



# CLASS ACTION LITIGATION



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**REPORT**

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Consumer

## Will Class Actions Survive Ruling By Supreme Court in *Concepcion*?

**A**s the dust settles after the U.S. Supreme Court's April 27 opinion in *AT&T Mobility LLC v. Concepcion* (see related story), the question arises: What is left of consumer and employment class actions? While the court's decision will curtail class actions, plaintiffs have several strategies at their disposal to revive at least some class actions, and Congress or the new Consumer Financial Protection Bureau may get in the act as well, experts say in BNA interviews.

Though all the experts agree that the decision is a major win for businesses that use pre-dispute arbitration, a public interest plaintiffs' attorney told BNA that there are limits to the decision that the plaintiffs' bar will test. For example, there may still be avenues open to argue that unconscionability nullifies some class action bans, and the decision may not apply to cases in state court, or in cases based on federal substantive law.

The experts also debated the significance of Justice Clarence Thomas's concurrence in the case. Thomas joined in the 5-4 opinion "reluctantly," but wrote separately. One professor who has written extensively about pre-dispute arbitration agreements told BNA that the concurrence may provide a foothold for some unconscionability arguments.

And there have been calls for the legislative branch to get involved. Experts assess the appropriate role for the new Consumer Financial Protection Bureau provided for in the Dodd-Frank Wall Street Reform and Consumer Protection Act, as well as the likelihood for revival of the Arbitration Fairness Act.

Elizabeth Chamblee Burch, an assistant professor at Florida State University College of Law who writes about class actions, predicted that the plaintiffs' bar would adapt to the new ruling, as it has to other statutes.

"In many ways, the recent *Concepcion* opinion shares (though not explicitly) the same kind of mistrust of the plaintiffs' bar that animated the Private Securities Litigation Reform Act and the Class Action Fairness Act of 2005. If you look back to 1995 when Congress passed the PSLRA and to 2005 when Congress passed CAFA, commentators predicted the death knell for class actions (or at least that they would be severely curtailed). And while those statutes have changed class action

practice, they have done so in ways that largely strengthen the high-end plaintiffs' bar," Burch told BNA May 3.

**What's the Impact?** Courtwatchers agreed that the opinion's impact on class actions would be significant.

Professor John C. Coffee Jr., who teaches at Columbia Law School in New York and who has written extensively on class actions, told BNA April 27 that provisions requiring arbitration are standard in most financial contracts that millions of consumers use. "This decision makes it clear that classwide arbitration will be infrequent," he said. "You can certainly provide for it, but few will do that."

Alan S. Kaplinsky, a partner at Ballard Spahr LLP in Philadelphia who told BNA April 27 he pioneered the use of pre-dispute arbitration provisions in consumer contracts, said that the Supreme Court has made it very clear that states are not allowed to invalidate class action waivers because they think they run afoul of state public policy or that they are unconscionable. "Now the courts all over the country are going to have to come into line."

But some said the decision would allow big businesses to escape liability at the expense of consumers.

Jean R. Sternlight, professor at the University of Nevada, Las Vegas Boyd School of Law, who is an authority on the imposition of mandatory arbitration on consumers and employees, told BNA April 27, "*Concepcion* is, in my view, a wrongly-decided case that will potentially allow companies to insulate themselves from all liability by preventing consumers and others from bringing class actions against the company," she said.

"The majority grossly over-reads the Federal Arbitration Act as being inconsistent with classwide arbitration. The majority also gives inappropriately short shrift to states' interest in defining and explicating their own common law of contracts in general and unconscionability in particular. And, the majority fails to recognize that an important benefit of class actions is protecting individuals who may not yet be aware they have been harmed," she continued.

**Surviving Arguments for Plaintiffs.** Although the path to successfully pursuing a class action has gotten narrower, experts told BNA that the Supreme Court's opinion may have limits.

In the decision, Justice Antonin Scalia, writing for a five-justice majority, said that the FAA preempts California's "*Discover Bank* rule," a state court judicial

gloss on state statutes that made class action waiver provisions in certain consumer agreements unconscionable and, therefore, unenforceable.

Sternlight said some unconscionability attacks on class action prohibitions may survive the decision.

“While stating that the FAA preempted ‘the *Discover Bank* rule,’ the majority made clear that unconscionability can still appropriately be used to invalidate arbitration clauses. Thus, in a future case where plaintiffs could show that the nature of the arbitration process, including its lack of class action opportunities, prevented plaintiffs from having access to justice, a court could find the arbitration clause unconscionable and this finding would not be preempted by the FAA,” Sternlight said.

