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Outside Counsel

Challenging 'Concepcion' in New York State Courts

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During the last few years meaningful consumer remedies, e.g., the class action device, have come under vigorous assault, particularly, in the realm of the purchase of moderately priced goods and services. One need only read Justice Ruth Bader Ginsburg's dissent in *Direct, Inc. v. Imburgia*,¹ The New York Times article cited therein [see "In Arbitration, a 'Privatization of the Justice System'"² ("By inserting individual arbitration clauses into a soaring number of consumer and employment contracts, companies [have] devised a way to circumvent the courts and bar people from joining together in class-action lawsuits, realistically the only tool citizens have to fight illegal or deceitful business practices")³ and the Arbitration Study⁴ published by the federal Consumer Financial Protection Board⁵ to understand that meaningful consumer remedies have nearly been extinguished⁶ through forced arbitration, particularly on the Internet.⁷

A Brief History

A brief history⁸ of the U.S. Supreme Court's views on the enforceability of mandatory arbitration clauses and class action and class arbitration waivers in consumer contracts follows. In [Green Tree Financial Corp. v. Basse](#)⁹ the court held that whether an arbitration agreement prohibits class arbitrations is to be decided by arbitrators and not the courts. Subsequently, the court, in [Stolt-Nielsen v. AnimalFeeds International Corp.](#),¹⁰ clarified its earlier ruling in *Bazze* by reversing the U.S. Court of Appeals for the Second Circuit decision finding the class wide arbitration was permissible. "It follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so."

In [AT&T Mobility v. Concepcion](#)¹¹ the court addressed the enforceability of contractual clauses prohibiting class actions and/or class arbitrations. In *Concepcion* the court abrogated a rule in [Discover Bank v. Superior Court](#)¹² to the effect that consumer contracts containing clauses prohibiting class actions or class arbitrations were void as

unconscionable. The court found, "California's Discover Bank rule similarly interferes with arbitration. Although the rule does not require classwide arbitration, it allows any party to a consumer contract to demand it ex post."

In [American Express Co. v. Italian Colors Restaurant](#),¹³ the Court rejected the argument that class arbitration was necessary to prosecute claims "that might otherwise slip through the legal system." And in [Direct, Inc. v. Imburgia](#)¹⁴ the Court held that a mandatory arbitration clause must be enforced noting that "California's interpretation of the phrase 'law of your state' does not place arbitration contracts 'on equal footing will all other contracts'...For that reason, it does not give 'due regard...to the federal policy favoring arbitration.'"

New York Decisions

In New York State there is a strong policy favoring arbitration,¹⁵ and class action waivers have been enforced.¹⁶ Since 2011, however, the Appellate Divisions of the First and Second Departments have rejected motions to compel individual arbitration and allowed joint or class arbitrations distinguishing *Stolt-Nielsen* (see [JetBlue Airways Corp. v. Stephenson](#)¹⁷ and [Cheng v. Oxford Health Plans](#)¹⁸) or remitted to the trial court for a hearing on "the factors relevant to unconscionability...including the extent to which the plaintiff had a meaningful choice to reject the arbitration changes-in-terms and the availability of similar credit devices that are free of terms that serve to prohibit class actions...The parties should also address the costs of prosecuting the plaintiff's claim on an individual basis, including anticipated fees for experts and attorneys, the availability of attorneys willing to undertake such a claim, and the corresponding costs likely incurred if the matter proceeded on a class-wide basis" ([Frankel v. Citicorp Insurance Services](#)¹⁹).

Post 'Concepcion'

However, in [Weinstein v. Jenny Craig Operations](#),²⁰ an employee class action, the defendant sought to exclude purported class members who after the action had been commenced signed arbitration agreements containing class action waivers. In denying this request, the Appellate Division, First Department, held that the trial "court properly exercised its discretion by drawing the inference that the agreements had been implemented in response to this litigation and to preclude class members. Thus, the court properly declined to enforce those agreements signed after the commencement of this litigation. *However, the waiver would be enforced as to employees who were hired after the class action was commenced*" [emphasis added].

