Latest Issues in Arbitration and Class Actions
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I. Key U.S. Supreme Court cases on arbitration and class action bans since 2010

A. *Rent-A-Center, West, Inc. v. Jackson*, ___ U.S. ___, 130 S. Ct. 2772 (June 21, 2010) – Delegating the authority to decide enforceability of arbitration clause to the arbitrator.

1. A delegation clause is "an agreement to arbitrate threshold issues concerning the arbitration agreement." Such a clause gives the arbitrator, as opposed to a court, the authority to decide "gateway" issues such as whether the arbitration clause is enforceable or whether the dispute falls within the scope of the arbitration clause. *Id.* at 2777.

2. *Held*: Unless a plaintiff challenges a delegation clause specifically, it must be treated as valid and enforceable.

3. *Facts:* Plaintiff filed an employment discrimination case, and Rent-A-Center moved to compel arbitration. Plaintiff opposed the motion on the ground that the arbitration agreement in question was unconscionable and therefore unenforceable. But the plaintiff failed to direct his unconscionability challenge to the delegation clause itself (delegating the question of enforceability to the arbitrator); rather, he challenged the enforceability of the arbitration agreement as a whole. Therefore, the Supreme Court held the delegation clause to be valid, and left the question of whether the arbitration agreement was enforceable for the arbitrator to decide.

4. Possible challenges to a delegation clause

a. Language of delegation is not "clear and unmistakable." *First Options of Chicago v. Kaplan*, 514 U.S. 938, 944 (1995), held that "[c]ourts should not assume that parties agreed to [have the arbitrator decide whether a given dispute is arbitrable] unless there is 'clear and unmistakable' evidence that they did so." The "clear

and unmistakable" evidence standard "is meant to be a high one, and the normal presumptions in favor of arbitration do not apply." *Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1, 14 (1st Cir. 2005).

b. Something about the delegation clause itself is unconscionable or otherwise unenforceable – *i.e.*, it would be unfair to have the arbitrator decide whether her own fees were unfairly high.

B. *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (Apr. 27, 2011) – FAA preempts state unconscionability laws that invalidate categorical class action bans in mandatory arbitration agreements.

1. FAA § 2 – Courts can invalidate arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Until *Concepcion*, this savings clause was interpreted to mean that although states can't discriminate against arbitration, arbitration clauses can be struck down on contract law grounds that are generally applicable to all contracts.

2. In *Concepcion*, the 5-4 majority said that even a *generally applicable* contract defense under state law, such as unconscionability, may be preempted if it is *applied* in a way that disfavors arbitration. The Court held that any state law rule effectively requiring classwide arbitration of particular categories of cases "interferes with fundamental attributes of arbitration" – efficient and speedy dispute resolution -- and therefore conflicts with the FAA.

3. Under *Concepcion*, bilateral (i.e., individual) adjudication is considered a "fundamental attribute" of arbitration unless the parties have voluntarily agreed to multilateral (e.g., class) arbitration, so a state law that invalidates all contractual class action bans would still be preempted even though it also invalidates such bans outside the arbitration context.

C. *CompuCredit Corp. v. Greenwood*, ___ U.S. ___, 132 S. Ct. 665 (Jan. 10, 2012) – All claims under federal statutes are presumed to be arbitrable unless there is a contrary congressional command.

1. *Held:* Language in the Credit Repair Organizations Act (CROA), 15 U.S.C. § 1679 *et seq.*, that requires governed organizations to notify consumers that they have a non-waivable "right to sue" does not sufficiently establish Congress's intent to provide consumers a right to sue in court rather than in arbitration.