“The Supreme Court’s finding in *Concepcion* described the AT&T arbitration process in highly favorable terms, praising its speed and efficiency and noting that it was likely to ensure relief and provide adequate incentives for prosecution of meritorious claims. In future cases, where companies’ plans might be less favorable to consumers or other plaintiffs, I believe *Concepcion* could appropriately be distinguished,” Sternlight continued.

For example, the arbitration agreement at issue in *Concepcion* provided that AT&T would pay claimants a minimum of \$7,500 and twice their attorneys’ fees if they obtained an arbitration award higher than AT&T’s most recent settlement offer.

**F. Paul Bland, senior attorney at Public Justice** who has litigated many cases involving class action waivers in arbitration agreements, reached a similar conclusion about the limits of the opinion.

**Bland told BNA** May 2 that it seemed as if the opinion is based on the premise that most individuals can vindicate their rights without a class action. He said that premise arises in large part because **there was no factual record in this case** demonstrating that the class action ban was exculpatory.

He said he will be arguing to courts that *Concepcion* doesn’t apply in settings where the evidence shows that the class action ban would shield a company from liability.

In such a case, **Bland said**, “The only way that one could say the *Concepcion* opinion would preempt state laws that would strike down a class action ban is if you believe that Justice Scalia intended to essentially reverse the long-stated rule of law that arbitration clauses are only enforceable when they allow people to effectively vindicate their rights.” Scalia cited with approval several Supreme Court cases that state this premise, Bland posited.

**No Application in State Courts?** **Bland said that the decision should not apply in state court at all.** Thomas, he stated, is on board with the idea that the state rule is preempted if the case is in federal court, but has said unequivocally in four cases, first in *Allied-Bruce Termitix Cos. v. Dobson*, 513 U.S. 265 (1995), that none of the FAA’s provisions apply in state court, Bland said.

The defense bar will probably say that Thomas has changed his mind on this issue, but Bland disagreed. Thomas didn’t discuss the application of the FAA in state court in *Concepcion* because it didn’t apply here, Bland continued. The *Concepcions*’ case was brought in the U.S. District Court of the Southern District of Cali-

fornia. Thomas has only talked about his position on this issue in cases arising in state court, he said.

**Effect of Thomas Concurrence.** Others said that the Thomas concurrence does not technically limit the majority opinion.

Thomas’s concurrence said that Section 2 of the FAA, which provides that a court can invalidate an arbitration provision on grounds that apply to any contract, only applies to contract formation issues such as fraud or duress. Contract defenses, such as public policy, that are unrelated to the making of the agreement cannot be the basis for declining to enforce an arbitration clause, Thomas wrote.

“The most important thing Thomas did was that he joined in the court’s opinion,” Kaplinsky said. “He reluctantly joins because he is not a big fan of implied federal preemption in all kinds of contexts . . . As a practical matter, I don’t think it matters very much what Thomas said,” he said.

Sternlight disagreed about the practical consequences of the concurrence. “As a technical matter, no, I don’t think Justice Thomas’s opinion has a limiting effect, in that he goes out of his way to join the majority. However, from a practical standpoint, I do think that eventually it may be important that Thomas is thinking about these issues from a somewhat different perspective.”

Sternlight continued, “Justice Thomas clearly believes and states that if an arbitration clause were so unreasonable/unfair that no reasonable person would accept that clause, then the clause should fail under Section 2. Thus, if the court were to hear a case in which a class action prohibition contained in an arbitration clause was written in such a manner as to prevent claimants from presenting their claim in any forum, I believe that five or more justices—including Justice Thomas—might well hold such a clause was void.”

**No Limit on Federal Substantive Law.** **Bland said that the decision will likely not apply to federal substantive causes of action, such as violation of the antitrust laws.**

“I think there is very strong case law that says that it violates the antitrust laws to have a class action ban in settings where the evidence would show that the ban would gut the antitrust laws,” Bland said.

For example, the Second Circuit decided March 8 in *In re American Express Merchants’ Litig.*, No. 06-1871-cv (2d Cir. 2011) (12 CLASS 198, 3/11/11) that a class action waiver is unenforceable when it would effectively shut down an action seeking to vindicate statutory rights.

Bland said he thought this rule would apply to other statutes as well.