In [Ansah v. A.W.I. Security & Investigation](#),²¹ an employee class action, defendant's precertification summary judgment motion was denied as premature with the court noting that defendant's argument that the contracts require arbitration...is unpreserved (and in any event) would 'fail...since plaintiffs never agreed to arbitrate.'" And in [Schiffer v. Slomin's](#),²² the Appellate Term, relying upon *Concepcion*, found that "General Business Law Section 399-c is a categorical rule prohibiting mandatory arbitration clauses in consumer contracts, and thus, at least where there exists a nexus with interstate commerce, is displaced by the FAA." And in *Chan v. Chinese-American Planning Council Home Attendant Program*²³ the

Supreme Court, New York County, refused to enforce an arbitration clause because it was both inapplicable ("does not apply to the claims herein") and unclear ("does not clearly indicate an agreement to arbitrate"; "does not constitute a 'clear and unmistakable' agreement to arbitrate claims arising under federal or state law").

Challenging Enforceability

There are a number of common law challenges that may be permissible under *Concepcion* and which some state courts have used in considering the enforceability of mandatory arbitration clauses.²⁴ For example, in [Sanchez v. Valencia Holding Company](#),²⁵ the California Supreme Court noted that *Concepcion* "reaffirmed that the FAA does not preempt 'generally applicable contract defenses, such as fraud, duress or unconscionability'...Under the FAA, these defenses may provide grounds for invalidating an arbitration agreement if they are enforced evenhandedly and do not 'interfere[] with fundamental attributes of arbitration.'"

Examples

Mandatory arbitration clauses may be found unenforceable for reasons stated in the following court opinions.

- The costs for the consumer to arbitrate are too high [See [Vasquez-Lopez v. Beneficial Oregon](#), 152 P.3d 940 (Or. App. 2007). But see *Tsadilas*, supra ("the risk' that plaintiff will be saddled with prohibitive costs is too speculative to justify invalidation of an arbitration agreement"). Another reason is that the costs for the consumer are unfair [See *Guerra v. Long Beach Care Center*, 2015 WL 6672220 (Cal. App. 2015)] (clause requiring payment of arbitrator fee unfair; the clause was severed but arbitration enforced) or unknown [See [Kinkel v. Cingular Wireless](#), 857 N.E. 2d 250 (Ill. Sup. 2006)].
- There is a lack of mutuality in the arbitration agreement [See *Motormax Financial Services Corp. v. Knight*, 2015 WL 4911825 (Mo. App. 2015) (arbitration agreement lacked mutuality and adequate consideration); [Tillman v. Commercial Credit Loans](#), 362 N.C. 93 (N.C. Sup. 2008) (lack of mutuality). But see *Berent v. CMH Homes*, 2015 WL 3526984 (Tenn. Sup. 2015) (arbitration agreement not unconscionable). Lack of consideration is also an issue [See [Feeney v. Dell](#), 87 Mass App. Ct. 1137 (Mass. App. 2015) (agreement to arbitrate enforced as supported by consideration)].
- The arbitration clause is procedurally unconscionable [See *Shaffer v. Royal Gate Dodge*, 2009 WL 4638850 (Mo. App. 2009)(arbitration agreement unconscionable)]. But see [Sanchez v. Valencia Holding Company](#), 61 Cal. 4th 899 (Cal. Sup. 2015) (arbitration agreement not unconscionable); *Berent v. CMH Homes*, 2015 WL 3526984 (Tenn. Sup. 2015) (arbitration agreement not unconscionable); *Ranazzi v. Amazon.com*, 2015 WL 641280 (Ohio App. 2015)(arbitration agreement neither procedurally nor substantively unenforceable).
- The arbitration agreement is substantively unconscionable [See *Strausberg v. Laurel HealthCare Providers*, 2013 WL 5741413 (N.M. App. 2013) (arbitration agreement unconscionable); *Brown v. MHN Government Services*, 306 P. 3d 948 (Wash. Sup. En Ban.

2013) (arbitration agreement unconscionable). But see [Bank of the Ozarks v. Walker](#), 2013 Ark. App. 517 (Ark. App. 2013) (arbitration agreement not unconscionable)].

