Bloomberg Law Reports®

February 29, 2012

Litigation

Antitrust & Trade

Arbitration

Concepcion and the Arbitration of Federal Claims

MAYER · BROWN

Contributed by Andrew Pincus, Mayer Brown LLP

Does the Supreme Court's landmark decision in *AT&T Mobility LLC v. Concepcion*[1] - holding that arbitration clauses may not be invalidated on the ground that they contain class-action waivers - apply only when the underlying cause of action is based on state law? That is what a panel of the Second Circuit concluded earlier this month in *In re American Express Merchants' Litigation*,[2] a ruling that is the subject of a pending petition for rehearing en banc.

American Express is part of the flood of lower court decisions that are beginning to define the scope of *Concepcion*.

The first battleground was class actions that, like the complaint in *Concepcion*, asserted state-law claims. Plaintiffs have tried to avoid *Concepcion* on a variety of grounds, but very few have been successful. Federal courts have upheld the validity of class action waivers in more than forty such cases. Although a few state courts in California have tried to distinguish *Concepcion*, other courts have not followed their lead.

Now, attention is shifting to actions in which the claim sought to be arbitrated arises under federal law. Although *American Express* is the first federal appellate ruling to address that question squarely, district courts in California and Minnesota reached the opposite conclusion with respect to claims under the same federal antitrust laws at issue in *American Express*.[3]

The *American Express* panel's ruling will not be the last word on this subject. A review of its reasoning indicates why other courts are likely to disagree with its conclusion that *Concepcion* is irrelevant to the enforceability of a class waiver in the context of federal claims.

The Second Circuit's Decision

American Express involves a putative class action on behalf of merchants claiming that American Express's requirement that they accept all American Express-branded cards constitutes a tying arrangement in violation of the federal antitrust laws. American Express moved to compel arbitration, citing the arbitration clause in its merchant agreement, which bars either party from pursuing or participating in class actions or other forms of representative claims. The district court granted the motion to compel arbitration and dismissed the class action.[4] After reconsidering its decision several times in the wake of intervening Supreme Court decisions, a two-judge Second Circuit panel reversed, holding the arbitration clause unenforceable because of the class-action waiver.[5]

The *American Express* court rested its holding on three conclusions. To begin with, it determined that *Concepcion* "offers a path for analyzing whether a state contract law is preempted by the [Federal Arbitration Act (FAA)]," but is not relevant when the claims to be arbitrated involve "federal statutory rights."[6]

Originally published by Bloomberg Finance L.P. in the Vol. 2, No. 10 edition of the Bloomberg Law Reports–Litigation. Reprinted with permission. Bloomberg Law Reports® is a registered trademark and service mark of Bloomberg Finance L.P.

According to the panel, *Concepcion* "leaves open" the question "whether a mandatory class action waiver clause is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to bring federal antitrust claims."[7] That issue, the panel stated, is governed entirely by pre-*Concepcion* Supreme Court decisions.

Next, the panel recognized that the Supreme Court has held that federal antitrust claims can be arbitrated,[8] but concluded that it nonetheless was appropriate to determine whether a litigant could effectively vindicate its particular antitrust claim in arbitration. Relying on the Supreme Court's decision in *Green Tree Financial Corp.-Alabama v. Randolph*,[9] the panel held that a party may challenge an arbitration clause that includes a class-action waiver "on the grounds that prosecuting such claims on an individual basis would be a cost prohibitive method of enforcing a statutory right."[10]

Finally, the panel determined that the plaintiffs in this case had met their burden of showing that the cost of pursuing arbitration on an individual basis was "prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws."[11] It relied entirely on an affidavit submitted by the plaintiffs' expert stating that expert-witness fees would amount to between $300,000 and $2 million, while the median damages for a class member would be $5,252. That evidence, according to the panel, "demonstrate[d] that the only economically feasible means for plaintiffs enforcing their statutory rights is via a class action."[12]

Concepcion Controls

The critical threshold question in assessing the *American Express* holding is whether the panel correctly concluded that *Concepcion* is irrelevant in the context of federal claims. It is of course true that *Concepcion* involved application of an arbitration clause to a state-law claim and that the Supreme Court's holding therefore rested on the Federal Arbitration Act's preemption of state law. But that does not mean that *Concepcion* is irrelevant in determining how the Act applies to a federal claim.

The Supreme Court has identified only one difference in the FAA's treatment of federal and state claims: Congress, unlike a state legislature, may exempt a cause of action from the FAA's generally-applicable policy favoring arbitration. "Like any statutory directive, the [FAA's] mandate may be overridden by a contrary congressional command."[13] Once a federal claim has been found to be arbitrable, however, the Court has not distinguished actions founded in state law from those founded in federal law.

Moreover, *Concepcion*'s rationale was that California's state-law rule requiring class proceedings was invalid because it "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" in enacting the FAA.[14] "Requiring the availability of class wide arbitration," the Court stated, "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[15]

That rationale applies equally to federal claims. The "interference" with arbitration - and resulting inconsistency with the FAA - would be identical, and just as significant, if class proceedings were required in the context of a federal claim. Once a federal claim has been found to be arbitrable, therefore, a court must apply the congressional policy embodied in the FAA unless it can identify a "contrary congressional command" expressly declaring class proceedings to be so indispensable as to justify overriding the FAA.