2. While the FAA establishes a "liberal policy favoring arbitration agreements," that mandate can be "overridden by an express statutory command." Plaintiffs argued that CROA, which regulates businesses that purport to assist consumers in improving their credit records and ratings,

contained such a command. Specifically, plaintiffs pointed to: (a) a provision in CROA's disclosure provision requiring businesses to disclose to consumers that "You have a right to sue a credit repair organization that violates the [Act]"; and (b) a term providing that the waiver by any consumer of "any protection provided by or any right of the consumer under this subchapter" is void and cannot be enforced in any court. The Court held that these provisions do not create a right for consumers to bring an action in court, but rather merely a right to receive a statement advising them of their "right to sue." The majority rejected the notion that "if the CROA does not create a right to a judicial forum, then the disclosure provision effectively requires that credit repair organizations mislead consumers," reasoning that "most consumers" would understand the disclosure to mean that they have a legal right, enforceable in court, to recover damages from a credit repair organization in some forum (here, arbitration).

3. Since *CompuCredit*, many defendants have argued that the *only* way an arbitration clause can be invalidated is if Congress has expressly stated in another federal statute that claims under that statute are not arbitrable. These defendants argue that the "effective vindication" doctrine is no longer good law.

D. *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, ___ U.S. ___, 130 S. Ct. 1758 (April 27, 2010) – Where parties have not agreed to authorize class arbitration, permitting class arbitration is inconsistent with the Federal Arbitration Act.

1. *Held*: If an arbitration agreement is "silent" as to class arbitration, a party cannot be forced to submit the dispute to class arbitration. While the parties had agreed to have the arbitrator decide whether their agreement permitted class arbitration, the arbitration panel exceeded its authority under FAA § 10(a)(4) by improperly "impos[ing] its own view of sound policy," rather than interpreting the FAA or relevant maritime law to construe the arbitration agreement..

2. Justice Alito also wrote that an arbitrator may not infer an agreement to permit class arbitration from the fact of the agreement itself. This determination is rooted in the subsequent discussion regarding differences between class actions and individual actions. 130 S.Ct. at 1775-76 ("In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.") The benefits in class arbitration are "much less assured."

3. "An implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties'

agreement to arbitrate" 130 S.Ct at 1775. However, the Court expressly declined to decide what contractual basis is necessary to support a finding that the parties had intent to permit class arbitration. *See* 130 S.Ct. at 1776, n.10 ("We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration. Here, as noted, the parties stipulated that there was "no agreement" on the issue of class-action arbitration.")

4. The dissent (Ginsburg, J.) highlighted this dimension of the majority decision: "the Court does not insist on express consent to class arbitration. Class arbitration may be ordered if 'there is a contractual basis for concluding that the part[ies] *agreed*' 'to submit to class arbitration.'" 130 S.Ct. at 1783; *see* discussion above re fn. 10 of *Stolt-Nielsen*...

E. Arbitration Agreements with No Express Provision re Class Arbitration: *Jock v. Sterling Jewelers Inc.* and *Oxford Health Plan*

1. *Jock v. Sterling Jewelers Inc.*: Following *Stolt-Nielsen*, the Second Circuit upheld an arbitral award interpreting an arbitration agreement containing no express provision regarding class arbitration as permitting employees to proceed on a classwide basis. *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113 (2d Cir. 2011), *cert. denied* 132 S. Ct. 1742 (2012).

   a. The court relied on the deferential standard of review afford to decisions of arbitrators and the fact that the parties had agreed to submit this question to the arbitrator.

   b. The question of whether the arbitration clause permitted the claimants to seek class certification was "properly submitted to [the arbitrator] by the parties" and the arbitrator "reached her decision by analyzing the terms of the agreement in light of applicable law." *Jock*, 646 F.3d at 115.

   c. The court interpreted *Stolt-Nielsen* narrowly, holding that the arbitrator's interpretation of the agreement as implicitly manifesting an intention to allow class arbitration proceedings was reasonable, even though the arbitration agreement did not contain an express provision permitting class arbitration.

   d. The Supreme Court denied Sterling's petition for *certiorari*.

2. The Fifth Circuit disagreed with the Second Circuit's decision in *Sterling Jewelers*, holding that an arbitrator exceeds his authority by permitting class arbitration where the agreement does not address the issue explicitly. *See Reed v. Florida Metropolitan University, Inc.*, 681 F.3d 124 (5th Cir. 2012). In that decision the Fifth Circuit found *Jock* incompatible with *Stolt-Nielsen* and took a narrower view of the deference that should be afforded arbitration awards.

