Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Justices' AmEx Ruling Greenlights Class Action Waivers

By **Melissa Lipman**

Law360, New York (June 20, 2013, 7:37 PM ET) -- The U.S. Supreme Court on Thursday shut down any questions about whether its landmark Concepcion decision allowing class action waivers was limited to state law when it ruled that the federal antitrust laws don't take precedence over the Federal Arbitration Act, paving the way for companies to include broad, explicit class action waivers in arbitration agreements with their customers.

Although the justices ruled in 2011 that the Federal Arbitration Act preempts state laws that invalidate class action arbitration waivers, some questions remained over whether arbitration agreements could require parties to relinquish their class action rights for federal claims. Some arguments also persisted that it was the strength of the pro-consumer provisions in AT&T Mobility Inc.'s arbitration agreement that helped it pass muster in the Concepcion case.

But Thursday's decision put an end to that speculation, ruling that American Express Co.'s class action waiver in its arbitration agreement with merchants like plaintiff Italian Colors Restaurant couldn't be invalidated simply because it might cost merchants too much to pursue antitrust claims to make it worthwhile for them to pursue those claims.

"As it came out, it doesn't go much beyond Concepcion," Jones Day appellate partner Brian Murray said. "The logic of Concepcion I think takes you right to where Italian Colors comes out, but the fact that we've now actually said that logic applies to federal class actions as well cuts off what would have been a major escape hatch.

"This eliminates any questions that the Supreme Court may not have meant business," Murray added.

The ruling is the latest in a string of Supreme Court cases on arbitration that generally make it easier for companies to avoid litigation and class arbitration through waivers in contracts with customers.

In the first case, **Stolt**-Nielsen SA v. AnimalFeeds International Corp., the court ruled that companies couldn't be forced into class arbitration if they have not agreed to it. More recently, AT&T Mobility LLC v. Concepcion held that state law couldn't block companies from using class action arbitration waivers.

Both of those cases forced the Second Circuit to reconsider its original decision ruling that AmEx couldn't push a purported antitrust class action against it into arbitration. Ultimately, however, the appeals court reasoned that because the cost of pursuing the monopolization claims individually would be prohibitive, the arbitration agreement's class action waiver couldn't be enforced.

Writing for the majority, Justice Antonin Scalia said the court's recent opinion in AT&T Mobility LLC v. Concepcion "all but resolves this case," pointing out that the antitrust laws are not a special case when it comes to federal arbitration law.

"Respondents argue that requiring them to litigate their claims individually — as they contracted to do — would contravene the policies of the antitrust laws," Justice Scalia wrote. "But the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim."

There had been some question about whether Concepcion would apply in the AmEx case because, unlike the state law at issue in the earlier case that is automatically preempted if it conflicts with a federal statute, AmEx put the federal antitrust laws up against the FAA. But the "loophole that the Second Circuit opened has now been closed," according to Mayer Brown LLP's Andy Pincus, who successfully argued Concepcion for AT&T.

"I think some people, mainly people who file cases who didn't like Concepcion, had seen this as a possible way to circumvent Concepcion by adding a federal claim to your case," Pincus said. "That would have opened up quite a significant tear in Concepcion, but what the court has basically said is, 'No, that gambit won't work.'"

Companies had already begun putting more explicit class action waivers into arbitration agreements in the wake of Concepcion, and this decision will only push companies further in that direction, experts said.

And that is especially true in light of the Supreme Court's decision handed down earlier in June that unanimously affirmed an arbitrator's decision to allow class arbitration based on broad contractual language in a doctor's dispute with Oxford Health Plans LLC. In that case, the justices warned that courts cannot second-guess an arbitrator's interpretation of a contract.

"When you read today's decision with the Oxford Health decision, companies are more likely to include explicit class action waivers," Vinson & Elkins LLP partner Alden Atkins said.

And while the dissent argued that the AmEx waiver should have allowed the plaintiffs to share the cost of an economic expert's report or allowed for some level of joint counsel or consolidation, attorneys said the plain language of the majority opinion doesn't require companies to make those kinds of concessions.

"The bells and whistles in the AT&T Mobility arbitration agreement made it easier to overcome those concerns in Concepcion, but I think here what the court is saying is the parties have to stand by their agreements," Atkins said. "What this case says is implicitly that if you're a big company doing business with a lot of customers and you have a form agreement, I don't think you have to include the kinds of provisions you did in Concepcion."

Still, experts cautioned that companies would be wise to pursue the kind of more carefully wrought arbitration agreements that AT&T used.

"It's still not clear to me anyway that you can actually have one that's bulletproof," Crowell & Moring LLP employment partner Thomas Gies said. "[At AT&T] they were very careful and smart to put in enough consumer-friendly provisions that they were able to get over the hump. ... From that perspective, companies may want to put as many of those terms into an agreement as they can."

And despite the apparent clarity of the majority's opinion, predicting exactly how the lower courts will interpret the ruling is always difficult. Moreover, as Justice Elena Kagan's vehement dissent shows, the court is only one appointment away from seeing all of these types of decisions come out the other way.

"Belt and suspenders, it can't help to keep putting them in," Murray said. "The important point is you can never tell what lower courts are going to do with the Supreme Court's ruling [and] putting better stuff in your arbitration agreements can only help."

--Additional reporting by Abigail Rubenstein. Editing by Sarah Golin and Richard McVay.