Supreme Court Accepts Second Circuit's Domestic Arbitration Challenge

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During its 2010 and 2011 terms, the U.S. Supreme Court decided three high-profile arbitration law cases, each focusing on what the court described in the third case, *AT&T Mobility v. Concepcion,* as the Federal Arbitration Act's (FAA) overarching purpose "to ensure the enforcement of arbitration agreements according to their terms so as to facilitate informal, streamlined proceedings."[1]

Concepcion was preceded by *Stolt-Nielsen v. Animal Feeds International*[2] and *Rent-A-Center, West v. Jackson*.[3] In *Stolt-Nielsen*, the Supreme Court held that a party to an arbitration agreement cannot be compelled to submit to class arbitration absent a "contractual basis for concluding that the party agreed to do so."[4] Thus, where an agreement to arbitrate is silent on the subject, and a meeting of the minds cannot otherwise be inferred, a court or arbitrator may not compel a party to engage in a class arbitration.[5]

In *Rent-A-Center,* the Supreme Court enforced the parties' agreement to allow the arbitrator, rather than the courts, to decide questions of arbitrability, including any gateway challenge to the validity of the agreement to arbitrate.[6] Finally, in *Concepcion*, the Supreme Court held that a state may not impose a blanket rule banning class action waivers in arbitration agreements on the ground that the state deems such waivers to be unconscionable.[7] A state's concern that in some cases a class action may be the only economical way to litigate a claim does not overcome federal preemption under the FAA, which precludes any rule whose application has "a disproportionate impact on arbitration agreements [compared to other contracts]."[8] This remains true even if such a rule "is desirable for unrelated reasons."[9]

Additional FAA Cases

Since deciding these three cases the Supreme Court has reviewed several additional cases involving the FAA, in each instance further underlining the deference that courts should afford the statute. *KPMG v. Cocchi* considered whether courts may refuse to compel the separate arbitration of arbitrable claims where a complaint includes additional, nonarbitrable claims.[10] The Supreme Court held that the FAA's policy in favor of arbitration requires courts to compel arbitration of arbitrable claims that are subject to an arbitration agreement even if the result is to proceed simultaneously in two forums, with some claims arbitrated while others are resolved through the court system.[11] In *Compucredit v. Greenwood,* the Supreme Court underlined that the FAA also applies to federal statutory claims unless the FAA's mandate has been "overridden by a contrary Congressional command."[12]

The federal statute at issue in *Compucredit* is the Credit Repair Organizations Act (CROA), which does not expressly state that claims under the statute are nonarbitral.[13] However, the CROA requires credit card companies to disclose to consumers that they have "a right to sue" for violations of the Act, and contains a further provision that renders unenforceable any waiver by consumers of their protections under the act.[14] The U.S. Court of Appeals for the Ninth Circuit had held that, taken together, these provisions constituted a "contrary Congressional command" overriding the FAA.[15] The Supreme Court disagreed, noting that binding arbitration provisions were common in contracts at the time the CROA was drafted, so if Congress had intended to make claims under the act nonarbitral it would have clearly stated as much.[16] Since Congress did not, the Supreme Court reversed the Ninth Circuit and held that consumers' rights under the CROA could be vindicated through arbitration.[17]

The Supreme Court's recent responses to two state court decisions suggest that its patience may be wearing thin with courts that continue to circumvent its precedent regarding the FAA's "national policy favoring arbitration."[18] In *Marmet Health Care Center v. Brown*, the Supreme Court reviewed a decision by the Supreme Court of Appeals of West Virginia that applied West Virginia public policy to hold unenforceable all predispute arbitration agreements in personal injury or wrongful death cases brought against nursing homes.[19] The Supreme Court forcefully reversed, noting that the West Virginia court's public policy rationale was exactly the same as the one rejected in *Concepcion*, that the FAA does not provide an exception for personal injury or wrongful-death claims, and that "[w]hen this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established."[20]

More recently, in *Nitro-Lift Techs. v. Howard,* the Supreme Court had occasion to consider, and reject, the Oklahoma Supreme Court's invalidation of noncompetition agreements on public policy grounds despite the existence of valid arbitration clauses.[21] In another brusque reversal, the Supreme Court underlined again that "It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law."[22]