3. *Sutter v. Oxford Health Plans LLC*, 675 F.3d 215 (3d Cir. 2012), as amended, (Apr. 4, 2012), *certiorari granted* (Dec. 7, 2012) -- Third Circuit affirmed the district court's determination that the arbitrator had not exceeded his power by interpreting a broad clause that did not mention class arbitration to permit class arbitration.

   a. The clause in that agreement stated: "No civil action concerning any dispute arising under this Agreement shall be instituted before any court." The arbitrator determined that this clause covered all possible actions, including class actions.

   b. The Third Circuit agreed that the arbitrator's decision was sufficiently anchored in the text of the arbitration agreement.

   c. The Supreme Court granted Oxford Health Plans' petition for *certiorari* on December 7, 2012. Oral argument is set for March 25, 2013.

   d. The question presented is: "Whether an arbitrator acts within his powers under the Federal Arbitration Act (as the Second and Third Circuits have held) or exceeds those powers (as the Fifth Circuit has held) by determining that parties affirmatively "agreed to authorize class arbitration," *Stolt-Nielsen*, 130 S. Ct. at 1776, based solely on their use of broad contractual language precluding litigation and requiring arbitration of any dispute arising under their contract."

   e. Petitioner Oxford Health Plans filed its opening brief on January 22, 2013. In addition to arguing that the arbitrator's "policy preference provides the most apparent explanation for [his] decision," Pet. Br. at 13, Oxford Health also argues that the Third Circuit's review of the arbitrator's decision was inadequate and too deferential.

   f. Amici include the Chamber of Commerce, Pacific Legal Foundation, DRI, New England Legal Foundation, Equal Employment Advisory Council.

II. **Potential limits to *AT&T Mobility v. Concepcion* – class action ban cases**

A. What if class action ban prevents "effective vindication" of federal statutory rights?

1. *American Express Co. v. Italian Colors Restaurant*, U.S. Supreme Court No. 12-133, oral arg. scheduled for Feb. 27, 2013

a. In *In re American Express Merchants' Litigation*, __ F.3d __, No. 06–1871, 2012 WL 284518, *12 (2d Cir. Feb. 1, 2012) ("*Amex III*") the Second Circuit held that *Concepcion* did not overrule well-settled U.S. Supreme Court precedent holding that statutory claims are arbitrable "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). The Court has cautioned that, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Id.* at 628. *See also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295 n.10 (2002); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 129 S. Ct. 1456, 1474 (2009); *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000); *Vimar Seguros y Reaseguros SA v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995) (Kennedy, J.).

b. The Second Circuit held, in this antitrust case brought by small businesses whose separate recoveries would be dwarfed by the expense of litigation, including the high costs of expert witnesses, that "[t]he evidence presented by plaintiffs here establishes, as a matter of law, that the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws."

c. *Amex III* will almost certainly decide whether the "effective vindication" doctrine is alive and meaningful, or if the Supreme Court was only paying lip service to vindication of rights in that long line of cases.

d. See Public Justice *amicus* brief – Policy argument that if Supreme Court enforces Amex's class action ban, arbitration will lose its legitimacy. *See also* amicus briefs by U.S. Solicitor General and by prominent arbitrators in support of plaintiffs.

e. The amicus brief filed by the Solicitor General focuses on the origins and development of the "effective vindication" doctrine,

argues that this doctrine is still meaningful and that it should be applied in this case.

i. This brief clearly articulates how costs can so strongly deter individuals from bringing claims as to make an arbitration agreement with a class ban unenforceable: "each plaintiff's non-recoverable arbitration costs will greatly exceed its potential recovery." Amicus at 16. Such a situation "force[s] the plaintiff to abandon its claim entirely." Amicus at 16-17.

ii. However, the Solicitor General's amicus brief also raises an area of concern for civil rights practitioners and plaintiffs in that it offers the Supreme Court an option to side-step concerns about effective vindication where there are cost-sharing or cost-shifting regimes.

