Ballard Spahr
LLP

AT&T Mobility LLC v. Concepcion and its Progeny and Scorecard on where Federal and State Appellate Courts and Statutes Stand on Enforcing Class Action Waivers in Pre-Dispute Consumer Arbitration Agreements

By: Alan S. Kaplinsky
Senior Partner and Chair of
Consumer Financial Services Group
Ballard Spahr LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
Telephone: (215) 864-8544
Telecopier: (215) 864-8999
E-Mail: kaplinsky@ballardspahr.com
Web Site: http://www.ballardspahr.com
(Practice Areas, Practice Groups,
Consumer Financial Services Group)

This outline was last revised on August 15, 2011

United States Supreme Court Opinion
Upholding Validity of Class Action Waivers

AT&T Mobility LLC v. Concepcion, No. 09-893, 131 S. Ct. 1740, 2011 U.S. LEXIS 3367. On April 27, 2011, the U.S. Supreme Court reversed the 9th Circuit Opinion (sub nom Laster v. AT&T Mobility LLC, 584 F.3d 849 (9th Cir. 2009)) and held that the FAA preempts California state court decisions holding that arbitration agreements between consumers and companies containing express class action waivers are unconscionable and unenforceable.

Important Opinions and Orders Following Concepcion

Missouri Title Loans, Inc. v. Brewer, No. 10-1027, 2011 U.S. LEXIS 3378 (May 2, 2011) (Supreme Court granted the petition for a writ of certiorari, vacated opinion of Missouri Supreme Court and remanded the case to the Missouri Supreme Court for further consideration in light of Concepcion; Missouri Supreme Court has asked for additional briefing.)

Sonic Automotive v. Watts, No. 10-315, 2011 U.S. LEXIS 3532 (May 2, 2011) (Supreme Court granted the petition for a writ of certiorari, vacated opinion of South Carolina Supreme Court and remanded the case to the South Carolina Supreme Court for further consideration in light of Concepcion).

Cellco Partnership v. Litman, No. 10-551, 2011 U.S. LEXIS 3383 (May 2, 2011) (Supreme Court granted the petition for a writ of certiorari, vacated opinion of Third Circuit and remanded the case to the Third Circuit for further consideration in light of Concepcion; Third Circuit has obtained additional briefing).

Fensterstock v. Educ. Partners, No. 10-987, 2011 U.S. LEXIS 4434 (June 13, 2011) (Supreme Court granted the petition for a writ of certiorari, vacated the opinion of Second Circuit and remanded the case to the Second Circuit for further consideration in light of Concepcion). Upon remand, Second Circuit concludes that its earlier opinion holding that the class action waiver is unconscionable under California law is no longer viable and remands to District Court to consider other arbitrability issues. No. 09-1562-cv, 2011 WL 2582166 (2nd Cir. June 30, 2011).

Bellows v. Midland Credit Management, Inc., No. 09CV 1951-LAB (W.Me), 2011 WL 1691323 (S.D. Cal. May 4, 2011) ("[Concepcion] disapproved of "[the California Supreme Court opinion in] Discover Bank, holding it impermissibly interfered with the Federal Arbitration Act. That decision disposes of Bellow's best argument, making clear the agreement to arbitrate is not substantively unconscionable merely because it includes a class action waiver. It is therefore not invalid, and will be enforced").

Zarandi v. Alliance Data Systems Corp., et al, CV 10-8309 DSF (ICGx), 2011 WL 1827228 (C.D. Calif. May 9, 2011). ("Plaintiff argues that the Court should not compel arbitration and stay proceedings because (1) Defendants have not shown a valid arbitration agreement exists; and (2) the arbitration agreement is unconscionable under state law due to its class action waiver. In the alternative, Plaintiff requests that the Court

bifurcate Plaintiff's claims that seek injunctive relief because such relief is not subject to arbitration under California law. Both of Plaintiff's arguments lack merit. Plaintiff does not dispute that she received the terms and conditions for her card. Her failure to opt out of the Arbitration Provision constitutes consent to those terms. See Gentry v. Superior Court, 42 Cal. 4th 443, 467-68 (2007) abrogated on other grounds, Concepcion, 2011 WL 1561956. Her second argument is no longer viable after Concepcion. See 2011 WL 1561956, *5-*13. The Court also rejects the request to bifurcate the claims seeking injunctive relief because the FAA preempts state law to the extent it prohibits arbitration of a particular type of claim See id. At *6."); plaintiff's motion for reconsideration denied (July 21, 2011).

In re Checking Account Overdraft Litigation – Hough v. Regions Financial Corporation, No. 10-12376, 2011 WL 1663989 (11th Cir. April 29, 2010); Barras v. Branch Banking and Trust Company, No. 10-12377; 2011 WL 169562 (11th Cir. April 28, 2011); Powell-Perry v. Branch Banking and Trust Company, No. 10-12374, 2011 WL 1659559 (11th Cir. April 28, 2011); 1659559 (11th Cir. April 28, 2011; Given v. M&T Bank Corporation, No. 10-12375, 2011 WL 16663991 (11th Cir. April 29, 2011); Buffington v. Suntrust Banks, Inc., No. 10-12373, 2011 WL 1659601 (11th Cir. April 28, 2011). (Court vacates and remands all five cases to the District Court for reconsideration in light of Concepcion).

Arellano v. T-Mobile USA, Inc., No. C 10-05663 WHA, 2011 WL 1842712 (N.D. Calif. May 16, 2011) (Court holds that Concepcion compels individual arbitration at least in federal court of claims seeking injunctive relief and preempts the California Supreme Court opinions in Broughton v. Cigna Healthplans of California, 21 Cal. 4th. 1066 (1999) and Cruz v. PacificCare Healthy Sys., Inc., 30 Cal. 4th 303 (2003)

Day v. Persels & Associates, LLC, Case No. 8:10-CV-2463-T- 33 TGW, 2011 U.S. Dist. LEXIS 49231(M.D. Fla. May 9, 2011) (Relying upon Concepcion, Court holds that FAA preempts Florida law to the extent that it would invalidate as substantively unconscionable a class action waiver in class action brought against debt settlement company under the Florida Deceptive and Unfair Trade Practices Act and the Federal Credit Repair Organizations Act; there was no procedural unconscionability by virtue of Concepcion and opt-out feature)

D'Antuono v. Serv. Rd. Corp., No. 3:11 CV 33 (MRK), 2011 U.S. Dist. LEXIS 57367 (D. Conn. May 25, 2011) (Although Court concludes that class action waiver is valid under Connecticut law, court also reads Concepcion broadly to cover both substantive and procedural unconscionability and to the federal common law doctrine involving the vindication of federal statutory rights.); certifies order to Second Circuit for interlocutory review, 2011 WL 2222313 (D. Conn. June 6, 2011)

Bernal v. Burnett, Civil Action No. 10-cv-01917-WJM-KMT, 2011 WL 2182903 (D. Colo. June 6, 2011) (Court compels individual arbitration of claims of named-plaintiffs after applying Concepcion; Court rejects notion that Concepcion does not affect procedural unconscionabilty)

Wallace v. The Ganley Group, No. 95081, 2011 WL 2434093 (Ohio Ct App. 8th Dist. June 16, 2011) (Relying upon Concepcion, Court affirms order of trial court compelling individual arbitration of claim against used-car dealer under Ohio Consumer Sales Protection Act.)

Villegas v. US Bancorp, No. C 10-1762 RS, 2011 U.S. Dist. LEXIS 65032 (N.D. Cal. June 20, 2011) (Relying upon Concepcion, Court compels individual arbitration in a case that had been pending for 13 months; Court rejected waiver argument made by plaintiff because it would have been futile for defendant to have sought arbitration until Concepcion case was decided.)

Kanbar v. O'Melveny & Myers, No. C-11-0892 EMC, 2011 WL 2940690 (N.D. Calif. July 21, 2011) (Court compels individual arbitration based on plaintiff's waiver of judicial forum after holding that Concepcion does not preempt holding in Davis v. O'Melveny & Myers, 485 F.3d 1066 (9th Cir. 2007) that following features of arbitration provision are unconscionable under California law: (1) provision giving employee only one year to give notice from when any claim was known to him or her or with reasonable effort should have been known to him or her; (2) provision barring an employee from mentioning what took place during the arbitration or even the fact that the arbitration existed in the first place; and (3) provision exempting defendant from arbitration.)

Reeners v. Verizon Communications, Inc., No. 3-11-0573, 2011 WL 2791262 (M.D. Tenn. July 14, 2011) (Court follows Concepcion and compels individual arbitration after refusing to allow plaintiff to conduct arbitration-related discovery.)

Daugherty v. Encana Oil & Gas (USA) Inc., Civil Action No. 10-cv-02272 – WJM-KLM, 2011 WL 2791338 (D. Colo. July 15, 2011) (Court compels individual arbitration of Fair Labor Standards Act ("FLSA") class action after severing two features of arbitration provision which Court held were unconscionable under Colorado law or incompatible with FLSA: (1) provision requiring application of AAA Commercial Rules which permit assessment of any costs on plaintiffs; and (2) provision allowing for award of attorneys' fees to defendant in the event it is prevailing party. While Concepcion does not preempt Colorado law on these points, Concepcion does preempt argument that arbitration provision is unconscionable because it is adhesion contract.)

Hamby v. Power Toyota Irvine, No. 11cv544-BTM (BGS), 2011 WL 2852279 (S.D. Calif. July 18, 2011) (Court permits discovery on unconscionability of arbitration provision and class action waiver after concluding that while plaintiff can no longer rely on California's Discover Bank rule to assert that the arbitration provision is substantively unconscionable merely because it includes a class action waiver, Concepcion "does not stand for the proposition that a party can never oppose arbitration on the ground that the arbitration clause is unconscionable.)

Estrella v. Freedom Financial, No. C 09-03156 SI, 2011 U.S. Dist. LEXIS 71606 (N.D. Calif. July 5, 2011) (Court, relying upon Concepcion, compels individual arbitration of claims under California Unfair Competition Law, California Consumer Legal Remedies Act and negligence claims and stays action on the Federal Credit Repair Organizations

Act ("CROA") claim pending the outcome of CompuCredit Corp. v. Greenwood in the U.S. Supreme Court where the Court will determine whether CROA claims can be arbitrated.)

Hawkins v. Hooters of America, Civil Case No. 09-1475 (RJL), 2011 U.S. Dist. LEXIS 72024 (D.D.C. July 6, 2011) (Court denies motion to vacate arbitrator's clause construction award determining that class arbitration was not permitted under the arbitration provision with respect to a claim under the Fair Labor Standards Act; Court relied, in part, on Concepcion's holding that class arbitration is generally disfavored as undermining the efficiency benefits of the arbitration process.)

In re California Title Insurance Antitrust Litigation, No. 08-01341 JSW, 2011 WL 2566449 (N.D. Calif. June 27, 2010) (Court compels individual arbitration of claims alleging that defendant "manipulated, controlled and maintained the cost of title insurance at supra-competitive levels" and "fixed prices at rates that far exceed the risk and loss experience associated with the insurance" based on Concepcion and held that there was no waiver even though case had been litigated since 2008.)

Chen-Oster v. Goldman, Sachs & Co., 10 Civ. 6950 (LBS) (JCF), 2011 U.S. Dist. LEXIS 73200 (S.D.N.Y. July 7, 2011) (Court denies motion for reconsideration of Chen-Oster v. Goldman, Sachs & Co., 2011 U.S. Dist. LEXIS 46994 (S.D. N.Y. April 28, 2011) where Court denied motion to compel individual arbitration of pattern and practice claim of gender discrimination under Title VII of Civil Rights Act of 1964 on the basis that such a claim, as opposed to a disparate impact claim, may only be prosecuted on a class basis; Court distinguishes Concepcion on the basis that Concepcion involved the preemption of state contract law while this case involves rights created by a competing federal statute.)

Wolf v. Nissan Motor Acceptance Corporation, Civil Action No. 10-cv-3338 (NLH) (KMW), 2011 U.S. Dist. LEXIS 66649 (D.N.J. June 22, 2011) (Court holds that (i) Concepcion overrides New Jersey Supreme Court opinion in Muhammad v. County Bank of Rehoboth Beach, 912 A.2d 88 (N.J. 2006) (which held that class action waiver is unconscionable in small-dollar consumer case) and (ii) there is no non-waivable right to bring a class action under the Servicemembers Civil Relief Act.)

Williams v. Securitas Security Services USA, Inc., Civil Action No. 10-7181, 2011 WL 2713741 (E.D. Pa. July 13, 2011) (Court grants emergency motion of plaintiffs for a protective order and corrective mailing to address defendant's improper communications with absent class members—namely, implementing an arbitration provision which could apply to pending putative class actions—and holds that Concepcion is not relevant to the issue.)

Brown v. Ralph's Grocery Company, B222689, 2011 WL 2685959 (Calif. Ct. App., 2nd Dist. July 12, 2011) (Court holds that Concepcion does not apply to representative actions under the California Private Attorney General Act of 2004 ("PAGA") and affirms order of trial court that waiver of right to pursue a representative action under PAGA was not enforceable; case remanded to determine whether such waiver should be severed.)

Quevado v. Macy's Inc., No. CV 09-1522 GAF (MANx), 2011 WL 3135052 (C.D. Calif. June 16, 2011) (Court holds that Concepcion applies to representative PAGA claims.)

In re Apple and AT&T iPad Unlimited Data Plan Litigation, No. C-10-02553 RMW, 2011 WL 2886407 (N.D. Calif. July 19, 2011 (Court holds that Concepcion preempts Massachusetts and Washington laws holding that class action waivers are invalid as well as California's arbitration exemption for claims requesting public injunctive relief as held in Broughton v. Cigna Health Plans of California, 21 Cal. 412 1066, 1079-80 (1999) and Cruz v. PacifiCare Health Systems, Inc., 30 Cal. 4th 303, 316 (2003))

Cardenas v. AmeriCredit Financial Services Inc., Nos. C 09-04978 SBA, C 09-04892 SBA, 2011 WL 2884980 (N.D. Calif. July 19, 2011) (Court stays proceeding pending outcome of appeal in 9th Circuit and observes that since Broughton v. Cigna Health Plans of California, 21 Cal. 412 1066, 1079-80 (1999) and Cruz v. PacifiCare Health Systems, Inc., 30 Cal. 4th 303, 316 (2003)) "create an outright prohibition to the arbitration of certain claims [i.e., for pubic injunctive relief], the application of Concepcion's 'straightforward' analysis arguably compels the conclusion that the FAA preempts both of these cases")

Hopkins v. World Acceptance Corporation, No. 1-10-cv-03429- SCJ, 2011 U.S. Dist. LEXIS 79770 (N.D. Ga. June 29, 2011) (Court compels arbitration in reliance upon Concepcion: "The [Supreme] Court's ruling is quite broad, and allows for the enforcement of class action waivers in arbitration agreements, even when (1) the arbitration agreement is a contract of adhesion, (2) the plaintiff can only recover a small amount, and (3) the plaintiff alleges that the defendant had schemed to cheat its customers." The Court also holds that there is no procedural unconscionability, in part because of the opt-out feature. The Court also refuses to allow the plaintiff to conduct arbitration-related discovery.)

Boyer v. AT&T Mobility Services, LLC, Civil No. 10CV1258 JAH (WMc), 2011 U.S. Dist. LEXIS 80607 (S.D. Calif. July 25, 2011 (Court relies upon Concepcion and compels individual arbitration of claims for (i) fraudulent inducement; (ii) violation of California Consumer Legal Remedies Act; (iii) violation of the California Unfair Competition Law; and (iv) false and deceptive advertising.)

Nakano v. ServiceMaster Global Holding, Inc., No. C 09-05152 SI, 2011 U.S. Dist. LEXIS 81949 (N.D. Cal. July 27, 2011) (Court relies on Concepcion in rejecting any continuing viability of California Supreme Court opinion in Gentry v. Superior Court, 42 Cal. 4th 443 (2007), in case involving California Labor Code and Wage Orders and California Business and Professions Code, Section 17200 and compels individual arbitration; court also rejects waiver argument; petition for reconsideration denied on August 9, 2011, 2011 U.S. Dist. LEXIS 88901)

Morse v. ServiceMaster Global Holdings, Inc., Civil Action No. C 10-00628 SI, 2011 U.S. Dist. LEXIS 82029 (N.D. Cal. July 27, 2011) (same result and reasoning as Nakano)

NAACP of Camden County East v. Foulke Management Corp., Docket No. A-1230-09T3, 2011 WL 3273896 (N.J. Super. Ct. App. Div. August 2, 2011) (Although Court reversed order compelling arbitration because disparate arbitration provisions were too confusing, too vague, and too inconsistent to be enforced, the Court strongly endorsed Concepcion and stated: "[T]he Court in AT&T Mobility held that the FAA preempts courts from nullifying class action waiver provisions in arbitration agreements based upon state-law notions of unconscionablity and public policy. The Court unambiguously ruled that the FAA trumps state laws in this respect. Consequently, we must reject plaintiffs' specific attempt to have us declare the class action waiver provisions in this case invalid on the basis that such waivers, as a policy matter, unconscionably discourage the pursuit of 'low-value' claims such as those involved here." The Court then rejected each of these arguments made by plaintiffs to distinguish Concepcion: (1) the case does not involve interstate commerce, (2) Concepcion does not apply to allegations of class-wide fraud; (3) the defendant's arbitration provision in Concepcion was more consumer friendly than the AT&T provision; and (4) Concepcion condemns only generalized state-law nullifications of class waivers, not case-specific ones. With respect to the third argument, the Court stated: "The fact that the arbitration provisions in AT&T Mobility may have been more generous to consumers than the provisions here does not affect the force of the Supreme Court's preemption analysis. The Court's analysis turned on general doctrinal principles rather than the specific wording of the cellular contracts."