- The claims made are not covered by the arbitration clause [See [Extendicare Homes v. Whisman](#), 2015 WL 5634309 (Ky. Sup. 2015)(attorneys in fact cannot execute pre-dispute arbitration agreements waiving nursing home residents' constitutional right to jury trial and access to courts); [Collier v. National Penn Bank](#), 2015 WL 7444713 (Pa. Super. 2015) (arbitration clause unenforceable per superceding agreement)]; [Hobbs v. Tamko](#), 2015 WL 6457837 (Mo. App. 2015) (arbitration clause does not apply to warranty claims); [Klussman v. Cross Country Bank](#), 134 Cal. App. 4th 1283 (Cal. App. 2005) (injunctive relief claims under Consumers Legal Remedies Act and Unfair Competition Law not subject to arbitration); [GMAC v. Pittella](#), 2012 N.J. Super. Unpub. LEXIS 1928 (N.J. Super. A.D. 2012) (*Concepcion* "did not alter the basic premise that 'an agreement to arbitrate must be a product of mutual assent, as determined under customary principles of contract law'").
- The arbitration agreement is a contract of adhesion [See [Kortum-Managhan v. Herbergers](#), 204 P.3d 693 (Mont. Sup. 2009)(adhesion contract)].
- There is unequal bargaining power between the parties [See [Tillman v. Commercial Credit Loans](#), 655 S.E. 2d 362 (N.C. Sup. 2008) (inequality of bargaining power)].
- The arbitration agreement may be enforced but class arbitration may be allowed [See [De Souza v. The Solomon Partnership](#), 88 Mass. App. Ct. 1107 (Mass. App. 2015)].
- The arbitration clause immunizes a defendant from liability [See [Brewer v. Missouri Title Loans](#), 364 S.W. 3d 486 (Mo. Sup. En Banc 2012)(unconscionable and unenforceable)].
- The arbitration agreement was never accepted, signed or negotiated [See [Hobbs v. Tamko](#), 2015 WL 6457837 (Mo. App. 2015) (customers did not accept terms of arbitration clause in warranty); [Maxon v. Initiative Legal Group APC](#), 2015 WL 5773358 (Cal. App. 2015) (defendants never signed agreement and hence there is no agreement to arbitrate)]. But see [Tallman v. Eighth Judicial District](#), 359 P.3d 113 (Nev. Sup. 2015) (arbitration agreement enforced notwithstanding employer's failure to sign agreement); [Wiese v. CACH](#), 189 Wash. App. 466 (Wash. App. 2015) (parent company, as a non-signatory, was entitled to compel arbitration); [Marreno v. DirectTV](#), 233 Cal. App. 4th 1408 (Cal. App. 2015) (successor in interest has standing to enforce arbitration agreement through equitable estoppel); [Gonzalez v. Metro Nissan of Redlands](#), 2013 WL 4858770 (Cal. App. 2013)(under some circumstances non-signatories may compel arbitration and be compelled to arbitrate).

An arbitration agreement may be found to be otherwise not applicable [See [UFCW & Employers Benefit Trust v. Sutter Health](#), 241 Cal. App. 4th 909 (Cal. App. 2015) (arbitration agreement between health care provider and contracting agent not binding on trust)].

- Defendant waives arbitration [See [Tennyson v. Santa Fe Dealership Acquisition II](#), 2015 WL 7421485 (N.M. App. 2015) (defendant waived right to compel arbitration)]. But see [Diamante v. Dye](#), 464 S.W.3d 459 (Ark. Sup. 2015) (waiver may apply to class); [Richmond Holdings v. Superior Recharge Systems](#), 455 S.W.3d 573 (Tex. Sup. 2015) ("mere delay in moving to compel arbitration is not enough for waiver"); [Tallman v. Eighth Judicial District](#), 359 P.3d 113 (Nev. Sup. 2015) (arbitration agreement enforced; employer did not waive

right to arbitrate); [Wiese v. CACH](#), 189 Wash. App. 466 (Wash. App. 2015) (defendants did not waive right to arbitrate)].

- The arbitration clause lacks clarity [See *Rotondi v. Dibre Auto Group*, 2014 WL 3129804 (N.J.A.D. 2014) (class action arbitration waiver not stated with sufficient clarity).
- The arbitration clause violates a state statute [See [Iskanian v. CLS Transportation Los Angeles](#), 59 Cal. 4th 348 (Cal Sup. 2014) (Under the Labor Code Private Attorneys General Act (PAGA) "an 'aggrieved employee' may bring a civil action personally and on behalf of other...employees to recover civil penalties")] or public policy [See [Garrido v. Air Liquide Industrial U.S.](#), 241 Cal. App. 4th 833 (Cal. App. 2015)(class action waiver violates public policy)].

There are, of course, other grounds which the Courts of New York State may wish to use in challenging the dictates of *Concepcion*.