That the panel did not, and could not, do. The Sherman and Clayton Acts were enacted more than a half-century before the creation of the modern class action and Congress, by adopting those statutes, could not have mandated a procedure not yet in existence. Rule 23 itself was promulgated pursuant to a statute - the Rules Enabling Act - that expressly provides that any such rules of court "shall not abridge, enlarge or modify any substantive right."[16] It therefore could not be the source of this substantive protection.

Nor is there any basis for creation of a federal common-law rule requiring class proceedings for federal claims in some or all circumstances. It is a settled principle that federal courts' exercise of common-law authority must be guided by Congress's legislative decisions.[17] Because Congress in the FAA has determined that class proceedings cannot be required for state-law claims, the federal courts are barred from creating a different rule for federal claims.

In sum, far from "leav[ing] open" the question presented in *American Express*, the decision in *Concepcion* resolves it: in the absence of a congressional determination that class proceedings are so essential to a federal cause of action that they cannot be waived, federal claims that are arbitrable are subject to the rule announced in *Concepcion*. That result should come as no surprise: more than twenty years ago the Supreme Court rejected the argument that class procedures are indispensable for the vindication of federal rights, explaining that "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [federal statute] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred."[18]

The *Randolph* Standard

The panel's analysis of the Supreme Court decision that it believed to govern the case - *Green Tree Financial Corp.-Ala. v. Randolph* - is also erroneous. *Randolph* presented questions regarding "payment of filing fees, arbitrators' costs, and other arbitration expenses"; the Court observed that "the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum."[19]

The case establishes only that a party may avoid arbitration by proving that the price of gaining entry to the arbitral forum is ***so much greater than the costs the plaintiff would incur in federal court*** that she is effectively prevented from pursuing her claims at all. As one federal court has put it, "[t]o be sure,

Concepcion does not explicitly overrule [*Randolph*], but it does make it untenable to read [*Randolph*] for a vindication-of-rights principle as robust as [plaintiff] asserts here. If [*Randolph*] has any continuing applicability, it must be confined to circumstances in which a plaintiff argues that costs ***specific to the arbitration process***, such as filing fees and arbitrator's fees, prevent her from vindicating her claims.... *Concepcion* forecloses plaintiffs from objecting to class-action waivers in arbitration agreements on the basis that the potential cost of proving a claim exceed potential individual damages."[20]

Even if *Randolph* did allow the invalidation of a class waiver based on litigation costs not unique to arbitration, the panel's conclusion that a class action is the only "economically feasible" means for the class members to assert their claims is highly suspect. If there is any merit to a cause of action, attorneys or even consumers with access to the Internet should have no trouble using a website or social media to identify numerous similarly-situated parties willing to bring claims and share in the costs.

In the context of *American Express*, where the potential claimants are organized businesses, there is a ready means for identifying and soliciting large numbers of antitrust claimants to file individual claims across which litigation costs can be manageably shared.

American Express is not just inconsistent with *Concepcion* and *Randolph*; it also is bad policy. Arbitration provides a fair and economical alternative to the litigation system for all claims, particularly those too small or too unique to attract a lawyer. Requiring class proceedings will have the practical effect of eliminating this alternative - no defendant will voluntarily subject itself to arbitration ***and*** class actions in court. That will reduce access to justice for consumers and employees.

Andrew Pincus, a partner in Mayer Brown LLP's Washington, D.C., office argued Concepcion in the Supreme Court and has participated in numerous cases involving arbitration issues in appellate and trial courts. Mr. Pincus can be reached at APincus@MayerBrown.com.

[1] 131 S. Ct. 1740 (2011).

[2] 2012 BL 27969 (2d Cir. Feb. 1, 2012).

[3] *In re Apple & AT & TM Antitrust Litig.*, 2011 BL 332368 (N.D. Cal. Dec. 1, 2011); *In re Wholesale Grocery Prods. Antitrust Litig.*, No. 09-md-2090 ADM/AJB (D. Minn. July 5, 2011).

[4] 2006 BL 37592 (S.D.N.Y. 2006).

[5] Justice Sotomayor was a member of the original panel, but did not participate in the most recent decision. The original panel ruling was vacated and remanded by the Supreme Court for reconsideration in light of *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), but "[f]inding its original analysis unaffected," the panel adhered to its decision. The panel then received supplemental briefing regarding the impact of *Concepcion* and again concluded that its analysis was unaffected. 2012 BL 27969 at 8-14.

[6] 2012 BL 27969 at 8.

[7] *Id.*

[8] *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

[9] 531 U.S. 79 (2000).

[10] 2012 BL 27969, at 11.

[11] *Id.* at 12.

[12] *Id.* at 13.

[13] *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226-27 (1987).

[14] 131 S. Ct. at 1753 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

[15] 131 S. Ct. at 1748.

[16] 28 U.S.C. § 2072(b).

[17] *City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981).

[18] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (internal quotation marks omitted).

[19] 531 U.S. at 84, 90.

[20] *Kaltwasser v. AT&T Mobility LLC,* 2011 BL 240387 at 6 (N.D. Cal. Sept. 20, 2011) (emphasis added).