In re Gateway LX6810 Computer Products Litigation, No. SACV 10-1563-JST (JEMx), 2011 Wl 3099862 (C.D. Cal. July 21, 2011). (Court relies upon Concepcion and compels individual arbitration of claims for (i) violations of the California Consumer Legal Remedies Act ("CLRA"); (ii) violation of the California Unfair Business Practices Act ("UCL"); (iii) violations of the California False Advertising Law; (iv) violations of the Song-Beverly Warranty Act; (v) strict liability; (vi) breach of warranty; (vii) Common counts, assumes it and declaratory relief. Based on Concepcion, Court also rejects argument that claims for injunctive relief under CLRA and UCL are nonarbitrable under California law and that the arbitration provision is therefore unenforceable)

Webster v. Freedom Debt Relief, LLC, Case No. 1:10-cv-1587, 2011 U.S. Dist. LEXIS 85843 (N.D. Ohio July 15, 2011) (Court compels individual arbitration after concluding: "In the wake of Concepcion, any public policy in favor of class action for consumers in the [Ohio Consumer Sales Practices Act] is clearly superseded by the FAA….")

Swift v. Zynga Game Network, Inc., No. C-09-5443 EDL, 2011 U.S. Dist. LEXIS 85983 (N.D. Cal. Aug. 4, 2011) (Court follows Concepcion and compels individual arbitration and found no waiver even though case was pending for 18 months before motion was filed)

Saincome v. Truly Nolen of America, Inc., Case No. 11-CV-825-JM (BGS), 2011 U.S. Dist. LEXIS 85880 (S.D. Calif. Aug. 3, 2011) (Court compels arbitration of class action brought under Fair Labor Standards Act ("FLSA") and authorizes the arbitrator to decide whether to permit class arbitration; court distinguishes (i) Stolt-Nielsen based on the fact that the employment arbitration agreement which contained no class action waiver was an

adhesion contract, and (ii) Concepcion because the FLSA permits class members to participate in the class on an opt-in basis only)

Murphy v. DirecTV, Inc., Case No. 2:07-cv-06465-JHN-VBKx, 2011 U.S. Dist. LEXIS 87625 (C.D. Calif. Aug. 2, 2011) (Based on Concepcion Court grants motion to reconsider May 9, 2008 order denying motion to compel arbitration even though 9th Circuit had affirmed that order)

Pablo v. Service Master Global Holdings, Inc., No. C 08-03894 SI, 2011 U.S. Dist. LEXIS 87918 (N.D. Calif. Aug. 9, 2011) (Court denied motion for class certification based on a failure to satisfy the "superiority" requirement by virtue of the fact that numerous arbitration agreements were signed by defendants and their employees and defendants utilized these agreements for at least 8 years and the class action waivers therein are now enforceable post-Concepcion)

Carney v. Verizon Wireless Telecom, Inc., Case No. 09CV1854 DMS (WVG), 2011 U.S. Dist. LEXIS 88172 (S.D. Calif. Aug. 9, 2011) (Court compels individual arbitration post-Concepcion)

Cruz v. Cingular Wireless, LLC, No. 08-16080 (11th Cir. August 11, 2011) (Court affirms District Court order compelling individual arbitration: "[T]o the extent that Florida law would be sympathetic to the Plaintiffs' arguments here, and would invalidate the class waiver simply because the claims are of small value, the potential claims are numerous, and many consumers might not know about or pursue their potential claims absent class procedures, such a state policy stands as an obstacle to the FAA's objective of enforcing arbitration agreements according to their terms, and is preempted"; the Court gave short shrift to (i) the affidavits of three Florida consumer law attorneys who attested that they would not represent consumers in pursuing the claims in the case on an individual basis and (ii) statistical evidence showing that an infinitesimal percentage of AT&T subscribers have arbitrated a dispute with AT&T which the plaintiff claims starkly demonstrates the claims – suppressing effect of the class action ban).

Alfeche v. Cash America Int'l, Inc., Civil Action No. 09-0953 (E.D. Pa. Aug. 12, 2011) Relying upon Concepcion, Court enforces class action waiver and orders individual arbitration: "Like the California Supreme Court's decision in Discover Bank, the Pennsylvania Superior Court's decision in Thibodeau [v. Comcast Corp., 912 A.2d 874 (2006)], in its analysis of the circumstances under which class action waivers are procedurally and substantively unconscionable has the effect of requiring the availability of classwide arbitration. The Supreme Court has held that state law requiring the availability of classwide arbitration undermines the FAA's central purpose and is preempted by the FAA. The FAA preempts Pennsylvania's unconsionability law with regard to class action waivers in arbitration agreements. Under FAA § 2, the instant arbitration clause containing a class action waiver is valid and enforceable." (citations and footnote omitted)

Plows v. Rockwell Collins, Inc., Case No. SACV 10-01936 (MANx), 2011 U.S. Dist. LEXIS 88781 (C.D. Calif. Aug. 9, 2011). (Court distinguishes Concepcion and holds

that (i) a class action waiver in an employment agreement is still invalid under the California Supreme Court's opinion in Gentry v. Superior Court, 42 Cal. 4th 443 (2007) which is not preempted by the FAA, and (ii) Concepcion does not apply to representative actions under the California Private Attorney General Act of 2004).

Other Relevant U.S. Supreme Court Opinions

Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp., No. 08-1198, 2010 WL 1655826 (April 27, 2010) (although not dealing directly with validity of class action waiver, Court held that imposing class arbitration on parties who have not agreed to authorize class arbitration is inconsistent with the Federal Arbitration Act).

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 (1991) (although not dealing with validity of class action waiver, Court held that federal statutory age discrimination claim was subject to arbitration under the FAA "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator").

Federal Circuit Court Opinions
Upholding Validity of Class Action Waivers

Second Circuit

JLM Industries, Inc. v. Stolt-Nielson SA, 387 F.3d 163 (2nd Cir. 2004) (in dictum, Court states in footnote 9, in relevant part: "We also note that we do not understand JLM to be making an argument to the effect that its assertion of class claims should serve as a bar or deterrent to sending the instant case to an arbitral panel. We would likely view such an argument skeptically because [f]ederal courts have . . . consistently enforced arbitration provisions in the context of class action lawsuits where federal statutory claims have been at issue. Lewis Tree Serv., Inc. v. Lucent Techs, Inc., 239 F. Supp. 2d 332, 338 (S.D. N.Y. 2002)."

Third Circuit

Cappalli v. National Bank of Great Lakes, 281 F.3d 219 (3d Cir. 2001) (in context of usury action under Section 85 of National Bank Act involving claim of $33.02, rejecting plaintiff's contention that the arbitration agreement made it difficult for individuals to vindicate their rights "in small claim consumer cases")

Johnson v. West Suburban Bank, 225 F.3d 366 (3d Cir. 2000), cert. denied, 531 U.S. 1145 (2001) (no non-waivable right to class action under Truth-in-Lending Act)

Lloyd v. MBNA America Bank, N.A., 2001 U.S. Dist. LEXIS 8279 (D. Del. Feb. 22, 2001), aff'd, 27 Fed. Appx. 82, 2002, WL 21932 (3d Cir. Jan. 7, 2002) (because right to a class action is "merely procedural" and may be waived, "an arbitration clause barring classwide relief for claims brought under Truth-in-Lending Act is not unconscionable")

Sagal v. First USA Bank, N.A., 69 F. Supp. 2d 627 (D. Del. 1999), aff'd, 254 F.3d 1078 (3d Cir. 2001) (enforcing a class action waiver in an arbitration agreement despite plaintiff's contention that consumer claims are "too small to litigate" on an individual basis)

Delta Funding Corporation v. Harris, No. 04-1951 (3rd Cir. July 27, 2005) (petition to New Jersey Supreme Court to determine whether class action waiver is unconscionable). New Jersey Supreme Court granted petition. Docket No. 58,437, 185 N.J. 255 (2005)

Delta Funding Corporation v. Harris, No. 04-1951, 2006 U.S. App. LEXIS 24649 (3d Cir. Oct. 3, 2006) (Court affirms the opinion of the District Court which compelled arbitration after upholding the validity of class action waiver based on the New Jersey Supreme Court opinion in Delta Funding Corp. v. Harris, A44 September Term 2005, 2006 WL 2277984 (Aug. 9, 2006))

Gay v. CreditInform, 511 F.3d 369 (3d Cir. 2007) (in context of a claim for $39.92 under the Federal Credit Repair Organizations Act and the Pennsylvania Credit Services Act, Court enforces class action waiver after enforcing a Nevada choice-of-law clause and then stating that the result would be the same under Pennsylvania law because the FAA

preempts Pennsylvania law invalidating class action waivers). In Puleo v Chase Bank USA, N.A., No. 08-3837, 2010 WL 1838762 (3d Cir. May 10, 2010 (en banc), the Third Circuit stated in footnote 2: "While perhaps dicta itself, it is worth noting our agreement that Gay's discussion of Pennsylvania law was indeed dicta, since our holding in Gay was that Virginia law governed the parties' arbitration agreement. Gay, 511 F.3d at 390. In any event, the New Jersey case law at issue in Homa did not evince hostility toward arbitration clauses, which was the concern about Pennsylvania law expressed in Gay. Compare Homa, 558, F.3d at 230 with Gay, 511 F.3d at 394-95." Another panel of the Third Circuit reiterated this dicta in Litman v. Cellco Partnership, No. 08-4103, 2010 WL 2017665 (3d Cir. May 21, 2010).

Cronin v. Citifinancial Services, Inc., No. 09-2310, 2009 WL 2873252 (3rd Cir. Sept. 9, 2009) petition for rehearing den'd, Dec. 21, 2009 (in context of Fair Credit Reporting Act ("FCRA") claim, enforcing a class action waiver noting that "Cronin sought actual and punitive damages, costs and attorneys' fees, all of which are permitted under the FCRA and potentially recoverable in an arbitration under that statute . . . . We have noted that the statutory ability to recover attorneys' fees helps to preserve an individual's ability to pursue claims, even in those situations where the class forum has been foreclosed.")

Kaneff v. Delaware Title Loans, Inc., No. 08-1007, 2009 WL 4042926 (3rd Cir. Nov. 24, 2009) petition for rehearing den'd, Dec. 21, 2009 (affirms order compelling individual arbitration after enforcing class action waiver under Pennsylvania law even though the dollar amount of the claim was less than $900)

Vilches v. The Travelers Companies, Inc., No. 10-2888 (3rd Cir. Feb. 9, 2010) (non-precedential) (applying New Jersey law, Court upholds validity of class action waiver in plaintiff's employment agreement after distinguishing prior New Jersey decisions that had invalidated class action waivers in consumer adhesion contracts involving small amounts of damages; court further concluded, however, that it was for the arbitrator to decide whether the arbitration agreement had been properly amended to add a class action waiver)

Fourth Circuit

Adkins v. Labor Ready, Inc., 303 F.3d 496 (4th Cir. 2002) (arbitration compelled despite inability to maintain class action under Fair Labor Standards Act)

Snowden v. CheckPoint Check Cashing, 290 F.3d 631 (4th Cir. 2002), cert. denied, 537 U.S. 187 (2002) (class action waiver not unconscionable under Maryland law)

Deiulemar Compagnia di Navigazione S.p.A. v. M/V Allegra, 198 F.3d 473 (4th Cir 1999), cert denied, 529 U.S. 1109 (2000) ("The parties here did not include in their agreement an express term providing for class arbitration. Thus, one could say that through the proper application of 9 U.S.C. §4, the FAA has already provided the type of procedure to be followed in this case, namely, non-class arbitration.")

In Re Cotton Yarn Antitrust Litigation, Nos. 05-2392, 05-2393, 505 F.3d 274 (4th Cir. Oct. 12, 2007) (Class action waiver is enforceable under federal antitrust laws.)

Fifth Circuit

Carter v. Countrywide Credit Indus., Inc., 362 F.3d 294 (5th Cir. 2004) (class action waiver not unconscionable under Texas law and no non-waivable right to class action exists under Fair Labor Standards Act)

Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, No. 379 F.3d 159 (5th Cir. 2004) (class action waiver not unconscionable under Louisiana law; also suggests that FAA would preempt state law if it invalidated class action waiver)

Sixth Circuit

Burden v. Check into Cash of Kentucky, LLC, 267 F.3d 483 (6th Cir. 2001) cert. denied, 535 U.S. 970 (2002) (court suggests that there is no non-waivable right to maintain class action under Truth-in-Lending Act, RICO and Kentucky law)

Seventh Circuit

Caudle v. American Arbitration Association, 230 F.3d 920 (7th Cir. Oct. 17, 2000) ("A procedural device aggregating multiple persons' claims in litigation does not entitle anyone to be in litigation; a contract promising to arbitrate the dispute removes the person from those eligible to represent a class of litigants")

Livingston v. Associates Finance, Inc., 339 F.3d 553 (7th Cir. 2003) (court enforced class action waiver based on FAA principle that arbitration agreement must be enforced in accordance with its terms)

Iowa Grain v. Brown, 171 F.3d 504 (7th Cir. 1999) ("Because arbitration is based fundamentally on an agreement between parties, [a class action] is normally unavailable in arbitration.")

Champ v. Siegel Trading Co., Inc., 55 F.3d 269 (7th Cir. 1995) ("Since the parties' arbitration agreement does not expressly provide for class arbitration, the district court correctly concluded that it was prohibited from reading such a procedure into these arbitration agreements.")

Eighth Circuit

Cicle v. Chase Bank, USA, No 08-1362, 2009 WL 3172157 (8th Cir. Oct. 6, 2009) (holding that class action was not unconscionable under Missouri law or contrary to the public policy permitting class actions under the Missouri Merchandising Practices Act)

Pleasants v. American Express Company, 541 F.3d 853 (8th Cir. 2008) (holding that class action waiver was not unconscionable under Missouri law because of fee-shifting feature in Truth-in-Lending Act and the fact that class action waiver was prominently disclosed; court distinguished Missouri Court of Appeals opinion in Whitney on the basis that the American Express arbitration provision did not limit the plaintiff's remedy)

In re Piper Funds, Inc., 71 F.3d 298 (8th Cir. 1995) (a party's "contractual and statutory right to arbitrate may not be sacrificed on the altar of efficient class action management")

Dominium Austin Partners, L.L.C. v. M.J. Emerson, 248 F.3d 720 (8th Cir. 2001) ("[B]ecause the partnership agreements make no provision for arbitration as a class, the district court did not err by compelling appellants to submit their claims to arbitration as individuals.")

Ninth Circuit

Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003) cert. denied, 540 U.S. 811 (2003) (FAA preempts provision under California Consumer Legal Remedies Act creating non-waivable right to class action)

Horenstein v. Mortgage Market, Inc., 9 Fed. Appx. 618 (9th Cir. 2001) ("Appellants' contention that the arbitration clause in the Employment Agreements may not be enforced because it eliminates their statutory right to a collective action [under the Fair Labor Standards Act] is insufficient to render an arbitration clause unenforceable")

Lozano v. AT&T Wireless Services, Inc., 504 F.3d 718 (9th Cir. 2007) (Court affirms order of District Court denying certification of a national class for claims based on Federal Communications Act because of the need for a state-by-state inquiry into the enforceability of the arbitration agreement and class action waiver with the result that individual questions would predominate over class-wide questions.)

Eleventh Circuit

Bowen v. First Family Financial Services, Inc., 233 F.3d 1331 (11th Cir. 2000)

Randolph v. Green Tree Fin. Corp. – Ala., 244 F.3d 814 (11th Cir. 2001) and Baron v. Best Buy Co., Inc., 260 F.3d 625 (11th Cir. 2001) (no non-waivable right to class action under Truth-in-Lending Act)

Jenkins v. First American Cash Advance of Georgia, LLC and First National Bank in Brookings, 400 F.3d 868 (11th Cir. 2005), rehearing and rehearing en banc denied, 143 Fed. Appx. 311 (2005), cert. denied, 126 S. Ct. 1457 (2006) (class action waiver is not unconscionable under Georgia law)

Caley v. Gulfstream Aerospace Corporation, 428 F.3d 1359 (11th Cir. 2005) (same; also suggests that FAA would preempt state law if it invalidated class action waiver)

Pendergast v. Sprint Nextel Corporation, No. 09-10612, 2010 WL 6745 (11th Cir. Jan. 4, 2010) Court certifies the following questions to the Florida Supreme Court:

> (1) Must Florida courts evaluate both procedural and substantive unconscionability simultaneously in a balancing or sliding scale approach, or may courts consider either procedural or substantive unconscionability independently and conclude their analysis if either one is lacking?

(2) Is the class action waiver provision in plaintiff's contract with Sprint procedurally unconscionable under Florida law?

(3) Is the class action waiver in plaintiff's contract with Sprint substantively unconscionable under Florida law?

(4) Is the class action waiver provision in plaintiff's contract with Sprint void under Florida law for any other reason?

In the aftermath of Concepcion, Sprint filed a motion to withdraw certification and to affirm.