1.) This distinction, while supporting the position articulated the amicus brief that the arbitration ban on class action in this case should not be enforced, would permit such bans on class actions brought under many civil rights statutes.

2.) Because the antitrust laws do not expressly provide for the award of expert fees as part of costs, experts are paid as regular witnesses at the cost of $40/day. By contrast, many civil rights laws, amended by the Civil Rights Act of 1991, permit recovery of expert costs at market rates by providing expert costs are part of the costs recoverable by a prevailing plaintiff.

3.) The Solicitor General's amicus brief asserted that "inclusion of a cost-shifting provision might have rendered individual arbitration an economically feasible means of pursuing the underlying federal claims." Amicus at 25; *see also* Amicus at 20, 22 n.2, 24, 28. This argument would effectively endorse enforcement of bans on class actions in arbitration for civil rights cases, where the statute contains a cost-shifting provision.

B. What if class action ban <u>itself</u> violates federal law?

1. **Title VII:** *Chen-Oster v. Goldman, Sachs & Co.*, 785 F. Supp. 2d 392 (S.D.N.Y. 2011). Title VII gives employees a federal statutory right to bring a pattern-or-practice claim. The court held that, "because an

arbitration clause may not be enforced if it precludes the vindication of substantive rights, and because a pattern or practice claim under Title VII can only be brought in the context of a class action, [the plaintiff]'s Title VII claim cannot be committed to arbitration lest she be deprived of her substantive rights." Pending before the 2d Cir.

a. An amicus brief filed in support of respondents before the Second Circuit by NELA, Asian American Justice Center, the Lawyers' Committee, NAACP Legal Defense and Education Fund, and many other organizations explains role that pattern or practice claims play in Title VII's framework and argues that arbitration agreements containing class waivers effectively bar employees from pursuing pattern-or-practice claims and are therefore unenforceable. Amicus at 18.

    i. Pattern-or-practice claims, which "allow for claims and remedies focused more broadly and deeply at employers' systemic practices and engrained cultures," are central to the remedial framework of Title VII. Amicus at 7. They are not simply procedural rules. They are, therefore, not subject to waiver simply by assignment to arbitration.

    ii. Pattern-or-practice claims are not interchangeable with individual disparate treatment claims under Title VII.

        1.) Pursuit of pattern-or-practice claims in individual adjudications is impracticable because of limitation on the scope of discovery, prohibitive costs as compared to individual recoveries, and the limited scope of available injunctive relief.

        2.) Individual disparate treatment claims are substantively different from pattern-or-practice claims.

            a.) The substance of the claim, method of proof and burden-shifting framework in pattern-or-practice cases are distinct.

            b.) The relief available, in particular systemic, prospective injunctive relief, in pattern-or-practice claims is distinct.

    iii. "[T]he limitation on arbitration here derives from the complementary principle that arbitration can only be compelled 'so long as the prospective litigant may vindicate its statutory cause of action in the arbitral

forum.'" Amicus at 17, *quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985).

2. **NLRA:** *D.R. Horton, Inc.* 357 NLRB No. 184, 2012 WL 36274 (Jan. 3, 2012)

   a. Holding: Employer violates Section 7 and 8(a)(1) of National Labor Relations Act, and counterpart provisions of Norris-LaGuardia Act, by prohibiting employees from pursuing workplace claims on joint, class, or representative action basis, because Section 8(a)(1) prohibits any "interference, restraint, or coercion" on Section 7 rights, including the "core, substantive" right to engage in concerted legal activity for mutual aid and protection.

   b. Current Status: Cross-Appeals for Review and Enforcement pending before the Fifth Circuit (King, Southwick, Graves)

      i. Argued February 5, 2013

      ii. Panel on February 8 requested supplemental briefing to address whether it should decide the additional quorum issues raised by the D.C. Circuit's decision in *Noel Canning*, __ F.3d __, 2013 WL 276024 (D.C. Cir. Jan. 25, 2013)