**Role of the CFPB.** Burch said that she is hopeful that the Consumer Financial Protection Bureau will get involved in limiting the effects of the decision. The new Dodd-Frank Act gives that agency the authority to regulate mandatory pre-dispute arbitration in consumer financial products and services contracts, she said.

Congress directed the CFPB to conduct a study concerning the use of pre-dispute arbitration in the financial services context and to report back to Congress, 12 U.S.C. § 5518.

Andrew L. Sandler, chairman of BuckleySandler LLP and chief executive officer of Treliant Risk Advisors LLP in Washington, D.C., as well as a seasoned class ac-

tion defense litigator, told BNA May 3 that many will be closely watching how the bureau deals with this issue as an initial measure of its credibility.

“Hopefully, what the bureau will do is focus on what will really benefit consumers; that is, to embrace arbitration, but make sure that any arbitration approach is fair to consumers as well as companies,” he said.

Sandler said that it is possible that the bureau will seek to find a way to circumvent the opinion based on an argument that Congress gave it the power to overrule the decision, but he called that position a “hard sell.”

“I think when the Supreme Court speaks, if you are going to overrule the court under our system of separation of powers, it really needs to be through direct congressional action,” he said.

**Momentum for Passage of the AFA?** The decision may also provide momentum for revival of the **Arbitration Fairness Act**, which died in committee but received a substantial amount of attention and tallied 127 cosponsors in its 2009 iteration. The act sought to regulate mandatory arbitration in consumer, employment and franchise disputes.

Following release of the opinion April 27, U.S. Senators Al Franken (D-Minn.) and Richard Blumenthal (D-Conn.) and Representative Hank Johnson (D-Ga.) said that they planned to reintroduce the bill. This version would eliminate forced arbitration clauses in employment, consumer, and civil rights cases, and would allow consumers and workers to choose arbitration after a dispute occurred, a statement from Franken’s office said.

Bland agreed that the decision may lead to passage of the AFA. “I have spoken with a number of elected officials who have expressed complete shock at the idea of this opinion. There are a number of state and federal officials that cannot believe that the Supreme Court went as far as it did,” he said.

Bland said that state legislators have also contacted him about how to get around this opinion through state legislation. “That is something we are going to be thinking about,” he said.

**Class Action Waivers Not for Everyone.** Gerald L. Maatman Jr., a partner of Seyfarth Shaw LLP in Chicago and New York, who defends employment class actions, said he disagrees with those who are pronouncing class ac-

tions dead. In the employment context, not all businesses will adopt class action waivers in pre-dispute arbitration agreements after this decision, he said.

Companies have to consider the kinds of litigation they most often face before deciding whether to embrace pre-dispute arbitration agreements.

In cases that might go before a jury and have a massive verdict, corporate defendants feel more comfortable in front of an arbitrator, Maatman said. But, on the other hand, in cases where corporations can win at the summary judgment stage in court, they often lose in front of the arbitrator. “There is a sense that in average, run of the mill cases, plaintiffs do better in arbitration than in the courthouse,” Maatman said.

It’s not a “black and white decision” for many companies to decide whether to adopt an arbitration agreement with a class action waiver, Maatman said. Companies have to ask, “When you look at your array of litigation risks, how many fall in the bucket of being the ‘bet-the-company’ class actions that you want your waiver to cover and keep you out of the federal courthouse and how many could you easily dispose of in the courthouse with minimum value?”

**Reading the Tea Leaves for *Dukes*.** Maatman said that the *Concepcion* decision might give some clues about the resolution of *Wal-Mart v. Dukes*, the blockbuster class action case that was argued this spring and expected to be decided in early summer (12 CLASS 265, 4/8/11).

“From a 100,000 foot view, *Concepcion* signals that at least five judges are not troubled with a limit with respect to class action litigation, at least so far as they are interpreting the FAA,” he said.

He said that one could read the tea leaves to mean those are five judges who might be inclined to elevate standards that currently exist and that will be elucidated in the *Wal-Mart v. Dukes* decision.

But he cautioned that the cases raise different issues so it is not an “apples to apples” comparison. “It signals a judicial disposition on the issue rather than a likely judicial holding on the issue,” he said.

BY JESSIE KOKRDA KAMENS

*The Supreme Court’s opinion in AT&T Mobility LLC v. Concepcion*, 79 U.S.L.W. 4271 (U.S. 2011), is available at <http://pub.bna.com/lw/09893.pdf>.