Cappuccitti v. DirecTV, Inc., No. 09-14107, 2010 WL 4027719 (11th Cir. Oct. 15, 2010) (class action waiver not unconscionable under Georgia law despite the fact there was no attorneys' fees fee-shifting feature under common law claims for "money had and received" and for "unjust money" and no contractual fee-shifting feature because the plaintiff could have brought a claim under the Georgia Fair Business Practices Act—a statute which does contain a mandatory fee-shifting feature for successful plaintiffs; plaintiff admitted that he omitted such a claim because it only permitted an individual action; unconscionability gets determined at the time the contract is entered into and not when the lawsuit gets filed)

Cruz v. Cingular Wireless, LLC, No. 08-16080 (11th Cir. August 11, 2011) (Court affirms District Court order compelling individual arbitration: "[T]o the extent that Florida law would be sympathetic to the Plaintiffs' arguments here, and would invalidate the class waiver simply because the claims are of small value, the potential claims are numerous, and many consumers might not know about or pursue their potential claims absent class procedures, such a state policy stands as an obstacle to the FAA's objective of enforcing arbitration agreements according to their terms, and is preempted"; the Court gave short shrift to (i) the affidavits of three Florida consumer law attorneys who attested that they would not represent consumers in pursuing the claims in the case on an individual basis and (ii) statistical evidence showing that an infinitesimal percentage of AT&T subscribers have arbitrated a dispute with AT&T which the plaintiff claims starkly demonstrates the claims – suppressing effect of the class action ban).

Federal Circuit Court Opinions
Invalidating Class Action Waivers[1]

---

[1] Most of these opinions have been overruled by virtue of the U.S. Supreme Court's opinion in AT&T Mobility LLC v. Concepcion, No. 09-893, 2011 U.S. LEXIS 3367 (April 27, 2011). The only possible exceptions are those where the court invalidated the class action waiver based on a federal statute as opposed to state law. Also, in most of these opinions, the courts held that there was some degree of procedural unconscionability as well as substantive unconscionability under state law. Many companies now give consumers and employees the unconditional right to opt out of or reject the arbitration provision without it having any adverse repercussions. Courts in states that require that there be both procedural as well as substantive unconscionability in order to invalidate a contract based on unconscionability have validated class action waivers and other arbitration features that they considered substantively unconscionable when an opt-out right was provided to the consumer or employee. See, e.g., Circuit City Stores, Inc. v. Ahmed, 283 F.3d 1198 (9th Cir. 2002); Circuit City Stores, Inc. v. Najd, 294 F.3d 1104, 1108 (9th Cir. 2002); Providian National Bank v. Screws, 894 So. 2d 625 (Ala. Oct. 3, 2003); Tsadilas v. Providian Nat'l Bank, 13 A.D. 3d 190, 786 N.Y.S. 2d 478 (1st Dep't. 2004); Marley v. Macy's South, No. CV 405-227, 2007 WL 1745619, at *3 (S.D. Ga. June 18, 2007) (court enforced arbitration clause in employment agreement because "[w]hile Ms. Marley states that she did not have a choice to enter the arbitration process because she was 'in jeopardy of losing [her] job' if she did not, the record indicates that each employee was mailed an election form to opt-out of the program at their home address"). Pivoris v. TCF Financial Corporation, No. 07-C 2673, 2007 U.S. Dist. LEXIS 90562 (N.D. Ill. Dec. 7, 2007); SDS Autos, Inc. v. Chrzanowski, Case No. 1D06-4293, 2007 WL 4145222 (Fla Ct. App., 1st Dist. Nov. 26, 2007) (Invalidates class action waiver for holders of small claims under Florida Deceptive and Unfair Trade Practices Act whose attorney's fees are limited by the amount of their actual damages.) (arbitration agreement with class action waiver not procedurally unconscionable where "[p]laintiff had the absolute right to reject the arbitration provision without affecting her account contract or the status of her account"); Honig v. Comcast of Georgia, LLC, Civil Action No. 1:07-cv-1839-TCB, 537 F.Supp. 2d 1277 (N.D. Ga. Jan. 31, 2007) ("Finally, and most importantly …, Honig was free to reject the terms of the arbitration provision without a single adverse consequence. Specifically, the arbitration provision gave her the right to opt out within thirty days without adversely affecting her cable service, but she never exercised that right. Honig's ability to opt out of the arbitration provision dilutes her unconscionability argument because the provision was not offered on a take-it-or-leave-it basis. Courts have stressed the importance of such opt-out provisions in enforcing class action waivers in arbitration agreements."); Sanders v. Comcast Cable Holdings, LLC, No. 3:07-cv-918-J-33HTS (M.D. Fla. Jan. 14, 2008) (class action waiver provision was not unconscionable where arbitration provision allowed subscribers to opt out); Davidson v. Cingular Wireless, LLC, No. 2:06-cv- 00133, 2007 WL 896349, at *6 (E.D. Ark. Mar. 23, 2007) (class action waiver in contract for cell phone service not unconscionable where plaintiff failed to opt out);); Martin v. Delaware Title Loans, Inc.,

(continued...)

(...continued)

No. 08-3322, 2008 WL 444302 (E.D. Pa. Oct. 1, 2008) (finding plaintiff could not establish procedural unconscionability under PA law in light of 15 day opt-out right); Columbia Credit Services, Inc. v. Billingslea, No. B190776, 2007 WL 1982721 (Cal. Ct. App. July 10, 2007) (court affirmed lower court's confirmation of arbitration award after rejecting unconscionability challenge based in part on the fact that cardholder was given the right to opt out of the arbitration provision and failed to do so); Eaves-Leanos v. Assurant, Inc., No. 07-18, 2008 WL 1805431 (W.D. Ky. Apr. 21, 2008) (finding arbitration agreement with class waiver not unconscionable as plaintiff had opportunity to opt out); Enderlin v. XM Satellite Radio Holdings, Inc., No. 06-0032, 2008 WL 830262 (E.D. ark. March 25, 2008)(finding plaintiff could not establish procedural unconscionability in light of opt-out right); Crandall v. AT&T Mobility, LLC, No. 07-750, 2008 WL 2796752 (S.D. Ill. July 18,2008) (class action waiver in cell phone service contract not unconscionable where plaintiff failed to opt out); Webb v. ALC of West Cleveland, Inc., No. 90843, 2008 WL 4358554 (Ohio Ct. App., 8th App. Dist. Sept. 25, 2008) (citing *Ahmed supra*, the buyer in an automobile retail installment contract "could not demonstrate that the arbitration clause was unconscionable because the contract gave her the right to reject the arbitration clause"); Wright v. Circuit City Stores, Inc., Case No. CV 97-B-0776-5 (N.D. Ala. Feb. 5, 2001) (employment arbitration provision with opt-out right is enforced); Stiles v. Home Cable Concepts, Inc., 994 F. Supp. 1410 (1998) (unconscionability challenge is rejected where credit card issuer gave the cardholder the right to reject the arbitration provision and those who opted out had their 2% APR reduction in interest rate reinstated to its previous rate: "Stiles was given a clear choice in this case; he could take the arbitration provision or leave it"); Guadagno v. E*Trade Bank, No. CV 08-03628 SJO (JCX), 2008 WL 5479062 (C.D. Calif. Dec. 29, 2008) (Class action waiver does not violate fundamental policy of California because of opt-out right: "Here, Guadagno had a meaningful opportunity to opt out of the Arbitration clause, which contained the class action waiver, by notifying E*Trade in writing within 60 days of receiving the Agreement. The Agreement highlighted the Arbitration clause, and the introduction to the Arbitration clause highlighted the opt-out term. Because the Arbitration clause containing the waiver was not presented on a take-it-or-leave-it basis, but gave Guadagno sixty days to opt out, it was not unconscionable. Thus, application of Virginia law does not contradict California's fundamental policy against enforcing unconscionable consumer class action waivers."); Magee v. Advance America Servicing of Ark, Inc., No 6:08-CV-6105, 2009 WL 890991 (W.D. Ark. April 1, 2009) (Court enforces class action waiver after noting that the arbitration agreement was clearly set off from the rest of the contract and provided the consumers with a 30-day opt-out period – a period which was actually longer than the term of the loan); Fluke v. CashCall, No. 08-05776 (E.D. PA. May 21, 2009)(Court enforces class action waiver under Pennsylvania law: "We predict that the Pennsylvania Supreme Court would agree with the reasoning of the district courts in Guadagno and Honig. An opt-out provision, like the one in Fluke's agreement with FBD, seriously undermines a consumer's contention that the arbitration agreement is unconscionable. Fluke was given the option to say "no" to the arbitration provision and he was given a full 60 days to do so. In that way, he had complete control over the terms of the agreement and it cannot be said that the arbitration

(continued...)

(...continued)

agreement was presented to him on a take-it-or-leave-it basis. Furthermore, like the agreements in Guadagno and Honig, the FBD loan agreement requires that FBD pay the filing fee and any costs and fees charged by the arbitrator regardless of which party initiated the arbitration. Moreover, under § 503 of the Loan Interest and Protection Law, a borrower or debtor who prevails in an action "shall" recover a reasonable attorneys' fee. 41 Pa. Cons. Stat. § 503. This should alleviate any concern regarding the availability and willingness of counsel to represent him. Accordingly, this case differs materially from Thibodeau and is more analogous to Guadagno and Honig. We predict that the Pennsylvania Supreme Court would hold that the arbitration provision in the loan agreement in issue is not unconscionable and is enforceable."); Credit Acceptance Corporation v. Davisson, Case No. 1:08 CV 107 (N.D. Ohio June 30, 2009) (in rejecting Davisson's argument that the arbitration provision violated the Ohio Consumer Sales Practice Act since it purported to waive access to the court for vindicating a claim under it, the Court noted that Credit Acceptance Corporation did not "waive her recourse to the courts" because of the opt-out feature); Freedman v. Comcast Corporation, Nos. 435, 2102, Sept. Term 2008, 2010 Md. App. LEXIS 12 (Ct. of Spec. App. of Md. Jan. 28, 2010 (court holds that there is no procedural unconscionability under Maryland law as a result of 30-day opt-out feature); Clerk v. ACE Cash Express, Inc., No. 09-05117, 2010 U.S. Dist. LEXIS 7978 (E.D. Pa. Jan. 29, 2010) (court holds that there is no procedural unconscionability when payday loan borrower was given a 30-day right to reject the arbitration provision without it having any adverse effect on the loan); Jackson v. The Payday Loan Store of Illinois, Inc., (Case No. 09 C 4189 (N.D. Ill. March 17, 2010) ("Considering the totality of the circumstances relevant to the class action waiver at issue here, the Court concludes that the waiver is enforceable. The parties agreed to the Agreement as a whole, including the waiver, and failed to opt-out as allowed by the provision for doing so described above. This allowed either party to elect arbitration, and contains a clear and legible notice to Plaintiffs that it limited certain rights, including the right to pursue a claim as a class action. Hante is therefore barred by the terms of the Agreement from bringing a claim in arbitration on a class basis"); Ambrose v. Comcast Corporation, No. 3:09-cv-182, 2010 WL 1270712 (E.D. Tenn. Mar. 31, 2010) ("the court finds that the arbitration provision was not a 'contract of adhesion' because plaintiff was provided with an opportunity to 'opt-out' of arbitration with no adverse affect on his relationship with Comcast. The 30-day window to 'opt-out' of arbitration afforded the consumer [plaintiff] with a realistic opportunity to bargain . . . ."); Pellett v. TCF Bank, N.A., Civil No. 10-3943 (DSD/FLN), D. Minn. Nov. 24, 2010 ("Plaintiffs first argue that they could not avoid the arbitration agreement and that it was a contract of adhesion. One of the first pages of The Terms and Conditions clearly states, in plain English and contrasting type, that plaintiffs had a right to opt out of the arbitration agreement. The arbitration provisions again describe plaintiffs' 30-day right to opt out in plain, simple terms. As a result, plaintiffs had an absolute right to opt out of the arbitration agreement, and their argument that the agreement was unavoidable and offered on a take-it-or-leave-it basis fails. Plaintiffs' next argue that they were unfairly surprised by the terms because the opt-out provision was 'buried' in the Terms and Conditions and that they 'could not find, and if found, could not understand' the opt-out provision. Pls.' Mem. Opp'n 34.

(continued...)

First Circuit

Kristian v. Comcast Corp., 446 F.3d 25 (1st Cir. 2006) (invalidating class action waiver where claims were asserted under federal and state antitrust laws because enforcing the waiver would shield defendants from private consumer antitrust liability, impede consumers from effectuating their statutory rights and frustrate the goals underlying the antitrust laws)

Skirchak v. Dynamics Research Corporation, 508 F.3d 49 (1st Cir. Nov. 19, 2007) (Without reaching the argument that class action waivers violate either the Fair Labor Standards Act or public policy, the Court holds that a class action waiver is unconscionable under Massachusetts law because of the timing (it was implemented two days before the Thanksgiving holiday), the language (there was language which arguably conflicted with the waiver) and format of the presentation (the communication was in the form of an e-mail which required no acknowledgement by the employee and the waiver was buried in the document)

Second Circuit

In re American Express Merchants' Litigation, 2009 WL 214525 (2nd Cir. Jan. 30, 2009) (invalidating class action waiver where claims were asserted under Section 4 of the Clayton Act challenging AMEX's "Honor all Cards" rule based on a vindication of statutory rights analysis. Plaintiff had demonstrated that the size of the recovery by any individual plaintiff would be too small to justify the expenditure of bringing an individual action, which in this case exceeded several hundreds of thousands of dollars for an expert

---

(...continued)

This argument is contrary to the face of the documents. The Account Agreements clearly direct plaintiffs to the Terms and Conditions. Moreover, on one of the first pages, the Terms and Conditions remind plaintiffs that they have a 30-day right to opt out of the arbitration agreement. Plaintiffs may not avoid their signed agreements by claiming that they did not read or understand the contents of those agreement. See Gartner v. Eikill, 319 N.W.2d 397, 398 (Minn. 1982)"; Day v. Persels & Associates, LLC, Case No. 8:10-CV-2463-T-33 TGW (M.D. Fla. May 9, 2011) ("More importantly, the arbitration provision was not a 'take-it-or-leave-it' situation, since it provided that the plaintiff could reject the provision by sending a rejection notice to CareOne (Doc. 25-1, p.8). And the Client Agreement itself was not particularly binding since the plaintiff was able to cancel it and get her money back."); Hopkins v. World Acceptance Corporation, No. 1:10-cv-03429- SCJ, 2011 U.S. Dist. LEXIS 79770 (N.D. Ga. June 29, 2011) (Court compels individual arbitration after finding no procedural unconscionablity, in part because of opt-out feature: "[W]hen a party challenges an arbitration agreement that contains an opt-out provision and fails to opt-out, the unconscionability argument is diluted because the provision was not offered on a take-it-or-leave-it basis.") But, see Duran v. Discover Bank, 2009 WL 1873651 (Call. App. 2d Dist. June 19, 2009 (unreported)) (class action waiver invalidated despite opt-out feature.

report which would not be recoverable in arbitration). On May 3, 2010, the U.S. Supreme Court (No. 08-1473) granted certiorari, vacated the Second Circuit judgment and remanded the case to the Second Circuit for further proceedings in light of the Supreme Court's opinion in Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp., No 08-1198, 2010 WL 1655826 (April 27, 2010). On March 8, 2011, the Second Circuit adhered to its original opinion after concluding that the Supreme Court's Stolt-Nielsen opinion is inapposite. 643 F.3d 187. On August 1, 2011, the panel announced that it is sua sponte considering rehearing in light of AT&T Mobility LLC v. Concepcion.

Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp., 548 F.3d 85 (2d Cir. 2008) (In upholding the arbitrators' ruling that an arbitration agreement that is silent on the issue of class-wide arbitration could be interpreted to permit class arbitration, the Court rejected Stolt-Nielsen's argument that the FAA itself precludes the imposition of class-wide procedures unless they are expressly provided for in arbitration agreement), cert. granted No. 08-1198 (June 15, 2009). On April 27, 2010, the U.S. Supreme Court, in a 5-3 decision, reversed the Second Circuit decision and held that imposing class arbitration on parties who have not agreed to authorize class arbitration is inconsistent with the Federal Arbitration Act. No. 08-1198, 2010 WL 1655826

Fenterstock v. Education Finance Partners, Case No. 09-1562-CV (2nd Cir. July 12, 2010) (invalidating class action waiver after applying California law and rejecting FAA preemption; Court, however, refuses to order class-wide arbitration despite severability clause because of U.S. Supreme Court opinion in Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S.Ct. 1758 (2010)). On June 13, 2011, the U.S. Supreme Court granted cert., vacated the Second Circuit opinion and remanded the case to the Second Circuit for further consideration in light of the Supreme Court's opinion in AT&T Mobility LLC v. Concepcion, No. 09-893, 2011 U.S. LEXIS 3367 (April 27, 2011). Upon remand, Second Circuit concludes that its earlier opinion holding that the class action waiver is unconscionable under California law is no longer viable and remands to District Court to consider other arbitrability issues. No. 09-1562-cv, 2011 WL 2582166 (2nd Cir. June 30, 2011).

Third Circuit

Homa v. American Express Company, 558 F.3d 225 (3rd Cir. 2009) (court refuses to enforce Utah choice-of-law clause after concluding that class action waiver violates fundamental policy of New Jersey in light of New Jersey Supreme Court opinion in Muhammad v. County Bank of Rehoboth Beach, Delaware, 912 A.2d 88 (NJ 2006); there is no FAA preemption of Muhammad; Third Circuit opinion in Gay v. CreditInform, 511 F.3d 369 (3rd Cir. 2007) saying that the FAA preempts Pennsylvania Superior Court opinion in Lytle v. Citifinancial Services, Inc., 2002 Pa. Super. 327 (2002) may be dicta)

Litman v. Cellco Partnership, No. 08-4103 2010 WL 2017665 (3rd Cir. May 21, 2010) (non-precedential) (court invalidates class action waiver after following Muhammad v. County Bank of Rehoboth Beach, Delaware, 912 A. 2d 88 (NI 2006) and Homa v. American Express Company, 558 F. 3d 225 (3rd Cir. 2009); once again, reiterates that discussion in Gay v. CreditInform, 511 F. 3d 369 (3rd Cir. 2007) is dicta; it notes that the

Supreme Court's ruling in Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp., 2010 WL, 1655826 (Apr 27, 2010) is irrelevant). On May 2, 2011, the U.S. Supreme Court granted the petition for a writ of certiorari, vacated the Third Circuit opinion, and remanded the case to the Third Circuit for further consideration in light of the Supreme Court's opinion in AT&T Mobility LLC v. Concepcion, No. 09-893, 2011 U.S. LEXIS 3367 (April 27, 2011). Court on May 2, 2011 ordered additional briefing in aftermath of Concepcion.