The Second Circuit's Gambit

In light of the common thread of deference to the FAA running through each of the Supreme Court's recent cases, it is perhaps surprising that the Supreme Courts of Virginia and Oklahoma invited this type of censure upon themselves by invalidating arbitration agreements despite contradictory Supreme Court precedent. In a recent U.S. Court of Appeals for the Second Circuit case, *In re Am. Express Merchs. Litig.* (*Amex*), the Second Circuit took things a step further—issuing what arguably amounts to a direct challenge of the Supreme Court's *Concepcion* holding.[23]

In *Amex*, the Second Circuit invalidated a class arbitration waiver in a standard credit card agreement using a vindication of federal rights argument substantially similar to a vindication of (state) rights argument raised and rejected in *Concepcion.*[24] In its *Amex* holding, the Second Circuit stated that the Supreme Court had not reached the *Amex* vindication of rights theory in *Concepcion*.[25] However, while the Supreme Court did not specifically use "vindication of rights" language, both cases considered that enforcing mandatory class action waivers would deny some plaintiffs an opportunity to vindicate their rights because it would sometimes be economically prohibitive to engage in an individual arbitration.[26]

In its *Amex* ruling, the Second Circuit cited several earlier Supreme Court cases holding that arbitration clauses should be invalidated where their effect would be to preclude plaintiffs from vindicating their federal statutory rights.[27] The Second Circuit observed that the class arbitration waiver before it would effectively preclude the *Amex* plaintiffs from pursuing claims under the federal antitrust statutes, and thus preclude them from vindicating their federal statutory rights.[28] In concluding that the FAA's preemption of state law under *Concepcion* did not control cases involving federal statutory claims, the Second Circuit relied on the earlier Supreme Court precedent to invalidate the class action waiver.[29]

The Second Circuit's decision in *Amex* is especially interesting in light of the Supreme Court's holding in *Compucredit* that the FAA applies to federal law in the same way as it does to state law, absent a "contrary Congressional command."[30] The Second Circuit did not attempt to differentiate its argument in *Amex* from *Compucredit's* precedent; rather, it simply seemed to challenge the Supreme Court to justify its *Concepcion* decision against an argument that the Second Circuit believed was not directly addressed in the *Concepcion* opinion. After mentioning that *Concepcion* dealt with state law, the Second Circuit inserted the following caveat in a footnote:

> In [*Compucredit*], the Supreme Court addressed whether the [federal] Credit Repair Organizations Act . . . precluded enforcement of an arbitration agreement. The Court concluded that because the Act is silent on whether claims brought under the Act can be arbitrated, the FAA requires that the arbitration agreement be enforced according to its terms . . . To support its analysis, the Court cited to a number of [federal] statutes that [expressly] restrict the use of arbitration . . . Plaintiffs here do not allege that the Sherman Act expressly precludes arbitration or that it expressly provides a right to bring collective or class actions, but instead argue that enforcement of the class arbitration waiver would effectively deprive them of their ability to vindicate their statutory rights.[31]

It is also interesting to compare the Second Circuit's reasoning in *Amex* with recent decisions from its sister courts. In *Pendergast v. Sprint Nextel,* the U.S. Court of Appeals for the Eleventh Circuit came out the other way, noting that evidence of the inability to vindicate one's statutory rights "goes only to substantiating the very public policy arguments that were expressly rejected by the Supreme Court in *Concepcion*—namely, that the class action waiver will be exculpatory, because most of these small-value claims will go undetected and unprosecuted."[32]

Meanwhile, in *Coneff v. AT&T,* the Ninth Circuit upheld a class action waiver, differentiating that case from *Amex* by saying that the *Amex* plaintiffs had "no effective means to vindicate their rights," while the *Coneff* plaintiffs simply had "insufficient incentive" to do so.[33] In an apparent acknowledgement that this was an exceedingly slim ground for differentiation, the Ninth Circuit added that "[t]o the extent that the Second Circuit's opinion is not distinguishable, we disagree with it and agree instead with the Eleventh Circuit."[34]

The *Amex* decision is even controversial in the Second Circuit itself; when Chief Justice Dennis Jacobs moved for rehearing en banc, but failed to secure majority support for this to occur, Justice Jose Cabranes wrote: "I concur fully in the thorough opinion of Chief Judge Jacobs dissenting from the denial of in banc review. I write separately simply to underscore that the issue at hand is indisputably important, creates a circuit split, and surely deserves further appellate review. This is one of those unusual cases where one can infer that the denial of in banc review can only be explained as a signal that the matter can and should be resolved by the Supreme Court."[35] On Nov. 9, the Supreme Court granted certiorari to resolve the matter.[36]

