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Developments and Ideas For the Practice of Consumer Law

Special Issue on Supreme Court's *Concepcion* ruling, plus:

- 20 litigation areas where consumer class actions remain viable despite *Concepcion*

Life After *Concepcion*: Sup. Ct. Greenlights Unconscionable Bans on Class Arbitration¹

The Supreme Court on April 27, in a highly anticipated decision in *Concepcion*, ruled that the Federal Arbitration Act (FAA) preempts the “*Discover Bank*” rule that finds unconscionable contractual bans on class-wide relief.² With a familiar 5-4 split,³ the Court limited FAA language that an arbitration agreement can be struck down “upon such grounds as exist at law or in equity for the revocation of any contract.”⁴

The *Discover Bank* rule prohibits bans on class-wide relief found in consumer adhesion contracts where damages are small and where the party with superior bargaining power deliberately cheats large numbers of consumers out of individually small sums of money.⁵ Since this rule applies to bans on class relief both in court and arbitration, it is grounds for “the revocation of any contract.” The majority still struck it down as inconsistent with the FAA.

The majority finds fundamental to arbitration that it be streamlined and expeditious. The *Discover Bank* rule, by forcing class arbitration on an unwilling party, negates the FAA requirement that arbitration agreements be enforceable as written. Class arbitration is inconsistent with FAA arbitration because it greatly increases the risks to defendants, requires arbitrators to make certification judgments, and is slower, more costly and more likely to generate procedural issues.

The majority opinion ignores the realities of consumer arbitration—that companies do not seek a streamlined and expeditious procedure, but are trying to deprive consumers of their ability to vindicate their statutory rights. The *Discover Bank* rule does not limit FAA arbitration, but only limits corporate efforts to deprive consumers of statutory remedies.

Limiting the Reach of *Concepcion*'s Holding

Justice Thomas, the fifth vote for *Concepcion*'s majority, would rule the opposite way were the case to originate in

state court, because Justice Thomas on a number of occasions has stated that the FAA does not apply to cases in state court.⁶ Thus five justices would hold that state courts are free to find class arbitration bans to be unconscionable.

Moreover, the Court, in striking down the *Discover Bank* rule, described it as a general rule that mechanically forces parties into class arbitration. Very different is a court's determination in a particular case based upon that case's unique facts that the whole arbitration agreement is unconscionable or exculpatory. The unusual nature of the *Concepcion* creditor's arbitration clause—consumers recover \$7500 minimum damages and double attorney fees in individual arbitration—led the Court to find individual arbitration to be preferred rather than forcing the creditor into class arbitration.

A clause requiring individual-only arbitration should still be struck down when it deprives consumers of their ability to vindicate rights under state and particularly federal law. The Court has held that “by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum.”⁷ Where individual arbitration prevents vindication of statutory rights, courts can still strike down the arbitration requirement in its entirety, allowing the matter to go to court as a class action.

Finally, companies will seek to re-open cases where courts have struck down class arbitration bans. But if a company did not argue FAA preemption of state law in the case originally, it should not be able to raise that issue at this late date.

20 Litigation Areas Where Consumer Class Actions Remain Viable Despite *Concepcion*

Concepcion may be the death knell for one of the most effective challenges to arbitration clauses, that, when successful, also allows for class-wide relief. But *Concepcion* does not spell the end for all consumer class actions. Summarized below are 20 areas where consumer class actions in court (or in one instance in arbitration) remain viable despite *Concepcion*.

1. Litigation Against Certain Credit Card Issuers

Bank of America, JP Morgan Chase, Capital One, and HSBC have settled an antitrust case by agreeing that they will delete their arbitration clauses and will not enforce existing arbitration agreements.⁸ PNC Bank, TD Bank, Regions

¹ Thanks to Paul Bland of Public Justice for his suggestions and comments.

² AT&T Mobility L.L.C. v. *Concepcion*, 2011 WL 1561956 (U.S. Apr. 27, 2011).

