

After AT&T Mobility LLC v. Concepcion — A Year in Review

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The U.S. Supreme Court's April 2011 decision in *Concepcion v. AT&T Mobility* was widely hailed as enforcing contractual agreements between consumers and businesses to arbitrate any disputes between them on an individual basis, so long as the agreement is not otherwise void due to unconscionability, fraud, duress or other substantive defenses to the enforcement of contracts. Since *Concepcion*, district courts have wrestled with unconscionability and other defenses to the enforcement of arbitration agreements.

While most courts have enforced arbitration provisions post-*Concepcion*, enough courts have refused to enforce arbitration provisions, emphasizing the care business need to exercise in preparing an arbitration provision that will be enforced. In the last two months, the 2nd U.S. Circuit Court of Appeals and the 9th U.S. Circuit Court of Appeals have split on the issue of whether statutory rights are subject to contractual arbitration provisions and class action waivers, as well as the efficacy of enforcing statutory rights in an arbitration proceeding.

As a result of these decisions, businesses wanting to enforce arbitration agreements and class action waivers must be mindful of the contemplated terms and conditions of a proposed agreement with customers and allow customers the ability to vindicate rights in disputes. The 2nd Circuit and the 9th Circuit decisions serve as examples of the difficulties courts are having in addressing arbitration agreements, and provide insight to what terms companies should consider including in order to increase the likelihood that its arbitration agreements are enforced.

On Feb. 1, the 2nd Circuit, in the case *In Re American Express Merchants' Litigation*, decided not to enforce American Express's arbitration provision and reversed the district court decision to grant American Express's motion to compel arbitration. Plaintiffs alleged that American Express's requirement that merchants honor both American Express's charge cards and credit cards was an illegal tying arrangement in violation of

Section 1 of the Sherman Act. Plaintiff filed a putative class action on behalf of all merchants that accepted American Express cards. After a tortured procedural history that included three trips to the 2nd Circuit, the appellate court addressed American Express's motion to compel arbitration once *Concepcion* was decided.

In the district court, the plaintiffs submitted expert testimony to demonstrate that an individual would need to present to address the market circumstances and the alleged arrangement could exceed \$1 million in fees and that any individual damage award would be in the range of \$12,000 to \$40,000. The expert further concluded that no rational merchant would pursue an individual claim against American Express. Relying heavily on this expert testimony, the 2nd Circuit found that the arbitration provision at issue effectively stripped plaintiffs of the opportunity to vindicate their statutory rights under the Sherman Act. As a result, the court refused to enforce the arbitration provision and reversed the district court's decision compelling arbitration.

On March 7, the 9th Circuit reached a different result in *Kilgor v. Key Bank National Association*. In *Kilgor*, the question was whether *Concepcion* pre-empted California's so-called *Broughton-Cruz* rule, which prohibits arbitration of claims for public injunctive relief. The plaintiffs filed a putative class action arising from an alleged sham aviation school and the student loan lender for that school. The agreement at issue contained an arbitration provision and class action waiver. In several sections of the agreement, the arbitration and class action waiver provisions were conspicuously noted. The agreement also provided a 60-day period for the consumer to opt-out of the arbitration and class action waiver.

The 9th Circuit reached two significant findings. First, it held that *Concepcion* preempted the *Broughton-Cruz* rule. Because the rule applied only to arbitration agreements as opposed to contracts generally, the 9th Circuit held the Federal Arbitration Act under the Supreme Court's *Concepcion* decision pre-empted it.

Second, the 9th Circuit found the agreement at issue was not unconscionable. To the contrary, the agreement's provision allowing a party to opt-out of the arbitration and class action waiver within 60 days, demonstrated that the agreement was not unconscionable.

Learnings from these two decisions, as well as over 100 district court cases deciding motions to compel arbitration since *Concepcion*, provide guidance on the form and substance of arbitration agreements. While not all of the terms identified below are necessary for enforcement of arbitration agreements, the more a court is assured that any plaintiff can vindicate its rights in a dispute, the more likely it is that the court will enforce the arbitration provision on an individual basis.

Here are some terms that businesses may want to consider after *Concepcion*:

- Outline conspicuous consent to arbitration and waive the right to participate in a class action, as well as a right to opt-out of the provisions within 30–90 days after entering the agreement.
- Allow both parties to sue in small claims court and seek injunctive or other equitable relief in the courts.
- Provide clear instructions to the consumer to initiate the arbitration process and make it easy for the consumer to do so (e.g., including forms on website).
- Reimburse arbitration and arbitrator fees if the plaintiff is unable to pay for arbitration.
- Reimburse plaintiff's legal fees if she prevails in the arbitration (and do not include any provision for the business to recover fees).
- Allow the arbitration to be conducted in a county where plaintiff resides or in any other agreeable location.
- Allow the arbitration to be conducted in person, by phone

Including some of all of these provisions in an arbitration agreement that includes a class action waiver will increase the likelihood that the provision will be enforced if a dispute arises between the consumer and the business.

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