Ninth Circuit

Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003), cert. denied, 540 U.S. 811 (2003) (court follows California Court of Appeal's opinion in Szetela v. Discover Bank, 97 Cal. App. 4th 1094 (2002) and holds that class action waiver is unconscionable under California law)

Ingle v. Circuit City Stores, 328 F.3d 1165 (9th Cir. 2003), cert. denied, 540 U.S. 1160 (2004) (same)

Circuit City Stores, Inc. v. Mantor, 335 F.3d 1101 (9th Cir. 2003), cert. denied, 540 U.S. 1160 (2004) (same)

Ramsdell v. Lenscrafters, Inc., 135 Fed. Appx. 130, 2005 WL 14329241 (9th Cir. 2005) (in this unpublished conclusory opinion, court follows Ingle, Ting, and California Court of Appeal opinion in Szetela and holds that class action waiver is unconscionable under California law)

Al-Safin v. Circuit City Stores, Inc., 394 F.3d 1254 (9th Cir. 2005) (in clause burdened by other unfair features, court, in a divided opinion, also invalidated class action waiver under Washington law; dissent points out that majority opinion may conflict with opinion in Stein v. Geonerco, 17 P. 3d 1266 (WA 2001))

Tamayo v. Brainstorm USA, 154 Fed. Appx. 564 (9th Cir. 2005) (in this unpublished conclusory opinion, court follows California Supreme Court's opinion in Discover Bank v. Superior Court, 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 (2005) and holds that class action waiver is unconscionable under California law, that the Ohio choice-of-law provision does not require a different result and that the FAA does not preempt California law)

Shroyer v. New Cingular Wireless Services, Inc., 498 F.3d 976 (9th Cir. Aug. 17, 2007) (Court holds that class action waiver is unconscionable under California law and that there is no FAA preemption)

Douglas v. U.S. Dist. Ct., 495 F.3d 1062 (9th Cir. 2007) (per curiam) (court grants writ of mandamus, refuses to apply New York law dealing with class action waivers and holds that such waivers are unconscionable under California law)

Laster v. T-Mobile, USA, Inc., No. 06-55010, 252 Fed. Appx 777 (9th Cir. Oct. 25, 2007) (Court, in unreported opinion, follows Shroyer opinion), *cert. denied*, 128 S. Ct. 2500 (2008)

Ford v. Verisign, Inc., 252 Fed. App'x 781, 2007 WL 3194743 (9th Cir. 2007 (court, in unreported opinion, follows Shroyer opinion), cert. denied sub nom; T-Mobile USA, Inc. V. Ford, 128 S. Ct. 2503 (2008)

Lowden v. T-Mobile USA, No. 06-35395, 513 F.3d 1213 (9th Cir. Jan 22, 2008) (Court holds that class action waiver is unconscionable under the Washington Supreme Court's opinion in Scott v. Cingular Wireless, 161 P.3d 1000 (Wash. 2007) and that there is no FAA preemption in light of Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976 (9th Cir. 2007))

Janda v. T-Mobile USA, Inc., No. 06-15712, 267 Fed Appx. 968 (9th Cir. Feb. 25, 2008) (Court, in unreported opinion, holds that class action waiver is unconscionable relying upon Shroyer opinion)

Hoffman v. Citibank (South Dakota), N.A., 546 F.3d 1078 (9th Cir. 2008) (court remands order of district court denying motion to compel individual arbitration to conduct a fact finding regarding Citibank's opt-out right)

Davis v. Chase Bank USA, No. 07-55561, ___ Fed. Appx. ___, 2008 WL 48322998 (9th Cir. Nov. 3, 2008) (unpublished) (class action waiver was unconscionable because it was "in the form of a bill stuffer the consumer would be deemed to accept if he did not close his account")

Doe 1 v. AOL, LLC, No. 07-15323 (9th Cir. Jan. 16, 2009) (per curiam) (forum selection clause calling for jurisdiction only in Virginia state court is unenforceable as to California resident plaintiffs bringing class action claims under California consumer law since class actions are not available in Virginia state court)

Chalk v. T-Mobile USA, Inc., No. 06-35909, 2009 WL 792517 (9th Cir. Mar. 27, 2009) (Court follows Vasquez-Lopez v. Beneficial Oregon, Inc., 210 Or. App. 553, and holds that class action waiver is unconscionable under Oregon law because it is contained in a consumer adhesion contract where individual damages are likely to be small)

Oestreicher v. Alienware Corporation, No. 07-16531, 2009 WL 902341 (9th Cir. April 2, 2009) (unpublished) (court refused to apply Florida choice-of law clause and held that class action waiver was unconscionable under California law even in the context of a plaintiff's claim of $4,000 for a defective computer)

Creighton v. Blockbuster, Inc., 321 Fed. Appx. 637, 2009, U.S. App. LEXIS 7238 (9th Cir. April 6, 2009) (unpublished) (Court holds that class action waiver in adhesion contract is unconscionable under Oregon law)

Detwiler v. T-Mobile USA, Inc., 305 Fed. Appx 353, 2008 WL 5213704 (9th Cir. 2008) (Court holds that class action waiver is unlawful under Florida law after applying Washington choice-of-law rules which called for application of the law of Florida, the state where the plaintiff resides.)

Kaltwasser v. Cingular Wireless, LLC, No. 08-15962, 2009 WL 3157688 (9th Cir. Oct. 1, 2009) (Court holds that class action waiver is unlawful under California law after refusing to enforce Virginia choice-of-law clause; court also rules that AT&T's "bump-up" provision does not change the result)

Laster v. AT&T Mobility, LLC, 584 F.3d 849 (9th Cir. 2009) (in affirming District Court order denying motion to compel arbitration, Ninth Circuit holds that AT&T's "bump-up" provision (which provides for a "premium payment of $7,500, the jurisdictional limit of California's small claims court, and double counsel fees if the arbitrator awards the customer an amount greater than AT&T's last written settlement offer made before the selection of an arbitrator) does not save the class action waiver from being unconscionable under California law; court concludes that actual damages are "predictably small" because AT&T will pay alleged overcharges to anyone who might initiate arbitration and few customers will actually initiate the arbitration and receive the premium; court finds no FAA preemption) AT&T has filed a Petition for a Writ of Certiorari with the U.S. Supreme Court sub nom ATT Mobility LLC v. Concepcion, No. 09-893. On May 24, 2010, the U.S. Supreme Court granted certiorari.

Masters v. DirecTV, Inc., 2009 WL 4885132 (9th Cir. Nov. 19, 2009) (unpublished) (court holds that California law governs the enforceability of class action waivers in the contracts of customers of California-based businesses even when those contracts choose the law of the customer's home state)

Omstead v. Dell, Inc., No. 08-16479, 2010 WL396089 (9th Cir. Feb. 5, 2010 (court holds that class action waiver is unlawful under California law after refusing to enforce Texas choice-of-law clause)

Greenwood v. CompuCredit Corporation, No. 09-15906, 2010 WL 3222415 (9th Cir. Aug. 17, 2010) (Court affirms denial of motion to compel arbitration of a claim brought under the Credit Repair Organizations Act (the "CROA") after concluding that it gives the consumer the "right to sue" in court and precludes any consumer waiver of that right; in doing so, the Court created a Circuit split since both the Third and Eleventh Circuits have previously held that the CROA does not create a non-waivable right to sue in court. Gay v. Credit Inform, 511 F.3d 369, 377 n.4 (3d Cir. 2007); Picard v. Credit Solutions, Inc., 564 F.3d 1249, 1255 (11th Cir. 2009))

Eleventh Circuit

Rollins, Inc. v. Garrett, No. 05-14127, 176 Fed. Appx. 968, 2006 WL 1024166 (11th Cir. 2006) (per curiam) (in affirming the District Court's order denying the plaintiff's motion to vacate an AAA Clause Construction Award concluding that under Florida law classwide arbitration could be entertained when the arbitration provision contains no class action waiver, the 11th Circuit held: "Under Florida law, a consumer contract that prohibits class arbitration is unconscionable because it 'preclude[s] the possibility that a group of its customers might join together to seek relief that would be impractical for any of them to obtain alone' Powertel, Inc. v. Bexley, 743 So. 2d 570, 576 (Fla. 1st DCA 1999). Accordingly, the arbitrators did not exceed their power by interpreting the

contract to allow class arbitration, see 9 U.S.C. §10(a)(4) nor did the arbitration award violate public policy.")

Dale v. Comcast Corporation, 498 F.3d 1216 (11th Cir. 2007) (Court holds that class action waiver is substantively unconscionable under Georgia law because of the lack of a contractual fee-shifting feature in the face of a claim under the federal Cable Communications Policy Act of 1984, which does not provide for the award of attorneys' fees to a prevailing consumer.)

Pendergast v. Sprint Nextel Corporation, No. 09-10612, 2010 WL 6745 (11th Cir. Jan. 4, 2010) Court certifies the following questions to the Florida Supreme Court:

> (1) Must Florida courts evaluate both procedural and substantive unconscionability simultaneously in a balancing or sliding scale approach, or may courts consider either procedural or substantive unconscionability independently and conclude their analysis if either one is lacking?
>
> (2) Is the class action waiver provision in plaintiff's contract with Sprint procedurally unconscionable under Florida law?
>
> (3) Is the class action waiver in plaintiff's contract with Sprint substantively unconscionable under Florida law?
>
> (4) Is the class action waiver provision in plaintiff's contract with Sprint void under Florida law for any other reason?

Jones v. DirecTV, Inc., No. 09-15936 (11th Cir. June 3, 2010) (*per curiam* and unpublished) (Court follows Dale v. Comcast Corporation, 498 F. 3d 1216 (11th Cir. 2007) and holds that class action waiver is unconscionable under Georgia law in a case involving only common law claims because of a lack of a contractual fee-shifting feature; the fact that the plaintiff could have, but did not, assert a claim under a Georgia statute with a fee-shifting feature is irrelevant). The reasoning of this opinion has been undermined by the later published opinion in Cappuccitti v. DirecTV, 2010 WL 4027719 (11th Cir. Oct. 15, 2010)

Gordon v. Branch Banking and Trust, No. 09-15399, 2011 WL 1111718 (11th Cir. March 28, 2011) (unpublished) (Court follows Dale v. Comcast Corporation, 498 F. 3d 1216 (11th Cir. 2007) and holds that class action waiver is unconscionable under Georgia law in a case involving only common law claims because of a lack of a contractual fee-shifting feature; because the defendant failed to argue in the District Court that plaintiff could have asserted a claim under a Georgia statute with a fee-shifting feature the Court held that this argument based on Cappucitti v. DirecTV, 2010 WL 4027719 (11th Cir. Oct. 15, 2010) was waived; Court denied petition for rehearing on June 3, 2011.

Federal Statutes Invalidating Arbitration Agreements

John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. 109-364, Section 670(a), to be codified at 10 U.S.C. Chap. 49, by adding § 987 (Oct. 17, 2006). Effective October 1, 2007, it shall be unlawful for any creditor to extend consumer credit to an active duty member of the military or his or her dependent which requires him or her to submit to arbitration. (Section 987(e)(3)). It also provides that no agreement to arbitrate any dispute involving the extension of consumer credit shall be enforceable against such persons. (Section 987(f)(4))

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010), Section 1414(a), to be codified as Section 129C(e) of the Truth-in-Lending Act (July 21, 2010). No residential mortgage loan and no extension of credit under an open-end consumer credit plan secured by the principal dwelling of the consumer may include terms which require arbitration or any other nonjudicial procedure as the method for resolving any controversy or settling any claims arising out of the transaction. It is unclear whether this provision became effective on July 22, 2010 (Section 4) or will become effective 18 months after the "designated transfer date" (Section 1400 (3)).

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010), Section 1028. The Consumer Financial Protection Bureau can issue regulations to prohibit or restrict the use of mandatory arbitration agreements if, based on the results of a mandated study which it provides to Congress, it finds this action to be "in the public interest and for the protection of consumers." Any such regulations can apply only to agreements entered into more than 180 days after their effective date.

State Court Appellate Opinions and Statutes Upholding
Validity of Class Action Waivers

California

Parrish v. Cingular Wireless, LLC, 28 Cal. Rptr. 3d 802 (Ct. App. 1st Dist. 2005) (class action waiver is not unconscionable under California law), vacated by California Supreme Court in light of Discover Bank v. Superior Court, 2005 Cal. LEXIS 9357 (Aug. 24, 2005)

Discover Bank v. Superior Court, 105 Cal. App. 4th 326 (Ct. App. 2d Dist. 2003), (pet. for review granted, 65 P.3d 1285 (2003) (FAA preempts California law even if class action waiver is unconscionable under California law), rev'd and remanded, 36 Cal 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1108 (2005). On remand, Court of Appeal upholds validity of class action waiver based on Delaware choice-of-law clause, 134 Cal. App. 4th 886, 36 Cal. Rptr. 3d 456 (2005), pet. for review denied (Mar. 29, 2006)

Vernon v. Drexel Burnham & Co., 125 Cal. Rptr. 147 (Cal. Ct. App. 1975) (compelled arbitration of claims of named-plaintiffs and held that "the policy of the law favoring arbitration prevails over the policy of law pertaining to class actions . . . ."); Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 97 Cal. Rptr. 811 (Cal. Ct. App. 1971) (same); Patterson v. ITT Consumer Financial Corp., 18 Cal. Rptr. 2d 563 (Ct. App.) rev. denied, 18 Cal. Rptr. 2d 563 (Cal. App. 1st Dist. 1993) (same), rehearing denied (May 13, 2005), review denied (Aug. 12 1993), cert. denied 510 U.S. 1176 (1994)

Vannier v. Gateway Companies, Inc., No. B179663, 2006 WL 121962 (Cal. Ct. App., 2nd Dist. Jan. 18, 2006) (held in unpublished opinion that FAA and South Dakota choice-of-law provision precluded a consumer who had agreed to arbitrate disputes from initiating a class action alleging violations of the California Consumer Legal Remedies Act (the "CLRA")[2])

---

[2] The United States Court of Appeals for the Ninth Circuit has held that the FAA preempts the class action anti-waiver language in the CLRA because the CLRA only applies to consumer contracts. The only state law preserved from preemption by Section 2 of the FAA are state laws which apply to all contracts within the state of California. See Ting v. AT&T, 319 F.3d 1126, 1147-48 (9th Cir. 2003), cert. denied, 540 U.S. 811 (2003); Provencher v. Dell, Inc., 409 F. Supp. 2d 1196 (C.D. Cal. 2006), Accord Bradley v. Harris Research, Inc., 275 F.3d 884, 892 (9th Cir. 2001) (holding that the FAA preempted Cal. Bus. & Prof. Code Section 20040.5 because it "is not a generally applicable contract defense that applies to any contract, but only to forum selection clauses in franchise agreements."). See also KKW Enters. Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp., 184 F.3d 42 (1st Cir. 1999); OPE Int'l LP v. Chet Morrison Contractors, Inc., 258 F.3d 443 (5th Cir. 2001); Doctor's Assocs. Inc. v. Hamilton, 150 F.3d 157, 163 (2d Cir. 1998), cert. denied 525 U.S. 1103 (1999), Management Recruiters Int'l, Inc. v. Bloor, 129 F.3d 851, 856 (6th Cir. 1997); Alphagraphics Franchising, Inc. v. Whaler Graphics,

(continued...)

Gentry v. Superior Court, 135 Cal. App. 4th 944, 37 Cal. Rptr. 3d 790 (Cal. Ct. App., 2nd Dist. 2006) (compelled arbitration of claim of named plaintiff after concluding that class action waiver in employment agreement is neither procedurally unconscionable as a result of the existence of an opt-out right nor substantively unconscionable because of the potential substantial damages and penalties available to the employee if he prevails)[3]

Jones v. Citigroup, 135 Cal. App. 4th 1491, 38 Cal. Rptr. 3d 461 (Cal. Ct. App., 4th Dist. 2006) (reverses trial court's denial of motion to compel arbitration after holding that there is no procedural unconscionability by virtue of the fact that Citibank allowed a cardholder to opt out of the arbitration provision without his or her account being closed until the end of the cardholder's current membership year or the expiration date on the card)[3]

Cardenas v. Chase Manhattan Bank, USA, N.A., No. G033939, 2006 WL 1454778 (Cal. Ct. App. 4th Dist. May 26, 2006) (in unpublished opinion, reverses trial court's denial of motion to compel arbitration after upholding validity of class action waiver based on Delaware choice-of-law clause and the Court of Appeal, Second District's opinion in Discover Bank v. Superior Court, 134 Cal. App. 4th 886, 36 Cal. Rptr. 3d 456 (2005); in ruling that the class action waiver was not contrary to a fundamental California policy, the Court of Appeal concluded that there was no procedural unconscionability by virtue

---

(...continued)

Inc., 840 F. Supp. 708 (D. Ariz. 1993); Michael v. NAP Consumer Elecs. Corp., 574 F. Supp. 68 (D.P.R. 1983); Battle v. Nissan Motor Acceptance Corp., No. 05-C-0669, 2006 U.S. Dist. LEXIS 37917 at *14-15 (E.D. Wis. Mar. 9, 2006). The California Court of Appeal has recently determined that the CLRA does not apply to loan or credit transactions. Berry v. American Express Publishing, Inc., No. G036848, 147 Cal. App. 4th 224, 54 Cal. Rptr. 3d 91, (Calif. Ct. App., 4th App. Dist. Jan. 31, 2007); Credit Acceptance Corporation v. Davisson, Case No. 1:08 CV 107 (N.D. Ohio June 30, 2009). The California Court of Appeal, in Fisher v. DCH Temecula Imports, LLC, No. E047802 (Fourth District, Division 2 August 13, 2010) recently refused to follow the Ninth Circuit opinion in Ting v. AT&T and, instead, held that the FAA does not preempt the CLRA because in California private contracts that violate public policy are unenforceable and that the right to bring a class action lawsuit, an unwaivable statutory right under the CLRA, is a separate, generally applicable contract defense under § 2 of the FAA.