³ Justice Thomas joined the majority opinion even though he would have allowed challenges only to the making of an arbitration clause, such as duress or fraud or mutual mistake.

⁴ 9 U.S.C. § 2.

⁵ See *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

⁶ *Preston v. Ferrer*, 552 U.S. 346 (2008); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995).

⁷ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

⁸ Final Judgment and Order of Dismissal with Respect to Enumerated Defendants, *Ross v. Bank of America, N.A.*, MDL No. 1409 (S.D.N.Y. July 22, 2010).

Bank, and other card issuers have also abandoned arbitration requirements for various reasons, including the threat of class arbitration. One study found that only 10% of card agreements today include an arbitration clause, down from 68% in July 2009.⁹

While this percentage will go up after *Concepcion*, Bank of America, JP Morgan Chase, Capital One, and HSBC will not be able to do so under the terms of their settlement until November 1, 2013—at which point the Consumer Financial Protection Bureau may have limited consumer arbitration clauses. Moreover, a change in terms for other card issuers, re-introducing an arbitration requirement, will only affect card holders who use their cards after that date, and will thus not affect a class of card holders in default at that point.

2. Litigation against Credit Card Debt Buyers

Where an arbitration clause is not found in credit card agreements sold to a debt buyer, then the debt buyer's actions are amenable to court class action. Bank of America, JP Morgan Chase, Capital One, and HSBC settlements, discussed in #1, *supra*, specify that, as to any sale of a card account after February 1, 2010, that the purchaser will also not enforce any applicable arbitration agreement.

Moreover, debt buyers will not be able to take advantage of a card issuer's new arbitration requirement for years after it is implemented—the card issuer's notice of the new arbitration requirement will not be sent to accounts already sold nor will a consumer whose account has been sold show acceptance of the new terms by using the card, because card privileges will have already been terminated.

3. Mortgage and Servicer Litigation

Few prime mortgage loans include arbitration clauses because in 2004 Freddie Mac and Fannie Mae stopped purchasing mortgages that contained arbitration requirements. In addition a federal law enacted in 2010 prohibits arbitration agreements in any residential mortgage loan or home equity loan, although the effective date for this new provision is unclear.¹⁰

Court class actions should thus be available against most mortgage lenders and their assignees, and servicers, because those parties will not be able to piggy-back on the originating lender's arbitration clause. Also subject to court class actions are appraisers, closing lawyers, realtors, and loan brokers, unless that entity separately entered into arbitration agreements with the homeowner.

4. Fair Credit Reporting Litigation

Unless purchasing a service from a consumer reporting agency (CRA), the consumer will have no contractual relationship with a CRA, and no arbitration requirement prevents a court class actions against a CRA. There may be arbitration agreements between a consumer and a creditor or other entity furnishing information to a CRA. But a class action against a furnisher may still be available if a court finds the practice beyond the arbitration clause's scope—a credi-

⁹ Nick Bourke and Ardie Hollifield, Pew Health Group, Two Steps Forward: After the Credit CARD Act, Credit Cards Are Safer and More Transparent—but Challenges Remain (July 2010), available at www.pewtrusts.org/uploadedFiles/www.pewtrusts.org/Reports/Credit_Cards/PEW-CreditCard%20FINAL.PDF.

¹⁰ 15 U.S.C. § 1639c, added by Pub. L. No. 111-203 (2010). The effective date is discussed at NCLC's Truth in Lending § 1.3 (7th ed. 2010).

tor's furnishing data to a CRA is not an aspect of the credit extension to the consumer. If a consumer has not entered into an arbitration agreement with a party that has pulled the consumer's credit report, then a court class action should also be available against a user without a permissible purpose.

5. FDCPA and Other Debt Harassment Litigation

Arbitration requirements do not apply to collection harassment or improper litigation practices aimed at the debtor's family or other third parties, at identity theft victims, at authorized users, or at the wrong person, since none of these individuals entered into an arbitration agreement with the collector or creditor.