Conclusion

The Supreme Court's continued willingness to accept arbitration cases and issue decisions favoring arbitration seems slowly to have pushed the lower courts in a more uniform direction. Decisions like *Coneff* and *Pendergast* suggest that the Second Circuit's defiant *Amex* holding would have become an outlier if the Supreme Court had not granted certiorari to review it. Given its decisions in *Concepcion* and *Compucredit,* it seems likely that the Supreme Court will hold that the FAA supersedes the vindication of rights concerns raised by the Second Circuit in *Amex*. To what extent it distinguishes or overrules any earlier Supreme Court precedent in the process remains to be seen.

Whether or not the court believes that substantial explanation is necessary may also impact whether, and to what extent, the Second Circuit is rebuked for failing to implement the rule established "[w]hen [the Supreme] Court has fulfilled its duty to interpret federal law." What can be said with some confidence is that another Supreme Court decision favoring the FAA should help resolve the continuing uncertainty regarding the application of arbitration law post-*Concepcion*,

resulting in more predictable analyses in future cases.

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Endnotes:

1. *Concepcion,* 131 S. Ct.1740, 1742(2011).

2. *Stoft-Nielsen,* 130 S. Ct. 1758 (2010)

3. *Rent-A-Center,* 130 S. Ct. 2772 (2010).

4. *Stolt-Nielsen,* 130 S. Ct. at 1775 (emphasis in original).

5. Id.

6. *Rent-A-Center,* 130 S. Ct. at 2779.

7. *Concepcion,* 131 S. Ct. at 1747.

8. Id.

9. Id. at 1753.

10. *KPMG v. Cocchi,* 132 S. Ct. 23 (2011).

11. Id. at 26.

12. *Compucredit,* 132 S. Ct. 665, 669 (2012), citing *Shearson/American Express v. McMahon,* 482 U.S. 220, 226 (1987).

13. Id.

14. Id.

15. Id.

16. Id. at 672.

17. Id. at 673.

18. *Concepcion,* 131 S. Ct. at 1749.

19. *Marmet Health Care Ctr.,* 132 S. Ct. 1201, 1203 (2012).

20. Id. at 1202.

21. *Nitro-Lift,* 2012 U.S. LEXIS 8897 (U.S. Nov. 26, 2012).

22. Id. at *7.

23. *Amex,* 667 F.3d 204 (2d Cir. 2012).

24. Id.

25. Id. at 212-13.

26. Id. at 214; *Concepcion,* 131 S. Ct. at 1753.

27. Id. at 214-16, referencing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *Amchem Prods. v. Windsor,* 521 U.S. 591 (1997); *Deposit Guar. Nat'l Bank v. Roper,* 445 U.S. 326 (1980); *Mitsubishi Motors v. Soler Chrysler-Plymouth,* 473 U.S. 614 (1985); *Lawlor v. Nat'l Screen Serv.,* 349 U.S. 322 (1955); *Gilmer v. Interstate/Johnson Lane,* 500 U.S. 20 (1991); *Green Tree Financial Alabama v. Randolph,* 531 U.S. 79 (2000).

28. Id.

29. Id. at 219-20.

30. *Compucredit,* 132 S. Ct at 669.

31. *Amex,* 667 F.3d at 213, n. 5.

32. *Pendergast,* 2012 U.S. App. LEXIS 17512, at *30 (11th Cir. 2012).

33. *Coneff,* 673 F.3d 1155, 1159 (9th Cir. 2012).

34. Id. Notably, *Coneff* is the closest that any circuit court of appeals has come to expressly splitting with the Second Circuit's *Amex* decision. The only court that has so far explicitly split with *Amex* is the U.S. District Court for the Northern District of California, which held that Supreme Court and Ninth Circuit precedent in *Compucredit* and *Coneff,* respectively, compelled it to overrule *Amex's* precedent. *Jasso v. Money Mart Express,* 2012 U.S. Dist. LEXIS 52538, at *17 (N.D. Cal. 2012).

35. *Nat'l Supermarkets Ass'n v. Am. Express Travel Servs. (In re Am. Express Merchants' Litig.)*, 681 F.3d 139, 149 (2d Cir. 2012).

36. *Am. Express v. Italian Colors Rest.,* 2012 U.S. LEXIS 8697 (U.S. Nov. 9, 2012).