         1.) Impacts of Noel Canning

            a.) D.C. Circuit held that recess appointments are valid only if made during an actual intersession recess and not to recesses within a congressional session; and also, only if the vacancy arose during that intersession recess.

            b.) D.R. Horton had previously argued that NLRB Member Craig Becker's appointment expired before the Board issued its Jan. 3, 2012 decision. In light of *Noel Canning*, it now also argues that Member Becker's appointment was never valid

         2.) Potential significance of request for supplemental briefing

            a.) D.R. Horton argued to the Fifth Circuit panel that it would not need to reach the constitutional issue of what constitutes a

valid recess appointment if the panel were to reject the Board's *D.R. Horton* decision on a threshold statutory ground. The request for supplemental briefing suggests that the Board has at least one vote to support its position.

c. Judicial Scorecard: Lower courts have overwhelmingly rejected *D.R. Horton*, although few if any cases meaningfully engage with the Board's analysis

i. As of early February 2013 more than two dozen courts have refused to follow *D.R. Horton* and none have followed it.

ii. Many of those decisions are from the California intermediate appellate courts, which may be governed by the California Supreme Court's eventual ruling in *Iskanian* (if there is still a dispute over the validity of *D.R. Horton* by then)

iii. Only one of those decisions is from a federal Court of Appeal. In *Owen v. Bristol Care, Inc*., 2013 WL 57875 (8th Cir. 2013), the Eighth Circuit rejected *D.R. Horton* after finding a conflict between the NLRA and the FAA which it largely resolved by focusing on the non-substantive 1947 re-codification of U.S. Code sections that included the FAA.

d. Pending Cases Raising Related Issues

i. Board cases

1.) *24 Hour Fitness USA, Inc.*, Case 20-CA-035419, *cross-exceptions pending* (ALJ followed *D.R. Horton* and applied it to mandatory arbitration agreement with 30-day opt-out provision for new employees that only 0.04% of employees hired since 2005 ever exercised)

2.) *Convergys Corp.*, Case CA-075249 (ALJD Oct. 25, 2012 (ALJ followed *D.R. Horton*)

3.) NLRB's Division of Advice has given approval for Complaints to be filed in several additional cases

ii. Federal Court of Appeal Cases

1.) *Johnmohammadi v. Bloomingdale's, Inc.*, 9th Cir. No. 12-55578 (raises issues concerning validity of *Gentry* and waiver as well: employer prohibited all class actions but provided 30-day opt-out clause)

2.) *Kairy v. SuperShuttle Intl.*, No. 13-80004 (9th Cir.) (petition for interlocutory appeal pending)

iii. Pending State Supreme Court Cases

1.) *Iskanian*

2.) *Machado v. System4 MA SJC*: oral arg available at http://www2.suffolk.edu/sjc/archive/2012/SJC_11175.html

iv. Effect of *Amex III* on likely outcomes: If the Supreme Court reaffirms the effective-vindication-of-statutory rights doctrine, the Fifth Circuit might be more likely to grant deference to the Board's construction of the NLRA as protecting employees' "core, substantive" to pursue concerted legal activity and to represent co-workers in class and collective actions

v. Even if the Fifth Circuit denies enforcement, the Board has authority under its "selective non-acquiescence" doctrine to continue to apply the principles of *D.R. Horton*

e. Preserving rights while the uncertainty continues

i. File a Board charge

ii. Seek interlocutory appellate review of an order compelling individual arbitration under 28 U.S.C. § 1292(b)

iii. Re clause construction, argue that the parties could not have intended a construction that violated federal labor law and policy

C. Does the "effective vindication" doctrine apply to <u>state</u> statutory rights?

1. **Plaintiffs unable to vindicate their state statutory rights individually as a factual matter.**

a. Helpful cases:

i. *Preston v. Ferrer*, 552 U.S. 346 (2008) – Arbitration clause enforced where it will not infringe on any state statutory rights.

