum, and also I think to use the policy arena to put pressure on the courts to rule their way,” Pincus said.

Fitzpatrick said, “I think there is going to be guerilla warfare for a number of years in the court, but I think the companies will win, so really the solution is going to be Congress.”

Many eyes are on the Bureau of Consumer Financial Protection (CFPB), which must conduct a study and report to Congress on the use of arbitration agreements in consumer financial products.

In April, the CFPB asked for comments until June 23 on the scope and methodology of the study, which is required under the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act of 2010 (13 CLASS 462, 4/27/12).

CFPB Director Richard Cordray said this inquiry will help the bureau assess whether rules are needed to protect consumers.

Pincus said that the CFPB study has “huge potential implications” if the agency goes forward with regulations. “There is going to be a very focused effort to provide input to the study to make sure that the study is balanced,” Pincus said.

The request for comments is focused on how effective arbitration is for consumers, he continued.

“But the real question here is does arbitration provide a good or better alternative to consumers than litigation? . . . One disappointment with the notice is that it did not address the other half of the equation: litigation,” Pincus said.

Pincus also noted that if a court overturns Cordray’s recess appointment, then all of the actions taken under his watch would be invalidated.

Congress has also taken the first steps to possibly limit arbitration in other contexts. The Arbitration Fairness Act (S. 987 and H.R. 1873), introduced by Democrats in both chambers shortly after *Concepcion* came out, would bar enforcement of arbitration agreements in the employment, consumer, and civil rights contexts (12 CLASS 453, 5/27/11). Those bills await committee action.

In the California Legislature, a Democratic senator introduced a bill (S.B. 491) stating that a contract that prohibits class actions is void. That bill also is in committee.

Fitzpatrick said unless Democrats control both houses of Congress and the presidency, no legislation will likely be enacted.

“In order to get anything through Congress, there will have to be a paradigm shift in the perception of class actions and class action lawyers because right now they are not very popular. I don’t think there is going to be a groundswell of popular concern with the loss of class actions,” he said.

BY JESSIE KOKRDA KAMENS

The report, Justice Denied. One Year Later: The Harms to Consumers From the Supreme Court’s Con-

ception Decision Are Plainly Evident, is at <http://www.citizen.org/pressroom/pressroomredirect.cfm?>

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