3 On April 26, 2006, the California Supreme Court granted review in both the Gentry and Jones cases, which had the effect of depublishing the cited opinions. See Gentry, No. S141502, 43 Cal. Rptr. 3d 748, 135 P.3d 1 (Cal. April 26, 2006); Jones, No. S141753, 43 Cal. Rptr. 3d 749 135 P.3d 2 (Cal. April 26, 2006). On November 28, 2007, the California Supreme Court transferred the Jones case to the Court of Appeal with directions to vacate its decision and to reconsider it in light of the decision in Gentry. The Court of Appeal ordered new briefing. Thereafter, the Jones case settled on an individual basis. The Gentry case has been reversed.

of the fact that Chase allowed its cardholders to opt out of the arbitration provision without their accounts being closed)

Konig v. U-Haul Company of California, No. B190547, 52 Cal. Rptr. 3d 244 (Calif. Ct. App., 2nd App. Dist., Div. 5 Dec. 19, 2006) (Court upholds validity of class action waiver after determining that the claims of plaintiff and each member of the putative class did not involve a "predictably . . . small amount of damages" per class member as required by the California Supreme Court's opinion in Discover Bank v. Superior Court in order to invalidate a class action waiver)

Arguelles-Romero v. Superior Court (AmeriCredit Financial Services, Inc.) No. B219178 (Calif. Ct. App, 2nd App. Dist., Div. 3 May 13, 2010). (Court affirms holding of trial court that claim seeking to eliminate $16,000 deficiency balance after repossession and sale of auto because of alleged failure to comply with post-repossession notice requirements of California Automobile Sales Finance Act (the "CASFA") was sufficiently large so as to not make class action waiver substantively unconscionable; however, the Court remanded the case to the trial court for it to do a discretionary analysis on whether a class action is a significantly more effective practical means of vindicating unwaiverable rights under the CASFA to bring a class action as required by the California Supreme Court's opinion in Gentry v. Superior Court, 42 Cal. 4th 443 (2007)e)

Colorado

Rains v. Foundation Health Systems Life & Health, 23 P.3d 1249 (Ct. App. Colo. 2001) ("arbitration clauses are not unenforceable simply because they might render a class action unavailable)

Medina v. Sonic-Denver T. Inc., No. 10CAO275 (Colo. Ct. App., Div. 1 March 17, 2011) (Court affirms trial court order which enforced class action waiver, but based its conclusion on the U.S. Supreme Court's opinion in Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., No. 09-14107, 2010 WL 4027719 (11th Cir. Oct. 15, 2010))

Delaware

Westendorf v. Gateway 2000, Inc., 41 UCC Rep. Serv. 2d 1110 (Del. Ch. 2000), aff'd, 763 A.2d 92 (2000) (compelled arbitration of named-plaintiff's claims under Delaware Consumer Fraud Act)

District of Columbia

Forrest v. Verizon Communications, Inc., 805 A.2d 1007 (D.C. Ct. App. 2002) (upholds validity of forum selection clause in putative class action stipulating for application of Virginia law even though class actions are not available in Virginia)

Florida[4]

America Online, Inc. v. Booker, 781 So. 2d 423 (Fla. Ct. of App., Third Dist. 2001) ("Florida plaintiffs cannot defeat otherwise valid provisions requiring suit in other states simply by asserting a cause of action in the name of a putative class")

Fonte v. AT&T Wireless Services, Inc., 903 So. 2d 1019 (Fla. Ct. of App., 4th Dist. 2005) ("We find that neither the text nor our review of the legislative history of [the Florida Deceptive and Unfair Trade Practices Act] suggest that the legislature intended to confer a non-waivable right to class representation. Moreover, there are numerous enforcement mechanisms which can protect consumers other than class actions."), review denied, 918 So. 2d 292 (2005)

Reeves v. ACE Cash Express, Inc., 937 So 2d 1136 (Fl. Ct of App, 2nd Dist. Aug. 11, 2006), reh'g denied, Sept. 29, 2006 (follows Fonte, Supra and concludes that class action waiver is valid)

Georgia

Crawford v. Great American Cash Advance, Inc., 284 Ga. App. 690, 644 S.E. 2d 522 (Ga. App. March 29, 2007) (affirms trial court order compelling arbitration and implicitly

---

[4] See Pendergast v. Sprint Nextel Corporation, No. 09-10612, 2010 WL 6745 (11th Cir. Jan. 4, 2010) Court certifies the following questions to the Florida Supreme Court:

(1) Must Florida courts evaluate both procedural and substantive unconscionability simultaneously in a balancing or sliding scale approach, or may courts consider either procedural or substantive unconscionability independently and conclude their analysis if either one is lacking?

(2) Is the class action waiver provision in plaintiff's contract with Sprint procedurally unconscionable under Florida law?

(3) Is the class action waiver in plaintiff's contract with Sprint substantively unconscionable under Florida law?

(4) Is the class action waiver provision in plaintiff's contract with Sprint void under Florida law for any other reason?

rejects the notion that the inability to prosecute a class action is unconscionable under Georgia law)

Hawaii

Brown v. KFC U.S.A., 82 Haw. 226, 921 P.2d 146 (Haw. 1996), recons. denied, 922 P.2d 973 (Haw. 1997) (compelled arbitration and rejected an argument that arbitration is inherently unfair to employees because of the "alleged elimination of the opportunity for class actions")

Illinois

Hutcherson v. Sears Roebuck & Company, 342 Ill. App. 3d 109, 793 N.E. 2d 886 (Ill. App. 2003), rev. denied, 205 Ill. 2d 582, 803 N.E. 2d 482 (2003) (class action waiver is not unconscionable under Arizona law and FAA requires class action waiver to be enforced in accordance with its terms)

Rosen v. SCIL, LLC and Saks Incorporated, 343 Ill. App. 3d 1075, 799 N.E. 2d 488 (Ill. App. 2003), rev. denied, 207 Ill. 2d 627, 807 N.E. 2d 982 (2004) (class action waiver is not unconscionable under Illinois law)

Ragan v. AT&T Corp., 291 Ill. Dec. 933, 824 N.E. 2d 1183 (Ill. App. 2005) (class action waiver is not unconscionable under New York law)

Hubbert v. Dell Corporation, 359 Ill. App. 3d 976, 835 N.E. 2d 113 (Ill. App. Ct. 5th Dist. 2005) (class action waiver is not unconscionable under Texas law), appeal denied, 217 Ill. 2d 601 (2006)

Kansas

Wilson v. Mike Steven Motors, Inc., 111 P.3d 1076 (Table) (Kan. Ct. App. May 27, 2005) (class action waiver is not unconscionable under Kansas law)

Maine

Stenzel v. Dell, Inc., 870 A.2d 133 (Me. 2005) (class action waiver is not unconscionable under Texas law)

Maryland

Walther v. Sovereign Bank, 386 Md. 412, 872 A.2d 735 (Md. 2005) (upholds validity of class action waivers in light of "the strong policy made clear in both federal and Maryland law that favors the enforcement of arbitration provisions")

Doyle v. Finance America, LLC, 173 Md. App. 370, 918 A.2d 1266 (Md. App. Mar. 15, 2007) (follows Walther and upholds validity of class action waiver)

Gilman v. Wheat, First Securities, Inc. 345 Md. 361, 692 A.2d 454 (1997) (upholds validity of forum selection clause in putative class action stipulating for application of Virginia law even though class actions are not available in Virginia)

Freedman v. Comcast Corporation, Nos. 435, 2102, September Term, 2008, 2010 Md. App. LEXIS 12 (Ct. of Spec. App. of Md. Jan. 28, 2010) (Court follows Walther v. Sovereign Bank, 386 Md. 412 (2005) and holds that class action waiver is valid under Maryland law; Court further holds that there was no procedural unconscionability because of provision giving customer 30 days to opt out of arbitration provision)

Mississippi

Mississippi has no class action rule or statute and Mississippi state courts do not recognize class actions. American Bankers Ins. Co of Florida v. Booth, 830 So. 2d 1205, 1213 (Miss. 2002); Marx v. Broom, 632 So. 2d 1322, 1325 (Miss. 2004)

New Jersey

Gras v. Associates First Capital Corp., 346 N.J. Super. 42, 786 A.2d 886 (App. Div. 2001), review denied (Sup. Ct.) (enforced class action waiver stating that there is no "overriding public policy in favor of class actions")

Delta Funding Corporation v. Harris, 189 NJ 28, 912 A.2d 104 (N.J. Supreme Court Aug. 9, 2006) (upholds validity of class action waiver in context of high-value claim)

Muhammad v. County Bank of Rehoboth Beach, Delaware, 379 N.J. Super 222, 877 A.2d 340 (2005) (follows Gras, supra), petition for review before New Jersey Supreme Court granted, 185 N.J. 254 (2005). This case was reversed, 189 NJ 1, 912 A.2d 88 (2006).

New Mexico

Fiser v. Dell Computer Corporation, 165 P.3d 325 (N.M. Ct. App. 2007), cert. granted, No. 30,424 (June 26, 2007) (Class action waiver in arbitration provision in terms and conditions of sale contained in "approve-or-return" contracts is neither procedurally unconscionable (because plaintiff did not establish a lack of other alternatives in purchasing a computer) or substantively unconscionable as a matter of Texas law and such a result did not violate New Mexico policy.) This opinion was reversed by the New Mexico Supreme Court, No. 30,424 (June 27, 2008).

New York

Ranieri v. Bell Atlantic Mobile, 304 A.D. 2d 353, 759 N.Y.S. 2d 448 (N.Y. App. Div. 1st Dep't 2003), leave denied, 1 N.Y. 3d 502, 775 N.Y.S. 2d 240, 807 N.E. 2d 290 (2003) (class action waiver is not unconscionable or contrary to public policy)

Brower v. Gateway 2000, 246 A. D. 2d 246 (N.Y. 1st Dep't 1998) (same)

Tsadilas v. Providian National Bank, 13 A.D. 3d 190, 786 N.Y.S. 2d 478 (N.Y. App. Div. 1st Dep't 2004), reargument denied, 2005 N.Y. App. Div. LEXIS 247 (Mar. 8, 2005), appeal denied, 5 NY 3d 702, 832 N.E. 2d 1189, 799 N.Y.S. 2d 773 (June 4, 2005) (same)

Johnson v. Chase Manhattan Bank, N.A., 2 Misc. 3d 1003(A), 784 N.Y.S. 2d 921 (table), 2004 WL 413213 (N.Y. Sup.) 2004 N.Y. Slip. Op. 50086(U) (2004), aff'd, 786 N.Y.S. 2d 302 (N.Y. App. Div. 2004) (same)

Hayes v. County Bank, 2006 NY Slip Op 1460, 26 AD3d 465, 811 N.Y.S. 2d 741 (Feb. 28, 2006) (same)

Harris v. Shearson Hayden Stone, 82 A. D. 2d 87, 441 N.Y.S. 2d 70 (1981); aff'd 56 N.Y. 2d 627, 450 N.Y.S. 2d 482, 435 N. E. 2d 1097 (1982)

North Carolina

Tillman v. Commercial Credit Loans, Inc., 177 N.C. App. 568, 629 S.E. 2d 865 (N.C. Ct. App. June 6, 2006) (North Carolina Court of Appeals, reversing the trial court, upheld the validity of the class action waiver in defendants' financing contracts. The court relied heavily on prior federal circuit court decisions holding that a class action waiver in an arbitration agreement is not per se unenforceable and is not unconscionable where the prevailing plaintiff is permitted to recover attorney's fees and costs under applicable substantive fee-shifting statutes. The court emphasized that "[t]he great majority of federal and state jurisdictions who have addressed this issue" have upheld the validity of class action waivers and have recognized that such waivers do not choke off the supply of attorneys willing to represent consumers on an individual basis where applicable substantive law permits successful plaintiffs to recover fees and costs.). This opinion was reversed by the North Carolina Supreme Court, 362 N.C. 93, 655 S.E. 2d 362 (2008).

North Dakota

Strand v. U.S. Nat'l Bank, N.A., 2005 N.D.68, 693 N.W. 2d 918 (N.D. March 31, 2005) (upholds validity of class action waiver: "Merely restricting the availability of a class action is not, by itself, a restriction on substantive remedies. The right to bring an action as a class action is purely a procedural right")

Ohio

Hawkins v. O'Brien, No. 224900, 2009 WL 50616 (Ohio App. 2 Dist. Jan. 9, 2009) (court upholds the validity of the class action waiver in a payday lender's arbitration provision and distinguished the earlier Ohio Court of Appeals opinion in Eagle v. Fred Martin Motor Co., 157 Ohio App. 3d 150 (2004), based on the fact that in Eagle case the dealer's arbitration agreement contained certain unfair features, including a confidentiality provision: "The private attorney general and class action provisions of R.C. 1345.09(D) are procedural mechanisms that aid consumers in their prosecution of SCPA violations. They confer no additional substantive rights. The arbitration clause in the present case preserves the statutory substantive rights and remedies Hawkins sought in the action he commenced. Therefore, and because no showing has been made that

those statutory rights and remedies are not arbitrable, the arbitration clause in the contract between Hawkins and Kentucky Check is enforceable. The trial court did not err when it held the issues in the action Hawkins commenced are referable to arbitration, and stayed the litigation until arbitration is had. R.C. 2711.02.")

Alexander v. Wells Fargo Financial Ohio 1, Inc., No. 89277, __WL_____ (Ohio Ct. App., 8th App. Dist., Cuyahoga Cty. Sept. 17, 2009) (class action waiver contained in arbitration agreement which was part of mortgage loan is neither procedurally not substantively unconscionable or against public policy; court distinguishes Eagle v. Fred Martin Motor Co., 157 Ohio App. 3d 150 (2004) on the basis that Eagle, unlike Alexander, specifically addressed class actions under the Consumer Sales and Practices Act (the "CSPA") and that the arbitration provision in Eagle, unlike Alexander, contained a confidentiality clause; court distinguishes Schwartz v. Alltel Corp., 2006 WL 2243649 (Ohio App. 8th Dist. June 29, 2006), on the basis that in Schwartz, as in Eagle, the plaintiff filed his claims under the CSPA and presented considerable evidence of procedural unconscionability.

Garber v. Buckeye Chrysler-Jeep-Dodge of Shelby, L.L.C., No. 2007-CA-0121, 2008 WL 2789074 (Ohio App. 5 Dist. July 14, 2008) rev. den. by Ohio Sup. Ct. (although the case does not deal with the validity of a class action waiver as such, the court holds that because appellants' complaint did not challenge the arbitration clause and instead alleged only that defendants committed various acts which were unfair, deceptive and unconscionable in selling a used car, appellants waived any such challenge and the trial court did not err in compelling arbitration based solely on its review of the pleadings and the motion to compel arbitration without giving the appellants the right to oppose such motion)

Wallace v. The Ganley Group, No. 95081, 2011 WL 2434093 (Ohio Ct App. 8th Dist. June 16, 2011) (Relying upon Concepcion, Court affirms order of trial court compelling individual arbitration of claim against used-car dealer under Ohio Consumer Sales Protection Act.)