Whether a debt collector or attorney can take advantage of the consumer's arbitration agreement with the creditor—if there is such an agreement—may depend on the wording of the clause. Does the clause apply to the creditor's agents or only the creditor's employees? Similarly, are abusive collection practices by a third party within the parties' intent in drafting the arbitration agreement relating to the credit contract?

Much FDCPA and other debt collection harassment litigation today revolves around debt buyers, collection agencies, and law firms hired by debt buyers. A debt buyer who takes advantage of the originating creditor's arbitration agreement as the creditor's assignee must prove a complete chain of ownership from the creditor to that debt buyer. The debt buyer must also show not only a contract containing an arbitration clause, but prove that this contract is the one applicable to and binding upon the particular consumer.

Debt buyers even in class litigation have great difficulty proving any of these facts. The debt buyer's collection agency or collection attorney cannot enforce an arbitration clause if the debt buyer cannot.

6. NAF Designation as the Arbitration Forum

Millions of arbitration clauses still specify the National Arbitration Forum (NAF) as the sole arbitration forum, even though a law enforcement action has forced the NAF to cease all consumer arbitrations nationwide. Auto installment and other closed-end loans cannot be unilaterally amended, so the NAF is still listed in the agreement. Courts increasingly find such arbitration agreements unenforceable because they cannot be carried out according to their terms.¹¹

7. Payday, Auto Title, and Refund Anticipation Loans Provided to Active Duty Military and Their Dependents

The Talent-Nelson Military Lending Act¹² and Defense Department regulations¹³ prohibit arbitration agreements in any payday, auto title, or refund anticipation loan provided to active duty military personnel, their spouses, or other dependents.

8. Insurance and Service Contract Litigation

The FAA generally preempts state law limiting arbitration's enforceability. But the McCarran-Ferguson Act provides that state law regulating insurance supersedes federal law unless the federal statute specifically references insurance.¹⁴ The FAA does not mention insurance, and state law

¹¹ NCLC's Consumer Arbitration Agreements. § 6.6a (2010 Supp.).

¹² 10 U.S.C. § 987(e), (f).

¹³ 32 C.F.R. pt. 232.

¹⁴ 25 U.S.C. § 1012(b).

can limit the use of arbitration clauses in insurance agreements. A number of states have done so.¹⁵

Insurance and service contracts also are often sold in conjunction with credit, but a credit insurer, service contract owner, force placed insurer, or mortgage insurer cannot take advantage of the creditor's arbitration clause, unless specifically listed in the agreement. Such entities not dealing directly with the consumer may have difficulty entering into arbitration agreements on their own.

Class action litigation is also available on behalf of claimants on another individual's insurance policy, such as where an auto insurer undervalues property damage claims filed against its insureds. The claimant has no contractual relationship with the other party's insurer.

9. Credit Repair Organizations Act Litigation Against a Surprising Number of Entities

Despite earlier decisions to the contrary out of the Third and Eleventh Circuits,¹⁶ the Ninth Circuit last year found that claims under the federal Credit Repair Organizations Act (CROA) are not subject to an arbitration requirement.¹⁷ This split should be resolved next year because the Supreme Court has granted *certiorari* in the Ninth Circuit case.¹⁸

CROA has a surprising reach and provides extraordinary consumer remedies not just as to credit repair organizations, but also to certain practices by merchants, creditors, and collectors. See NCLC's *Fair Credit Reporting* Ch. 15 (7th ed. 2010).