Endnotes:

1. *Direct, Inc. v. Imburgia*, 577 U.S._____(Dec. 14, 2015).
2. Silver-Greenberg and Corkery, "In Arbitration, a 'Privatization of the Justice System'," New York Times (Nov. 1, 2015) <http://nyti.ms/1kkstih>. See also Silver-Greenberg and Gebeloff, "Arbitration Everywhere, Stacking the Deck of Justice," (Oct. 31, 2015) <http://nyti.ms/1KMvBJg>; The Editorial Board, "Arbitrating Disputes, Denying Justice," www.nytimes.com (Nov. 7, 2015).
3. *Direct, Inc. v. Imburgia*, 577 U.S._____, _____(Dec. 14, 2015).
4. Arbitration Study, Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act 1028(a) (March 2015), www.consumerfinance.gov
5. See Silver-Greenberg and Corkery, "Efforts to Rein In Arbitration Come Under Well-Financed Attack," www.nytimes.com (Nov. 15, 2015) ("Proponents of arbitration, who say it provides an efficient alternative to courts...say a new rule proposed by the consumer agency, which would prevent financial services companies from including class-action bans in consumer contracts, could in effect kill arbitration altogether").
6. See also: Liptak, "Supreme Court Upholds Arbitration in DirectTV Case," www.nytimes.com (Dec. 14, 2015) ("The Times investigation cited by Justice Ginsburg found that once blocked from going to court as a group, most people dropped their claims entirely. By assembling records from arbitration firms across the country, The Times found that from 2010 to 2014, only 505 consumers went to arbitration over a dispute of \$2,500 or less").
7. Shopping on the Internet is increasingly problematic since the ease with which consumers may purchase goods and services is matched only by the equally rapid forfeiture of common consumer rights and remedies. In Dickerson & Berman, "Consumers' Loss of Rights in the Internet Age," NYSBA Journal, October 2014, it was noted that "One of the more ominous developments for e-commerce consumers, however, involves the increasing enforcement of onerous contractual terms and conditions, such as mandatory arbitration, forum selection and choice-of-law clauses, and liability disclaimers, lurking in the hyper-links and pop-up boxes."

8. Dickerson, "Class Actions: The Law of 50 States," Law Journal Press (2016) at Section 4.03[5].
9. *Green Tree Financial Corp. v. Bassel*, 539 U.S. 444 (2003).
10. *Stolt-Nielsen v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010).
11. *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011).
12. *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005).
13. *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013).
14. *Direct, Inc. v. Imburgia*, 577 U.S. ____ (Dec. 14, 2015). See also: Kendall, "Supreme Court Scorches California on Arbitration, Again," The Recorder (Dec. 14, 2015).
15. See *State of New York v. Philip Morris*, 30 A.D.3d 26 (1st Dept. 2006).
16. See *Tsadilas v. Providian National Bank*, 13 A.D.3d 190 (1st Dept. 2004); *Ranieri v. Bell Atlantic Mobile*, 304 A.D. 2d 353 (1st Dept. 2003).
17. *JetBlue Airways Corp. v. Stephenson*, 88 A.D.3d 567 (1st Dept. 2011).
18. *Cheng v. Oxford Health Plans*, 84 A.D.3d 673 (1st Dept. 2011).
19. *Frankel v. Citicorp Insurance Services*, 80 A.D.3d 280 (2d Dept. 2010).
20. *Weinstein v. Jenny Craig Operations*, 132 A.D.3d 446, 17 N.Y.S.3d 407 (1st Dept. 2015).
21. *Ansah v. A.W.I. Security & Investigation*, 129 A.D.3d 538 (1st Dept. 2015).
22. *Schiffer v. Slomin's*, 48 Misc.3d 15 (App. Term 2015).
23. *Chan v. Chinese-American Planning Council Home Attendant Program*, 2015 WL 5294803 (Sup. Ct., New York Co. 2015).
24. See Blumenthal, "Circumventing 'Concepcion': Conceptualizing Innovative Strategies To Ensure The Enforcement Of Consumer Protection Laws In The Age Of The Inviolable Class Action Waiver," 103 Cal. L.R. 699 (June 2015).
25. *Sanchez v. Valencia Holding Company*, 61 Cal. 4th 899 (Cal. Sup. 2015). See *Rotondi v. Dibre Auto Group*, 2014 WL 3129804 (N.J.A.D. 2014) (class action arbitration waiver not stated with sufficient clarity).

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