Tennessee

Pyburn v. Bill Heard Chevrolet, 63 S.W. 3d 351 (Tenn. Ct. App. May 9, 2001) (FAA preempts any non-waivable right which might exist to maintain class action under Tennessee Consumer Protection Act)[5]

---

[5] The Tennessee Supreme Court denied the plaintiff's petition for review and ordered the Court of Appeal's opinion to be published which means that the decision "may be relied upon by the bench and bar of [Tennessee] as representing the present state of the law with the same confidence and reliability the published opinions of [the Tennessee Supreme] Court." Meadows v. State, 849 S.W. 2d 748, 752 (Tenn. 1993)

Spann v. American Express Travel Related Services Company, Inc., No. M2004-02786 - COA - R3 - CV December 16, 2005 Term; 224 S.W. 3d 698 (Tenn. Ct. App. Aug, 30, 2006) (applies Utah choice-of-law clause in cardholder agreement and holds that class action waiver is not unconscionable under Utah Common law; new Utah statute validating class action waivers is cited as additional support)

Chapman v. H&R Block Mortg. Corp., 2005 WL 3159774 (Tenn. Ct. App. 2005) (class action waiver is valid)

Texas

AutoNation USA Corporation v. Leroy, 105 S.W. 3d 190 (Tex. App. Hous. (14 Dist.) 2003) (right to arbitrate under the FAA trumps right to maintain a class action)

NCP Finance Limited Partnership v. Escatiola, No. 04-10-00644-CV, 2011 WL 1572208 (Texas Ct. App. April 27, 2011) (Court reverses trial court and holds, based on Stolt-Nielsen, that the lender was entitled to compel individual arbitration)

Utah

Act of March 1, 2006, Chapter 172, Utah Laws of 2006, effective March 15, 2006 (to be codified at Utah Code Ann. §§ 70C-3-104, 70C-4-102, 70C-4-105) (validates class action waivers in consumer credit transactions as long as they are disclosed in all capital letters or bold-face type)

Virginia

Virginia has no class action rule or statute. Nationwide Mut. Ins. Co. v. Housing Opportunities Made Equal, Inc., 259 Va. 8, 22, 523 S.E. 2d 217 (2000) (quoting W.S. Carnes, Inc. v. Bd of Supervisors, 252 Va. 377, 478 S.E. 2d 295, 300 (Va. 1996)

Washington

Stein v. Geonerco, Inc., 105 Wash. App. 41, 17 P.3d 1266 (WA 2001) (court rejects argument that arbitration agreement is unenforceable because it prevented plaintiff from bringing class action)

Heaphy v. State Farm Mutual Automobile Insurance Co., 117 Wash App. 438 (2003), review denied, 150 Wash. 2d 1037 (2004) (same)

West Virginia

Recently, the West Virginia Supreme Court granted a Writ of Prohibition with respect to an order of the trial court which had denied a motion to compel arbitration filed by AT&T Mobility because of its determination that the class action waiver was unconscionable under the West Virginia Supreme Court's earlier opinion in State ex rel Dunlap v. Berger, 211 W. Va. 549, 567 S.E. 2d 265 (2002). In doing so the Supreme Court stated: "Based on the limited record that is before us, it appears that this case

stands in severe contrast to the concerns of legal representation; burdensome mediation costs; and nominal recovery that we articulated in Dunlap. Pursuant to the arbitral provisions that the trial court found to be controlling (2005 agreement plus the 2006 and 2009 modifications), Ms. Shorts bears no costs with regard to an arbitration proceeding. As to her potential recovery, the governing arbitration clause provides that there is a minimum recovery of $10,000 for any customer who is awarded more in arbitration than the last written settlement offer made by AT&T Mobility. And if the arbitral award exceeds the last settlement offer extended by AT&T Mobility, the claimant has a right to double attorney's fees. This double award is in addition to any attorney's fees and expenses the customer has a right to under applicable state laws. Finally, as mentioned above, Ms. Shorts' relief is not limited by the arbitration forum as she is entitled, under the provisions the trial court found to govern, to an award that provides for all statutory and punitive relief that is available in a court. These same arbitration provisions were recently upheld by a federal district court judge. See Wince v. Easterbrooke Cellular Corp., 681 F.Supp.2d 679, 685 (N.D. W.Va. 2010). [footnotes omitted]" State of West Virginia, ex rel AT&T Mobility, LLC et al v. Honorable Ronald E. Wilson, Judge of the Circuit Court of Brooke County and Charlene A. Shorts, September 2010 Term, No. 35537 (Oct. 28, 2010). The case was remanded to the trial court to "evaluate the provisions of the arbitration clause it has found to control against the ability of Ms. Shorts to enforce her rights in connection with her claims. This determination will necessarily involve a consideration of the financial costs to proceed in arbitration; the opportunity to address her claims in arbitration; and the ability to seek redress for her claims in arbitration." [footnote omitted]

State Court Appellate Opinions
Invalidating Class Action Waivers[6]

---

[6] Most of these opinions have been overruled by virtue of the U.S. Supreme Court's opinion in AT&T Mobility LLC v. Concepcion, No. 09-893, 2011 U.S. LEXIS 3367 (April 27, 2011). The only possible exceptions are those where the courts invalidated the class action waiver based on a federal statute as opposed to state law. Also, in most of these opinions, the courts held that there was some degree of procedural unconscionability as well as substantive unconscionability under state law. Many companies now give consumers and employees the unconditional right to opt out of or reject the arbitration provision without it having any adverse repercussions. Courts in states that require that there be both procedural as well as substantive unconscionability in order to invalidate a contract based on unconscionability have validated class action waivers and other arbitration features that they considered substantively unconscionable when an opt-out right was provided to the consumer or employee. See, e.g., Circuit City Stores, Inc. v. Ahmed, 283 F.3d 1198 (9th Cir. 2002); Circuit City Stores, Inc. v. Najd, 294 F.3d 1104, 1108 (9th Cir. 2002); Providian National Bank v. Screws, 894 So. 2d 625 (Ala. Oct. 3, 2003); Tsadilas v. Providian Nat'l Bank, 13 A.D. 3d 190, 786 N.Y.S. 2d 478 (1st Dep't. 2004); Marley v. Macy's South, No. CV 405-227, 2007 WL 1745619, at *3 (S.D. Ga. June 18, 2007) (court enforced arbitration clause in employment agreement because "[w]hile Ms. Marley states that she did not have a choice to enter the arbitration process because she was 'in jeopardy of losing [her] job' if she did not, the record indicates that each employee was mailed an election form to opt-out of the program at their home address"). Pivoris v. TCF Financial Corporation, No. 07-C 2673, 2007 U.S. Dist. LEXIS 90562 (N.D. Ill. Dec. 7, 2007); SDS Autos, Inc. v. Chrzanowski, Case No. 1D06-4293, 2007 WL 4145222 (Fla Ct. App., 1st Dist. Nov. 26, 2007) (Invalidates class action waiver for holders of small claims under Florida Deceptive and Unfair Trade Practices Act whose attorney's fees are limited by the amount of their actual damages.) (arbitration agreement with class action waiver not procedurally unconscionable where "[p]laintiff had the absolute right to reject the arbitration provision without affecting her account contract or the status of her account"); Honig v. Comcast of Georgia, LLC, Civil Action No. 1:07-cv-1839-TCB, 537 F.Supp. 2d 1277 (N.D. Ga. Jan. 31, 2007) ("Finally, and most importantly …, Honig was free to reject the terms of the arbitration provision without a single adverse consequence. Specifically, the arbitration provision gave her the right to opt out within thirty days without adversely affecting her cable service, but she never exercised that right. Honig's ability to opt out of the arbitration provision dilutes her unconscionability argument because the provision was not offered on a take-it-or-leave-it basis. Courts have stressed the importance of such opt-out provisions in enforcing class action waivers in arbitration agreements."); Sanders v. Comcast Cable Holdings, LLC, No. 3:07-cv-918-J-33HTS (M.D. Fla. Jan. 14, 2008) (class action waiver provision was not unconscionable where arbitration provision allowed subscribers to opt out); Davidson v. Cingular Wireless, LLC, No. 2:06-cv- 00133, 2007 WL 896349, at *6 (E.D. Ark. Mar. 23, 2007) (class action waiver in contract for cell phone service not unconscionable where plaintiff failed to opt out);); Martin v. Delaware Title Loans, Inc., No. 08-3322, 2008 WL 444302 (E.D. Pa. Oct. 1, 2008) (finding plaintiff could not establish procedural unconscionability under PA law in light of 15 day opt-out right); Columbia Credit Services, Inc. v. Billingslea, No. B190776, 2007 WL 1982721 (Cal. Ct. App. July 10, 2007)

(continued...)

(...continued)
(court affirmed lower court's confirmation of arbitration award after rejecting unconscionability challenge based in part on the fact that cardholder was given the right to opt out of the arbitration provision and failed to do so); Eaves-Leanos v. Assurant, Inc., No. 07-18, 2008 WL 1805431 (W.D. Ky. Apr. 21, 2008) (finding arbitration agreement with class waiver not unconscionable as plaintiff had opportunity to opt out); Enderlin v. XM Satellite Radio Holdings, Inc., No. 06-0032, 2008 WL 830262 (E.D. ark. March 25, 2008)(finding plaintiff could not establish procedural unconscionability in light of opt-out right); Crandall v. AT&T Mobility, LLC, No. 07-750, 2008 WL 2796752 (S.D. Ill. July 18,2008) (class action waiver in cell phone service contract not unconscionable where plaintiff failed to opt out); Webb v. ALC of West Cleveland, Inc., No. 90843, 2008 WL 4358554 (Ohio Ct. App., 8th App. Dist. Sept. 25, 2008) (citing *Ahmed supra*, the buyer in an automobile retail installment contract "could not demonstrate that the arbitration clause was unconscionable because the contract gave her the right to reject the arbitration clause"); Wright v. Circuit City Stores, Inc., Case No. CV 97-B-0776-5 (N.D. Ala. Feb. 5, 2001) (employment arbitration provision with opt-out right is enforced); Stiles v. Home Cable Concepts, Inc., 994 F. Supp. 1410 (1998) (unconscionability challenge is rejected where credit card issuer gave the cardholder the right to reject the arbitration provision and those who opted out had their 2% APR reduction in interest rate reinstated to its previous rate: "Stiles was given a clear choice in this case; he could take the arbitration provision or leave it"); Guadagno v. E*Trade Bank, No. CV 08-03628 SJO (JCX), 2008 WL 5479062 (C.D. Calif. Dec. 29, 2008) (Class action waiver does not violate fundamental policy of California because of opt-out right: "Here, Guadagno had a meaningful opportunity to opt out of the Arbitration clause, which contained the class action waiver, by notifying E*Trade in writing within 60 days of receiving the Agreement. The Agreement highlighted the Arbitration clause, and the introduction to the Arbitration clause highlighted the opt-out term. Because the Arbitration clause containing the waiver was not presented on a take-it-or-leave-it basis, but gave Guadagno sixty days to opt out, it was not unconscionable. Thus, application of Virginia law does not contradict California's fundamental policy against enforcing unconscionable consumer class action waivers."); Magee v. Advance America Servicing of Ark, Inc., No 6:08-CV-6105, 2009 WL 890991 (W.D. Ark. April 1, 2009) (Court enforces class action waiver after noting that the arbitration agreement was clearly set off from the rest of the contract and provided the consumers with a 30-day opt-out period – a period which was actually longer than the term of the loan); Fluke v. CashCall, No. 08-05776, 2009 U.S. Dist. Lexis 43231 (E.D. PA. May 21, 2009)(Court enforces class action waiver under Pennsylvania law: "We predict that the Pennsylvania Supreme Court would agree with the reasoning of the district courts in Guadagno and Honig. An opt-out provision, like the one in Fluke's agreement with FBD, seriously undermines a consumer's contention that the arbitration agreement is unconscionable. Fluke was given the option to say "no" to the arbitration provision and he was given a full 60 days to do so. In that way, he had complete control over the terms of the agreement and it cannot be said that the arbitration agreement was presented to him on a take-it-or-leave-it basis. Furthermore, like the agreements in Guadagno and Honig, the FBD loan agreement requires that FBD pay the filing fee and any costs and fees charged by the arbitrator regardless of which party initiated the arbitration. Moreover, under § 503 of the Loan Interest and Protection Law, a borrower or debtor who prevails in an action "shall" recover a reasonable attorneys' fee. 41 Pa. Cons. Stat. § 503. This should alleviate any concern regarding the availability and willingness of counsel to represent him. Accordingly, this
(continued...)

(...continued)
case differs materially from Thibodeau and is more analogous to Guadagno and Honig. We predict that the Pennsylvania Supreme Court would hold that the arbitration provision in the loan agreement in issue is not unconscionable and is enforceable."); Credit Acceptance Corporation v. Davisson, Case No. 1:08 CV 107 (N.D. Ohio June 30, 2009) (in rejecting Davisson's argument that the arbitration provision violated the Ohio Consumer Sales Practice Act since it purported to waive access to the court for vindicating a claim under it, the Court noted that Credit Acceptance Corporation did not "waive her recourse to the courts" because of the opt-out feature); Freedman v. Comcast Corporation, Nos. 435, 2102, Sept. Term 2008, 2010 Md. App. LEXIS 12 (Ct. of Spec. App. Of Md. Jan. 28, 2010 (court holds that there is no procedural unconscionability under Maryland law as a result of 30-day opt-out feature); Clerk v. ACE Cash Express, Inc., No. 09-05117, 2010 U.S. Dist. LEXIS 7978 (E.D. Pa. Jan. 29, 2010) (court holds that there is no procedural unconscionability when payday loan borrower was given a 30-day right to reject the arbitration provision without it having any adverse effect on the loan); Jackson v. The Payday Loan Store of Illinois, Inc., (Case No. 09 C 4189 (N.D. Ill. March 17, 2010) ("Considering the totality of the circumstances relevant to the class action waiver at issue here, the Court concludes that the waiver is enforceable. The parties agreed to the Agreement as a whole, including the waiver, and failed to opt-out as allowed by the provision for doing so described above. This allowed either party to elect arbitration, and contains a clear and legible notice to Plaintiffs that it limited certain rights, including the right to pursue a claim as a class action. Hante is therefore barred by the terms of the Agreement from bringing a claim in arbitration on a class basis"); Ambrose v. Comcast Corporation, No. 3:09-cv-182, 2010 WL 1270712 (E.D. Tenn. Mar. 31, 2010) ("the court finds that the arbitration provision was not a 'contract of adhesion' because plaintiff was provided with an opportunity to 'opt-out' of arbitration with no adverse effect on his relationship with Comcast. The 30-day window to 'opt-out' of arbitration afforded the consumer [plaintiff] with a realistic opportunity to bargain . . . ."); Pellett v. TCF Bank, N.A., Civil No. 10-3943 (DSD/FLN), D. Minn. Nov. 24, 2010 ("Plaintiffs first argue that they could not avoid the arbitration agreement and that it was a contract of adhesion. One of the first pages of The Terms and Conditions clearly states, in plain English and contrasting type, that plaintiffs had a right to opt out of the arbitration agreement. The arbitration provisions again describe plaintiffs' 30-day right to opt out in plain, simple terms. As a result, plaintiffs had an absolute right to opt out of the arbitration agreement, and their argument that the agreement was unavoidable and offered on a take-it-or-leave-it basis fails. Plaintiffs' next argue that they were unfairly surprised by the terms because the opt-out provision was 'buried' in the Terms and Conditions and that they 'could not find, and if found, could not understand' the opt-out provision. Pls.' Mem. Opp'n 34. This argument is contrary to the face of the documents. The Account Agreements clearly direct plaintiffs to the Terms and Conditions. Moreover, on one of the first pages, the Terms and Conditions remind plaintiffs that they have a 30-day right to opt out of the arbitration agreement. Plaintiffs may not avoid their signed agreements by claiming that they did not read or understand the contents of those agreement. See Gartner v. Eikill, 319 N.W.2d 397, 398 (Minn. 1982)." Day v. Persels & Associates, LLC, Case No. 8:10-CV-2463-T-33 TGW (M.D. Fla. May 9, 2011) ("More importantly, the arbitration provision was not a 'take-it-or-leave-it' situation, since it provided that the plaintiff could reject the provision by sending a rejection notice to CareOne (Doc. 25-1, p.8). And the Client Agreement itself was not particularly binding since the plaintiff was able to cancel it and get her money back."); Hopkins
(continued...)

Alabama

Leonard v. Terminix Int'l. Co., 854 So. 2d 529 (Ala. 2002) (in clause burdened by other unfair features, court invalidates clause containing class action waiver)

California

Discover Bank v. Superior Court of Los Angeles, 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 (2005) (class action waiver in a consumer contract of adhesion is unconscionable if California law applies when the dispute involves small amounts of damages and is not preempted by the FAA; case remanded to determine whether Delaware choice-of-law clause should be enforced)

Mandel v. Household Bank (Nevada) N.A., 129 Cal. Rptr. 2d 380 (Cal. Ct. App., 4th Dist. 2003), rev. granted and opinion superseded pending appeal, 132 Cal. Rptr. 2d 525, 65 P.3d 1284 (Cal. 2003), rev. dismissed, 29 Cal. Rptr. 3d 1, 112 P.3d 1 (Cal. 2005) (class action waiver unconscionable under Nevada law)

Castillo v. Dollar Financial Group, 2004 WL 2191551 (Cal. App. 4th Dist. 2004) (class action waiver unconscionable in employment arbitration agreement because it was unilateral)

Ramirez v. Circuit City Stores, Inc., 90 Cal. Rptr. 2d 916 (Cal. App. 1st Dist. 1999), review granted and opinion superseded pending appeal, 94 Cal. Rptr. 2d 1, 995 P.2d 137 (Cal. 2000), review dismissed, cause remanded, 101 Cal. Rptr. 2d 199, 11 P.3d 955 (Cal. 2000) (class action waiver unconscionable in employment agreement)

Parrish v. Cingular Wireless, LLC, No. A105518, 2005 Cal. App. Unpub. LEXIS 9021, 2005 WL 2420719 (Calif. Ct. App., 1st App. Dist., Div. 5 Oct. 3, 2005) (follows Discover Bank v. Superior Court in unpublished opinion), as modified on denial of rehearing (Nov. 2, 2005), pet. for review denied (Dec. 14, 2005), cert. denied in U.S. Supreme Court

Mendoza v. Cingular Wireless, LLC, No. A105518, 2005 Cal. App. Unpub. LEXIS 9021 (Cal. Ct. App., 1st App. Dist., Div. 5 (Oct. 3, 2005) (follows Discover Bank v. Superior Court, in unpublished opinion), cert. denied in U.S. Supreme Court

---

(...continued)

v. World Acceptance Corporation, No. 1:10-cv-03429- SCJ, 2011 U.S. Dist. LEXIS 79770 (N.D. Ga. June 29, 2011) (Court compels individual arbitration after finding no procedural unconscionablity, in part because of opt-out feature: "[W]hen a party challenges an arbitration agreement that contains an opt-out provision and fails to opt-out, the unconscionability argument is diluted because the provision was not offered on an take-it-or-leave-it basis." But, see Duran v. Discover Bank, 2009 WL 1873651 (Call. App. 2d Dist. June 19, 2009 (unreported)) (class action waiver invalidated despite opt-out feature).