10. Written Warranty Litigation

Manufacturers have difficulty entering into a binding arbitration agreement with consumers with whom they do not deal directly, and manufacturers cannot take advantage of an arbitration agreement between a retailer and the consumer.¹⁹

In addition, although most courts hold otherwise, more thoughtful courts find that binding arbitration is inconsistent with Magnuson-Moss Warranty Act's requirements and does not apply to written warranty litigation.²⁰ If the arbitration requirement is not found in the written warranty, courts have also held the arbitration agreement unenforceable even if it were consistent with the Magnuson-Moss Warranty Act.²¹

11. Used Car Litigation against Parties Up the Chain of Title

There is no question that a consumer can sue a wholesaler or dealer earlier in the chain of a used car's title for Odometer Act violations, salvage fraud, and the like, and need not just sue the dealer selling the vehicle to the consumer.²² Nor can an entity earlier in the chain of title avail itself of an arbitration clause between the consumer and the selling dealer.²³

¹⁵ NCLC's Consumer Arbitration Agreements § 3.3.4 (5th ed. 2007 and 2010 Supp.).

¹⁶ *Picard v. Credit Solutions, Inc.*, 564 F.3d 1249 (11th Cir. 2009); *Gay v. CreditInform*, 511 F.3d 369 (3^d Cir. 2007).

¹⁷ *Greenwood v. Compucredit Corp.*, 2010 WL 3222415 (9th Cir. Aug. 17, 2010), *cert. granted*, 2011 WL 220683 (U.S. May 2, 2011).

¹⁸ 2011 WL 220683 (U.S. May 2, 2011).

¹⁹ See NCLC's Consumer Arbitration Agreements § 7.4 (5th ed. 2007 and 2010 Supp.).

²⁰ *Id.* § 4.2.2.

²¹ *Id.* § 4.2.2.8.

²² See NCLC's Automobile Fraud (3^d ed. 2007 and 2010 Supp.).

²³ See NCLC's Consumer Arbitration Agreements § 7.4 (5th ed. 2007 and 2010 Supp.).

12. Litigation against Aiders and Abettors, Co-Conspirators

A third party that aids and abets an illegal scheme may never have a contractual relationship with the consumer and not be an agent of the party drafting the arbitration clause, so that there is no arbitration requirement applying to a class action against the third party. Examples might be form suppliers, a telemarketer's bank, or a fraudster's financier.

13. Arbitration Agreement Was Never Binding on the Consumer

If consumers never assent to an arbitration agreement, it cannot bind them. An arbitration agreement should not be binding where sent to a merchant's consumers *after* a sale is consummated (such as when the product is delivered to the consumer at a later date) and the consumer takes no action to consent to that agreement. Identity theft, minority, and forged signatures are other examples.

14. Transaction Is Never Consummated

Unless an arbitration clause is found in the credit application, class actions should be available for those denied credit, since they never entered into the contract that contained the arbitration requirement. The same should be the case with a sales transaction never consummated, such as where bait and switch or deceptive pricing lure consumers to a store, but where the offer was not as represented and no sales agreement containing an arbitration clause is consummated.

15. Individual Arbitration Is Cost-Prohibitive

Unaffordability is grounds to void an arbitration requirement, but the consumer must detail arbitration's costs in the particular case, and show that the consumer's financial resources cannot bear those costs.²⁴ For a class action, the proof should apply to all members of the class, and must take into account how the arbitration agreement allocates the costs of paying the arbitrator. Particularly helpful are two circuit court cases finding the cost of discovery and the complexity of a case made individual arbitration cost-prohibitive for the class.²⁵

16. Arbitration Prevents Utilization of Federal Substantive Statutory Rights

The Supreme Court has said that arbitration is enforceable only as long as it allows individuals to vindicate their federal substantive statutory rights.²⁶ While courts have found the Truth in Lending Act's cap on class action statutory damages does not create a federal substantive right to bring TIL class actions, other federal statutes (such as the Equal Credit Opportunity Act) provide a clearer substantive right to bring class actions to enforce the statute.²⁷

²⁴ *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000).

²⁵ *In re American Express Merchants' Litig.*, 554 F.3d 300 (2^d Cir. 2009), *remanded for further consideration in light of Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), *aff'd as originally decided*, 634 F.3d 187 (2^d Cir. 2011); *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006).