Meoli v. AT&T Wireless Services, Inc., Nos. A106061, A106340 and A106341, 2005 Cal. App. Unpub LEXIS 8994 (Calif. Ct. App., 1st App. Dist, Div. 5 Sept. 30, 2005) (follows Discover Bank v. Superior Court in unpublished opinion), cert. denied in U.S. Supreme Court

Bucy v. AT&T Wireless Services, Inc., A105910, 2005 Cal. App. Unpub. LEXIS 8993 (Calif. Ct. App., 1st App. Dist, Div. 5 Sept. 30, 2005) (follows Discover Bank v. Superior Court in unpublished opinion), cert. denied in U.S. Supreme Court

Wing v. Cingular Wireless, LLC, No. A105906, 2005 Cal. App. Unpub. LEXIS 9005 (Calif. Ct. App., 1st App. Dist, Div. 5 Oct. 3, 2005) (follows Discover Bank v. Superior Court in unpublished opinion), cert. denied in U.S. Supreme Court

Independent Association of Mailbox Center Owners, Inc. v. Superior Court, 133 Cal. App. 4th 396, 34 Cal. Rptr. 3d 659 (Calif. Ct. App., 4th App. Dist, Div. 1 2005) (follows Discover Bank v. Superior Court)

Patton v. Cingular Wireless, No. A108816, 2006 WL 1413537 (Cal. Ct. App., 1st Dist., Div. 1 May 23, 2006) (in this unpublished opinion, court follows California Supreme Court opinion in Discover Bank v. Superior Court, 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1106 (2005) and holds that class action waiver is unconscionable under California law)

Szetela v. Discover Bank, 97 Cal. App. 4th 1094, 118 Cal. Rptr. 2d 862 (4th Dist. Div. Three 2002), cert. denied, 123 S. Ct. 1258 (2003) (class action waiver is unconscionable under California law); Mandel v. Household Bank (Nevada), N.A., 105 Cal App. 4th 75 (4th Dist. Div. 3 2003) (same)

Lee v. AT&T Wireless Services, Inc., No. B186240, 2006 WL 1452936 (Cal. Ct. App. 2nd Dist. Div. 5 May 26, 2006) (in this unpublished opinion, court follows California Supreme Court opinion in Discover Bank v. Superior Court, 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1106 (2005) and holds that class action waiver is unconscionable under California law)

America Online, Inc. v. Superior Court, 108 Cal. Rptr. 2d 699, 90 Cal. App. 4th (2001) (invalidated Virginia forum selection clause in connection with putative class action filed under California Consumer Legal Remedies Act because that Act contains non-waivable right to maintain a class action)

Aral v. Earthlink, Inc., 134 Cal. App. 4th 544, 36 Cal. Rptr. 3d 229 (Calif. Ct. App., Second Dist., Div. 4 2005) (invalidated Georgia forum selection clause and class action waiver after refusing to enforce Georgia choice-of-law clause because the class action was just a California statewide class action asserting a claim under California Business & Professions Code §17200)

Klussman v. Cross Country Bank, 134 Cal. App. 4th 1283, 36 Cal. Rptr. 3d 728 (Cal. Ct. App., 1st Dist., Div. One 2005) (in clause where class action waiver was not express but covered by implication because of the incorporation by reference of the NAF's rules and

where there are California claims in a California-only statewide class action, the court refuses to apply the Delaware choice-of-law clause)

Cohen v. DirecTV, Inc., 142 Cal. App. 4th 1442, 48 Cal. Rptr. 3d 813 (Cal. Ct. App., 2nd Dist., Div. Eight 2006) (applies Discover Bank v. Superior Court in a case involving an individual claim of $1,000)

Merritt v. Cingular Wireless, LLC, No. B 178947, 2006 WL 2744357 (Cal. Ct. App., 2nd Dist., Div. 1 Sept. 27, 2006) (in this unpublished opinion, court follows California Supreme Court opinion in Discover Bank v. Superior Court, 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1106 (2005) and holds that class action waiver is unconscionable under California law)

Firchow v. Citibank (South Dakota), N.A., No. B187081 2007 WL 64763 (Cal. Ct. App., Second Dist., Div 7 Jan. 10, 2007) (Court affirms denial of motion to compel arbitration after holding that class action waiver: (1) is substantively unconscionable under the California Supreme Court's opinion in Discover Bank v. Superior Court; (2) is procedurally unconscionable because it would not renew a credit card issued to a person opting out of the arbitration provision, thus making the opt-out right illusory; (3) is contrary to a fundamental public policy of California which has a materially greater interest than South Dakota - the state where Citibank is located and designated in the choice-of-law provision in the cardholder agreement. The Court also found no FAA preemption)[7]

In re Cingular Cases, No. D047603, 2007 WL 93229 (Cal. Ct. App., Fourth Dist, Div. 1 Jan. 16, 2007) (Court affirms denial of motion to compel arbitration after holding that class action waiver and arbitration agreement: (1) is procedurally unconscionable because the arbitration provision was "at the end of three pages of single-spaced extremely small print that is, at best, difficult to read" and was sent to one of the plaintiffs "as a filler, in his billing"; (2) is substantively unconscionable based on the California Supreme Court's opinion in Discover Bank v. Superior Court despite the fact that the amount in controversy is between $1,000 - $2,000. The Court also found no FAA preemption)

Gatton v. T-Mobile USA, Inc., 152 Cal. App. 4th 571, 61 Cal. Rptr. 3d 344 (Cal. Ct. App. 2007) (Class action waiver is unconscionable), *cert. denied*, 128 S. Ct. 2501 (2008)

Gentry v. Superior Court, 42 Cal. 4th 443, 64 Cal. Rptr. 3d 773, 165 P.3d 556 (Cal. Aug. 30, 2007) (In some cases, class action waiver undermines the vindication of employees' unwaivable statutory rights and would pose a serious obstacle to the enforcement of the

---

[7] During the week of April 9, 2007, the California Supreme Court granted review of this case, which had the effect of depublishing the opinion. The Court deferred briefing pending decision in Gentry v. Superior Court, which was reversed on August 30, 2007. The Supreme Court on November 28, 2007 dismissed review of Firchow in light of its Gentry opinion.

state's overtime laws. The Supreme Court also holds that the existence of an opt-out right did not, in and of itself, preclude a finding of procedural unconscionability in light of two factors: (1) the employee handbook touted the benefits of arbitration while omitting any mention of the remedial limitations and shortening of the statute of limitations; and (2) the likelihood that employees felt at least some pressure not to opt out of the arbitration agreement.), *cert denied*, 128 S. Ct. 1743 (2008)

Murphy v. Check 'N Go of California, Inc., No. A11442, 156 Cal. App. 4th 138, 67 Cal. Rptr. 3d 120 (Cal. Ct. App. Oct. 17, 2007) (Class action waiver is unconscionable under California law.)

America Online, Inc. v. Superior Court of Alameda County (Mendoza), 108 Cal. Rptr. 2d 699 (Cal. Ct. App. 2001) (AOL's forum selection clause in unconscionable because the clause violated California public policy on two grounds: (1) enforcement of the forum selection clause violated California's public policy that strongly favors consumer class actions; and (2) enforcement of the forum selection clause violated the anti-waiver provision of the Consumer Legal Remedies Act)

Sanchez v. Western Pizza Enterprises, Inc., No. B203961, 2009 WL 683701 (Cal. Ct. App., 2nd Dist., Div. 3 March 17, 2009) (follows Gentry v. Superior Court, 42 Cal. 4th 443, and holds that the class action waiver undermines the vindication of employees' unwaivable statutory rights under the laws requiring employers to reimburse employees for job expenses and to pay a minimum wage. The Court also held that the language in the arbitration agreement saying that it "is not a mandatory condition of employment" did not, in and of itself, preclude a finding of procedural unconscionability in light of two factors: (1) the inequality in bargaining power between the low-wage employees and their employer makes it likely that the employees felt at least some pressure to sign the arbitration agreement; and (2) the agreement suggests that there are multiple arbitrators to choose from and fails to mention that the designated arbitration provider includes only one arbitrator.)

Franco v. Athens Disposal Company, Inc., 171 Cal. App. 4th 1277, 90 Cal. Rptr.3d 539 (Cal. Ct. App., 2nd App. Dist. 2009) (follows Gentry v. Superior Court, 42 Cal. 4th 443, and holds that class action waiver is unconscionable with respect to the alleged violations of the meal and rest period laws given the modest size of the potential individual recovery ($10,250), the potential for retaliation against members of the class and the fact that absent class members of the class may be ill-informed about their rights; in addition, because the arbitration agreement prevents plaintiff from acting as a private attorney general, it conflicts with the Labor Code Private Attorneys General Act of 2004 – an act that furthers Gentry's goal of comprehensively enforcing state labor laws through statutory sanction.)

Olvera v. El Pollo Loco, Inc., No. 3205343, 2009 WL 1110828 (Cal. Ct. App. 2nd App. Dist. Div. Three April 27, 2009) (follows Gentry v. Superior Court, 42 Cal. 4th 443, and holds that class action waiver is unconscionable (i) procedurally unconscionable because of the inequality in bargaining power between the low-wage employees and their employer makes it likely that the employees felt at least some pressure to sign the

acknowledgement and agree to the new dispute resolution policy and the explanatory materials describing the policy were misleading; and (ii) substantively unconscionable because a class action is the only effective way for the employees (many of whom are low-wage earners with limited English language skills who are likely ill-informed of their statutory rights) to vindicate their rights.)

Duran v. Discover Bank, 2009 WL 1873651 (Cal. App. 2d Dist. June 19, 2009) (unpublished) (court held class action waiver invalid despite existence of opt-out provision and Delaware choice-of-law provision)

Vu v. Superior Court, No. B213988, 2009 WL 3823383 (Cal. Ct. App., 2nd App. Dist., Div. 7 Nov. 17, 2009) (Because the employer's arbitration agreement contains multiple defects, including a class action waiver, the Court grants the petition for writ of mandate of trial court order granting petition to compel arbitration)

Fisher v. DCH Temecula Imports, LLC, No. E047802, 2010 WL 3192912 (Cal. Fourth Dist., Div. Two Aug. 13, 2010) (Court affirms judgment of lower court denying motion to compel individual arbitration based on the non-waivable right to bring a class action under the Consumer Legal Remedies Act (the "CLRA"); court refuses to follow the Ninth Circuit opinion in Ting v. AT&T, 319 F.3d 1126 (2003) which had held that the FAA preempts the CLRA)

Mahmud v. Ralph's Grocery Company, No. B219688, 2011 WL 17851 (Cal. Ct. App, Second Dist. (Jan. 5, 2011) (follows Gentry v. Superior Court, 42 Cal. 4th 443, and holds that a class action waiver in employee's arbitration agreement is invalid).

Florida[8]

Bellsouth Mobility LLC v. Christopher, 819 So. 2d 171 (Fla. Ct. App. 2002) (in clause burdened by numerous other unfair features, court holds that class action waiver is substantively unconscionable), rehearing denied (June 27, 2002)

Powertel, Inc. v. Bexley, 743 So 2d 570 (Fla. App., 1st Dist. 1999) (in clause burdened by numerous other unfair features, court also holds that class action waiver is unconscionable), review denied, 763 So. 2d 1044 (2000)

America Online, Inc. v. Paseika, 870 So. 2d 170 (Fla. Dist. Ct. App. 2004) (invalidated Virginia forum selection clause in putative class action brought under Florida Deceptive and Unfair Trade Practices Act), review denied, 880 So. 2d 1209 (2004)

SDS Autos, Inc. v. Chrzanowski, Case no. 1D06-4293, 2007 WL 4145222 (Fla Ct. App., 1st Dist. Nov. 26, 2007) (Invalidates class action waiver for holders of small claims under Florida Deceptive and Unfair Trade Practices Act whose attorney's fees are limited by the amount of their actual damages)

McKenzie v. Betts, Nos. 4D08-493 and 4D08-494 (Fla. Ct. App., 4th Dist. Feb. 2, 2011) (Court affirms denial of motion to compel arbitration of the named-plaintiffs' claims under the Florida Deceptive and Unfair Trade Practices Act and other Florida remedial statutes after holding that the class action waiver violates public policy when the trial court is persuaded by evidence that such a waiver prevents consumers from obtaining competent counsel even though the Florida statutes contain fee-shifting features; Court distinguishes earlier Fourth District Court of Appeals opinion in Fonte v. AT&T Wireless Services, Inc., 903 So 2d 1136 (2005), based on fact that the plaintiff in Fonte presented no evidence regarding an inability to retain competent counsel and the fact that the

---

[8] See Pendergast v. Sprint Nextel Corporation, No. 09-10612, 2010 WL6745 (11th Cir. Jan. 4, 2010) Court certifies the following questions to the Florida Supreme Court:

(1) Must Florida courts evaluate both procedural and substantive unconscionability simultaneously in a balancing or sliding scale approach, or may courts consider either procedural or substantive unconscionability independently and conclude their analysis if either one is lacking?

(2) Is the class action waiver provision in plaintiff's contract with Sprint procedurally unconscionable under Florida law?

(3) Is the class action waiver in plaintiff's contract with Sprint substantively unconscionable under Florida law?

(4) Is the class action waiver provision in plaintiff's contract with Sprint void under Florida law for any other reason?

AT&T arbitration provision, unlike the McKenzie arbitration provision, did not preclude the consumer from being part of a class action prosecuted by a government agency; Court certifies issue to Florida Supreme Court; Florida Supreme Court grants review, No. SC-11-514 (Mar. 28, 2011).

Illinois

Kinkel v. Cingular Wireless, LLC, 357 Ill. App. 3d 556, 828 N.E. 2d 812, 293 Ill. Dec. 502 (Ct. App., Fifth District 2005) (class action waiver is invalid, finding procedural unconscionability because waiver was in extremely small print in the middle of a long paragraph and substantive unconscionability because the waiver left consumers with small claims without an effective remedy in that the clause (1) did not contain a provision under which the company would pay arbitration costs, (2) did not provide for recovery of attorney's fees if permitted by applicable law and (3) put limitations on awarding punitive damages.

Kinkel v. Cingular Wireless LLC, 223 Ill. 2d 1, 857 N.E. 2d 250 (Ill. Sup. Ct. 2006) (Court affirmed the judgment of the Illinois Court of Appeals and held that a class action waiver in a cellular telephone service burdened by numerous other unfair features is unconscionable "because it is contained in a contract of adhesion that fails to inform the customer of the cost of her arbitration, and that does not provide a cost-effective mechanism for individual customers to obtain a remedy for the specific injury alleged in either a judicial or arbitral forum"; in doing so, however, the Court cautioned that it was not adopting a rule that class action waivers are per se unconscionable: "It is not unconscionable or even unethical for a business to attempt to limit its exposure to class arbitration in litigation, but to prefer to resolve the claims of clients individually. Indeed, it has been suggested as a matter of economic theory consumers may benefit from reduced costs if companies are allowed to engage in this strategy.")

Wigginton v. Dell, Inc., 382 Ill. App. 3d 1189, 890 N.E. 2d 541, 321 Ill. Dec. 819 (Ill. App. Ct., Fifth Dist. 2008) (class action waiver in computer contract with Texas choice-of-law clause is invalidated after court concludes that waiver violates a fundamental public policy of Illinois.

Peach v. CIM Ins. Corp., 352 Ill. App. 3d 691, 816 N.E. 2d 668 (5th Dist. 2004), appeal den., 212 Ill. 2d 536, 824 N.E. 2d 285 (2004) (class action waiver in arbitration provision unconscionable)

Keefe v. Allied Home Mortgage Corporation, No. 04-L-502, 2009 WL 2027244 (Ill. App. Ct., 5th Dist. July 10, 2009) (class action waiver unconscionable even though the borrower was given the option to decline signing the stand-alone arbitration agreement and still obtain the loan)

Kentucky

Schnuerle v. Insight Communications Company L.P., Nos. 2008-SC-00789-DG, 2009-SC-000390-DG, 2010 WL 5129850 (Ky. Supreme Court Dec. 16, 2010) (class action waiver unenforceable in case where individual average claim is only $40 and where

arbitration provision lacks any consumer-friendly features). Petition for rehearing is pending.

Louisiana

Sutton's Steel & Supply, Inc. v. Bellsouth Mobility, Inc., 776 So. 2d 589 (La. Ct. App. 3d Cir. 2000), writ den., 787 So. 2d 316 (La. 2001) (class action waiver unenforceable)

Maine

Public Law, Chapter 248 LD 1343, item 1, 124th Maine State Legislature (titled "An Act to Promote Consumer Fairness in Tax Refund Anticipation Loans") adds 9-A MRSA § 10-310 2.E. (7), which prohibits a facilitator of refund anticipation loans or refund anticipation checks from including a class action waiver in a refund anticipation loan application or agreement

Massachusetts

Feeney v. Dell Inc., No. SJC-10259, 908 N.E.2d 753, 454 Mass., 192 Mass Sup. Jud. Ct. July 2, 2009) (language in arbitration provision saying that the arbitration "will be limited solely to the dispute or controversy between customer and Dell" is contrary to fundamental public policy of state favoring class actions under G.L.C. 93A and refused to apply Texas choice-of-law clause; complaint, however, dismissed for failure to state a claim under 93A)

Minnesota

Minnesota Statutes, § 270 C.445, Subdivision 3(18)(vii), prohibits a tax preparer from including a class action waiver in any document provided or signed in connection with the provision of tax preparation services.

Minnesota Statutes, Chapter 68, S.F. No. 806, adds § 47.601, Subdivision 2, to prohibit a person making a consumer short-term loan from including a class action waiver in loan documents

Missouri

Whitney v. Alltel Communications, Inc., 173 S.W. 3d 300 (Mo. App. W.D. 2005) (in clause burdened by other certain features, including a provision which prohibited an award of any incidental, consequential, punitive or exemplary damages as well as attorneys' fee and which required the customer to bear the costs of arbitration, court invalidates clause containing class action waiver)

Woods v. QC Financial Services, Inc., No. ED 90949, 2008 WL 5454124 (Mo. App., Eastern Dist, Div. Three Dec. 23, 2008) (court invalidates class action waiver, severs it and affirms trial court's decision ordering class-wide arbitration)

Ruhl v. Lee's Summit Honda, No. WD 70189, 2009 WL 2571309 (Mo. App. Western Dist. Nov. 3, 2009) (court invalidates class action waiver, severs it and orders arbitration; the court follows Whitney and Woods and completely ignores the Eighth Circuit opinions enforcing class action waivers under Missouri law)

Brewer v. Missouri Title Loans, Inc., No. ED 92569, 2009 WL 4639899 (Missouri App. Eastern Dist., Div. 3 Dec. 8, 2009) (Based on Woods v. QC Financial Services, Inc. opinion, court affirms order invalidating class action waiver and then orders classwide arbitration)

Shaffer v. Royal Gate Dodge, Inc. No. ED 92839, 2009 WL 4638850 (Missouri App. Eastern Dist., Div. 2 Dec. 8, 2009) (Court affirms trial court order denying motion to compel arbitration after invalidating class action waiver in lawsuit alleging violation of Missouri Merchandising Practices Act which contains non-waivable right to bring class action lawsuits)

Brewer v. Missouri Title Loans, Inc., No. SC90647, 2010 WL 3430411 (Mo. S.W. 3d, Aug. 31, 2010) (Court affirms Court of Appeals opinion invalidating class action waiver, refuses to sever class action waiver, and invalidates the arbitration agreement) On May 2, 2011, the U.S. Supreme Court granted the petition for a writ of certiorari, vacated the Missouri Supreme Court opinion, and remanded the case to the Missouri Supreme Court for further consideration in light of the Supreme Court's opinion in AT&T Mobility LLC v. Concepcion, No. 09-893, 2011 U.S. LEXIS 3367 (April 27, 2011)

Ruhl v. Lee's Summit Honda, No. SC90601 (Missouri Supreme Court Aug. 31, 2010) (Court affirms Court of Appeals opinion invalidating class action waiver, refuses to sever class action waiver, and invalidates the arbitration agreement)

Nevada

Picardi v. The Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, No. 53126, 2011 WL 1205284 (Mar. 31, 2011) (Nevada Supreme Court grants petition for a writ of mandamus and holds that a class action waiver in a consumer contract violates Nevada public policy and is unenforceable; court does not consider FAA preemption)

New Jersey

Muhammad v. County Bank of Rehoboth Beach, Delaware, 912 A.2d 88 (N.J. 2006) (invalidates class action waiver in context of low-value consumer claim in adhesive contract; court does not consider choice-of-law argument or FAA preemption argument)

New Mexico

Fiser v. Dell Computer Corporation, 144 N.M. 464, 188 P.3d 1215 (2008) (invalidates arbitration agreement in small dollar ($10 - $20) consumer claim after refusing to enforce Texas choice-of-law provision and holding that class action waiver is contrary to New

Mexico's fundamental public policy of encouraging the resolution of small consumer claims)

Sections 44-7A-1(b)(4)(f) and 44-7A-5 of New Mexico Stat. Ann. Provides in Revised Uniform Arbitration Act that a class action waiver in an adhesion consumer arbitration agreement is unenforceable. This should be preempted by the FAA.

New York

Section 32 of the Tax Code, as amended by Section 2 of part VV of chapter 59 of the laws of 2009 prohibits a facilitator of a tax refund anticipation loan from including a class action waiver in any documents provided or signed to obtain a refund anticipation loan or refund anticipation check.

In the Matter of Mark Frankel v. Citicorp Insurance Services, Inc., 2010 WL 4909624 (Supreme Court, App. Div. Nov. 30, 2010) (Court vacates order of lower court compelling individual arbitration and remands case to lower court for a hearing to resolve whether class action waiver in credit card arbitration provision is unconscionable as a matter of South Dakota law)

North Carolina

Tillman v. Commercial Credit Loans, Inc., 362 N.C. 93 655 S.E.2d 362 (2008) (Court holds that class action waiver is unconscionable when coupled with a cost-shifting ("loser pays") provision for arbitration proceedings exceeding eight hours, the cost-shifting provision for *de novo* appeal from the initial arbitration, the $15,000 cap on the value of claims that can be pursued outside of arbitration, and the exclusion of foreclosure claims from arbitration)

Ohio

Eagle v. Fred Martin Motor Co., 157 Ohio App. 3d 150, 809 N.E. 2d 1161 (2004) (court in dictum states that inability to prosecute class action is violative of Ohio Consumer Sales Practices Act; court invalidates arbitration clause burdened by several unfair features)

Schwartz v. Alltel Corp., No. 86810, 2006 WL 2243649 (Ohio App. 8th Dist. June 29, 2006) (Court holds that class action waiver in a cellular phone contract runs afoul of the state's public policy regarding consumer protection and is thus substantively unconscionable when combined with a provision prohibiting an award of attorneys' fees that are statutorily authorized)

Oklahoma

12 Okla. Stat. Ann. §1880 (added by Laws, 2005, c. 364, §30 effective Jan. 1, 2006). Provides in Revised Uniform Arbitration Act that class action waivers, among other features of an arbitration agreement in a standard form adhesion contract, "shall be closely reviewed for unconscionability based on unreasonable one-sidedness and

understandable or unnoticeable language or lack of meaningful choice and for balance and fairness in accordance with reasonable standards of fair dealing." This should be preempted by the FAA.

Bilbrey v. Cingular Wireless, L.L.C., No. 102973, 164 P.3d 131 (Okla. June 26, 2007) (Class action waiver is unconscionable when applied retroactively to dismiss an already pending class action pertaining to an earlier contract which did not contain an arbitration provision.)

Oregon

Vasquez-Lopez v. Beneficial Oregon, Inc., 210 Or. App. 553, 152 P. 3d 940 (2007) (Court affirms denial of motion to compel arbitration after concluding that class action waiver is unconscionable in an individual action where (i) the plaintiffs did not speak English, the language used in the contract, (ii) the defendant misrepresented to the plaintiffs that they could "go to court after submitting to arbitration," and (iii) the arbitration agreement saddled the plaintiffs with arbitration fees they could not afford)

Sprague v. Quality Restaurants Northwest, Inc., No. 050504650, A131182 (Or. Ct. App. June 27, 2007) (Arbitration clause is not unconscionable because of silence with respect to availability of class-wide arbitration since court held that incorporation of AAA rules authorizes class-wide arbitration.)

Pennsylvania

Lytle v. Citifinancial Services, Inc., 2002 Pa. Super. 327, 810 A.2d 643 (2002) (remands to trial court for determination of whether class action waiver is unconscionable)[9]

Dickler v. Shearson Lehman Hutton, 408 Pa. Super 286, 596 A.2d 850 (1991) (Court held that class action arbitration should be held in the face of an arbitration agreement that was silent with respect to the issue.)

McNulty v. H&R Block, 2004 Pa. Super 45, 843 A.2d 1267 (2004) (While not dealing directly with the validity of a class action waiver, the Court, in the context of a putative class action invalidated an arbitration agreement based on the fact that the arbitration fee of $50 to obtain at most $30 precluded the individual presentation of claims.)

---

[9] The recent Pennsylvania Supreme Court opinion in Salley v. Option One Mortgage Corp., No. 50 EAP 2005, 592 Pa 323, 925 A.2d 115 (Pa. May 31, 2007) casts serious doubt on the continued viability of these two opinions. Furthermore, the even more recent Third Circuit opinion in Gay v. CreditInform, 511 F.3d 369 (3d Cir. Dec. 19, 2007) holds that the law created by these opinions is preempted by the FAA. Another later panel of the Third Circuit has stated that the discussion of FAA preemption in Gay is probably dicta.

Thibodeau v. Comcast Corporation, 2006 Pa. Super 346, 912 A.2d 874 (2006) (Court affirms denial of motion to compel arbitration after holding that class action waiver in Comcast's customer agreement is unconscionable; Court largely adopts opinion of trial court issued on January 27, 2006 in the Philadelphia Court of Common Pleas, March Term 2004, No. 4526, 2006 WL 416863; Court refuses to do a choice-of-law analysis even though the plaintiff resides in Massachusetts since it concluded that Massachusetts law is the same as Pennsylvania law.)[7]

South Carolina

Herron v. Century BMW, Opinion No. 26805, 2010 S.C. LEXIS 118 (S.C. April 19, 2010) (class action waiver is against public policy expressed in the South Carolina Regulation of Manufacturers, Distributors and Dealers Act which expressly provided plaintiffs with the right to bring class action lawsuits for violations of such Act – a holding which is flatly contrary to the FAA; court further concludes that there is no procedural unconscionability and does not deal with substantive unconscionability). On May 2, 2011, the U.S. Supreme Court granted the petition for a writ of certiorari, vacated the South Carolina Supreme Court opinion, and remanded the case to the South Carolina Supreme Court for further consideration in light of the Supreme Court's opinion in AT&T Mobility LLC v. Concepcion, No. 09-893, 2011 U.S. LEXIS 3367 (April 27, 2011)

Washington

Scott v. Cingular Wireless, 160 Wash. 2d 843, 161 P.3d 1000 (2007) (Class action waiver is unconscionable on the ground that it undermines the public policy of the Washington Consumer Protection Act by "dramatically decreasing" the possibility that Cingular customers would be able to act as private attorneys general and bring meritorious suits on minor claims and because it effectively exculpated Cingular from liability for those claims allegedly too small to warrant arbitration on an individual basis.)

Dix v. ICT Group, Inc., 160 Wash. 2d 826, 161 P.3d 1016 (2007) (Because forum selection clause calls for filing lawsuit in Virginia and Virginia state courts do not permit class actions, such clause is invalid in a small-value claim brought under the Washington Consumer Protection Act.)

Dix v. ICT Group, Inc., 125 Wash. App. 929, 106 P.3d 841 (Wash. Ct. App. 2005) (invalidated Virginia forum selection clause in putative class action brought under Washington Consumer Protection Act because Virginia does not permit class actions), reconsideration denied (Apr. 14, 2005).

McKee v. AT&T Corporation, No. 81006-1, 2008 WL 3932188 (Wa. Sup. Ct. Aug. 28, 2008) (court refuses to apply New York law, applies Scott supra and invalidates class action waiver based on small dollar amount of claim)

Olson v. The Bon, Inc., 183 P.3d 359 (Wash. Ct. App. Div. 3 2008) (class action waiver unconscionable in case involving less than a couple of hundred dollars)

Townsend v. The Quadrant Corporation, No. 62700-7-1, 2009 WL 3337228 (Wash. Ct. App. Div. 1 Oct. 19, 2009) (court compels arbitration of putative class action and distinguishes Scott and Dix opinions based on the fact that the arbitration provisions in those cases, unlike this case, contained class action waivers)

West Virginia

State of West Virginia ex. rel. James Dunlap v. Berger, 567 S.E. 2d 265 (W.Va. 2002) (in clause burdened by other unfair features, court also determined that inability to prosecute a class action was unconscionable), cert. denied, Friedman's Inc. v. West Virginia ex rel. Dunlap, 537 U.S. 1087, 123 S. Ct. 695, 154 L. Ed. 2d 631 (2002)[10]

Wisconsin

Eastman v. Conseco Finance Servicing Corp., No. 01-1743, 2002 WL 1061856 (Wis. Ct. App. May 29, 2002) (in certifying case for immediate review by Wisconsin Supreme Court, court suggests that an arbitration clause with several unfair features, including class action waiver, may be unconscionable)

Wisconsin Auto Title Loans v. Jones, 714 N.W. 2d 155, 2006 WI 53 (2006) ("[A]lthough the arbitration provision is silent on class actions, the parties assume the borrower must pursue his claims individually in arbitration and not as the representative of a class. Even if it were possible to pursue class claims in arbitration, and we do not address this issue, the relief available to the putative class appears to be substantially broader in circuit court than in arbitration. Under the Wisconsin Consumer Act, a class action may be maintained for injunctive relief. No such injunctive relief is available in arbitration. The arbitration provision, therefore, limits the meaningful remedies available to the borrower.")

Coady v. Cross Country Bank, 299 Wisc. 2d 420, 729 N.W. 2d 732 (WI Court of Appeals 2007) (Court affirms denial of motion to compel arbitration after concluding that arbitration provision is unconscionable because (1) the standard choice-of-law clause in

---

[10] Several federal district courts in West Virginia and the Fourth Circuit have held that this opinion is preempted by the FAA. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Coe, 313 F. Supp. 2d 603, 615 (S.D. W.Va. 2004); Schultz v. AT&T Wireless Services, Inc., 376 F. Supp. 2d 685 (N.D. W.VA. 2005); Miller v. Equifirst Corporation of West Virginia, Civil Action No. 2:00-0335, 2006 WL 2571634 (S.D. W. Va. Sept. 5, 2006); Strawn v. AT&T Mobility, Inc., Civil Action No. 2:06-0988 (S.D. W.Va. Jan. 20, 2009); Wince v. Easterbrooke Cellular Corporation, 681 F. Supp. 2d 679 (N.D. W. Va. 2010); Am. Gen. Life & Accident Ins. Co. v. Wood, 429 F.3d 83 (4th Cir. 2005). Moreover this opinion has recently been distinguished by the West Virginia Supreme Court itself in State of West Virginia, ex rel AT&T Mobility, LLC et al v. Honorable Ronald E. Wilson, Judge of the Circuit Court of Brooke County and Charlene A. Shorts, September 2010 Term, No. 35537 (Oct. 28, 2010).

the cardholder agreement calling for the application of Delaware and Federal law have the effect of precluding the plaintiffs from asserting claims or remedies under the Wisconsin Consumer Act either in court or arbitration; (2) the class action waiver is substantively unconscionable; and (3) it was in small type, the Bank did not explain to the unsophisticated plaintiffs the meaning or effect of the arbitration provision, the credit cards were adhesion contracts opened in response to a solicitation from the Bank, the plaintiffs did not read and were not otherwise aware of the arbitration provision, the credit card agreements were not provided to the plaintiffs at the time they signed up for the credit cards, and the Bank did not demonstrate that the plaintiffs could have obtained other credit cards without arbitration provisions)

Cottonwood Financial, LTD v. Estes, Appeal No. 2009 AP 760, 2010 WL 2036963 (WI Court of Appeals May 25, 2010) (court follows the Wisconsin Auto Title Loans and Coady Opinions in holding that the class action waiver is substantively unconscionable because it violates the Wisconsin Consumer Act but remands the case to the lower court so that it can determine whether the arbitration agreement is procedurally unconscionable)

Final Tally:

(This tally has been altered because of the U.S. Supreme Court's April 27, 2011 opinion in AT&T Mobility LLC v. Concepcion, No. 09-893, 2011 U.S. LEXIS 3367, which held that the FAA preempts all holdings by courts that class-action waivers are invalid under state laws.)

Federal Circuits

Class action waivers OK:
Supreme Court (because of FAA preemption), Third (because of FAA preemption of PA law), Fourth, Fifth, Sixth, Seventh, Eighth, Eleventh (as long as fee-shifting feature exists)

Class action waivers not OK:
First (in antitrust case and in employment case involving bad facts), Second (in antitrust case under vindication of statutory rights analysis), Ninth (based on Discover Bank v. Superior Court); and Third (based on NJ opinion in Muhammad v. County Bank)

Yet to weigh in:
Tenth

State Courts and Statutes:

Class action waivers OK (14 states):
Colorado*, Delaware, District of Columbia, Hawaii, Kansas*, Maryland, Mississippi***, New York*, North Dakota, Ohio*, Tennessee*, Texas*, Utah** and Virginia***

States uncertain (2 states):
Florida (11th Circuit just certified issue to Florida Supreme Court), South Carolina (invalid for claim under Auto Dealers statute)

Class action waivers probably not OK (although it is not completely clear because of other unfair features) (8 states):
Alabama****, Illinois****, Louisiana, North Carolina, Oregon*, Pennsylvania*, West Virginia, Wisconsin

---

* Opinions issued by intermediate appellate court, not state's highest court. A Third Circuit opinion in Gay v. CreditInform, 511 F.3d 269 (3d Cir. 2007) and a Pennsylvania Supreme Court opinion in Salley v. Option One Mortgage Corp.,592 PA. 323, 925 A.2d 115 (2007) have cast considerable doubt on the continued viability of the Pennsylvania opinion. In Ohio, the validity of the class action waiver may turn on whether the rest of the arbitration provision is considered fair.

** By statute.

(continued...)

Class action waiver invalid for small dollar consumer claims in "take-it-or-leave-it contract (8 states):

California, Kentucky, Massachusetts, Missouri*****, Nevada, New Jersey, New Mexico, Washington

Class action waiver in certain types of arbitration agreements statutorily invalidated or subject to higher scrutiny (4 states):
Maine, Minnesota, New York, Oklahoma

Courts applying the laws of 26 states (and the District of Columbia) have held that class action waivers are enforceable under state law, at least when the arbitration agreement neither imposes higher arbitration costs on the consumer nor limits the remedies that can be awarded in arbitration:
Alabama, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Hawaii, Illinois, Kansas, Louisiana, Maryland, Mississippi, Missouri, New York, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia and West Virginia

---

(...continued)

*** Class actions are not allowed in state court.

**** Several Federal District Courts in Alabama and Illinois have upheld the validity of class action waivers after distinguishing the Alabama Supreme Court and Illinois Supreme Court opinions.

***** In Missouri, the enforceability may turn on the complexity of the case.