²⁶ See *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

²⁷ The ECOA provides that "any creditor ... shall be liable ... either in an individual capacity or a member of a class." 15 U.S.C. § 1691e(a).

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17. Class Counterclaims to a Collection Action

A class counterclaim to a collection action may be able to avoid an arbitration requirement where an affirmative action could not. The collector's litigation may waive the arbitration clause²⁸—it is unconscionable for a collector to use the court but prevent the consumer from doing so as well.²⁹ Class counterclaims stay in state court even when raising federal claims and even where the Class Actions Fairness Act would otherwise allow removal.³⁰

18. Agreement Does Not Ban Class Arbitration

After *Conception*, few arbitration agreements will be drafted without prohibitions on class arbitration. But many older contracts do not contain such bans, and cannot be unilaterally amended. While the Supreme Court's 2010 decision in *Stolt-Nielsen* limits an arbitrator's ability to do so,³¹ some arbitrators continue to interpret silent arbitration clauses as permitting class arbitration.³² *Conception* is certainly disapproving of class arbitration, but limits its holding by saying "class arbitration, to the extent it is manufactured by *Discover Bank* rather than *consensual*, is inconsistent with the FAA."³³ There is some hope that arbitrators will continue to allow class arbitration where the clause is silent on the issue.

19. Qui Tam Litigation

When an individual initiates an action under the Federal False Claims Act, the individual is not doing so in the individual's own name, but as an agent for the federal government.³⁴ As such, an arbitration clause binding the consumer's actions should not apply to the *qui tam* action.³⁵ In

addition, federal law now prohibits the enforceability of arbitration clauses as to whistleblowers,³⁶ showing congressional intent that such *qui tam* actions go forward in court.

20. Arbitration Clause Is Poorly Drafted

An arbitration clause is only as binding as it is written. If an arbitration clause states it only applies to contract claims, it does not apply to tort or statutory claims. If it applies to only certain time periods, it does not apply to actions occurring earlier or later. If its terms over-reach in limiting consumer rights, it will be unconscionable and unenforceable.

Arbitration Challenges Must Comply with Supreme Court's *Rent-A-Center, West* Requirements

Any challenge to the enforceability of an arbitration agreement *must* take into account the Supreme Court's instructions in *Rent-A-Center, West, Inc. v. Jackson*,³⁷ applicable whenever an arbitration agreement clearly specifies that questions of arbitrability or the enforcement of the arbitration clause is for the arbitrator to decide. Where an agreement contains such a "delegation clause," the consumer cannot initially bring a court challenge to the arbitration clause, but instead must attack just the delegation clause. After a court finds the delegation clause unenforceable, and only then, will the court hear a challenge to the arbitration requirement itself.

For example, where there is a delegation clause, do not initially attack the arbitration requirement as being too costly. Instead, attack the delegation clause, arguing that the arbitrator who is the beneficiary of the high cost should not be deciding whether the cost is too high. Instead of initially arguing an arbitration requirement was never binding on the consumer, argue that the delegation clause found in the arbitration clause was never binding on the consumer.

²⁸ See NCLC's Consumer Arbitration Agreements Ch. 8 (5th ed. 2007 and 2010 Supp.).

²⁹ *Id.* at Ch. 6.

³⁰ See NCLC's Collection Actions § 5.5.4 (2008 and 2010 Supp.).

³¹ *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010).

³² See NCLC's Consumer Arbitration Agreements § 10.1b (2010 Supp.).

³³ 2011 WL 1561956, at 7 (*italics added for emphasis*).

³⁴ See NCLC's Unfair and Deceptive Acts and Practices § 14.5 (7th ed. 2008 and 2010 Supp.).

³⁵ See *Pram Nguyen v. City of Cleveland*, 121 F. Supp. 2d 643 (N.D. Ohio 2000).

³⁶ 7 U.S.C. § 26(h); 18 U.S.C. § 1514a(e); 12 U.S.C. § 5567.

³⁷ 130 S. Ct. 2772 (2010).