ii. *Franco v. Arakelian Enterprises, Inc.*, 211 Cal. App. 4th 314 (Ct. App. 2012) – "We conclude that *Gentry* remains good law because, as required by *Concepcion*, it does not establish a categorical rule against class action waivers but, instead, sets forth several factors to be applied on a case-by-case basis to determine whether a class action waiver precludes employees from vindicating their statutory rights."

iii. *Torrence v. Nationwide Budget Finance*, No. 05-CVS-0047, 2012 WL 335947 (N.C. Super. Ct. Jan. 25, 2012) (refusing to compel individual arbitration of state-law claims against payday lenders on grounds that the extensive factual record showed that "payday borrowers would not be able to effectively vindicate the type of claims raised by plaintiffs here, even if the claims are legally justified and correct, if [they] are required to proceed on an individual rather than class basis."

b. Troubling cases

i. *Coneff v. AT&T*, 673 F.3d 1155 (9th Cir. 2012) (holding that AT&T's arbitration clause must be enforced even though factual record before the district court showed that only an "infinitesimal" number of injured customers would seek relief in individual arbitration)

ii. *Homa v. American Express Co.*, 2012 WL 3594231 (3d Cir. 2012) (enforcing class action ban despite finding that it would be "*impossible*" for Mr. Homa to effectively vindicate his substantive statutory rights because any remedy he could obtain in individual arbitration would be purely "*illusory*." (cert petition filed Dec. 20, 2012)

c. Pending cases

i. *Iskanian v. CLS Trans. Los Angeles*, No. 5204032 (pending before California Supreme Court). Raises several issues about the enforceability of employer class action bans, although underlying legal principles ultimately rest on federal not state law. Issues include whether *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007), is still good law after *Concepcion* under effective-vindication-of-rights analysis; whether employers can prohibit representative actions for statutory penalties under the California Labor Code Private Attorney General Act; whether the NLRB's *D.R. Horton* decision is controlling in California courts; and under what circumstances does an employer's delay in seeking to compel arbitration constitute waiver.

ii. *Sonic-Calabasas A, Inc. v. Moreno:* Pending before California Supreme Court on remand from U.S. Supreme Court in light of *Concepcion* (Oct. 31, 2011) – Issue is whether FAA preempts state law right of employees to a *Berman* hearing before Labor Commissioner on wage issues

D. Arbitration clause would directly eliminate rights under state statute

1. *Kilgore v. Key Bank*, 9th Cir. No. 09-16703 (petition for rehearing en banc granted in Sept. 2012; argued Dec. 11, 2012)

a. May decide whether California's *Broughton*/*Cruz* doctrine—under which arbitration clauses may not be enforced when they would block consumers from pursuing their substantive statutory rights to an injunction under a pair of California consumer protection statutes—is preempted by the FAA under *Concepcion*.

III. **Other limits to *Concepcion***

A. *Concepcion* did not eliminate the availability of other unconscionability challenges to mandatory arbitration agreements.

1. *Marmet Health Center, Inc. v. Brown*, 132 S.Ct. 1201 (2012) (reaffirmed that state unconscionability law of general applicability may still be applied to invalidate arbitration provisions, while striking down West Virginia law that imposed burdens on arbitrability as matter of public policy)

2. *Kanbar v. O'Melveny & Myers*, Case No. C-11-0892 EMC, 2011 WL 2940690, *6 ("arbitration agreements are still subject to unconscionability analysis [after *Concepcion*]").

3. *Sanchez v. Valencia Holding Co., LLC*, Case No. BC433634 (Cal. Ct. App. Oct. 24, 2011) (*Concepcion* does not preclude the application of unconscionability principles to determine whether an arbitration provision is enforceable). (now before California Supreme Court)

4. *Newton v. American Debt Servs.*, 9th Cir. No. 12-15549 – pending before 9th Cir. – abusive terms in arbitration clause are unconscionable notwithstanding *Concepcion*.

B. Pending litigation -- An employer cannot impose a class action ban after litigation has already commenced.

1. Treat it as an improper communication with the class. Under *Gulf Oil v. Bernard*, 452 U.S. 89, 100 (1981), courts have "both the duty and the broad authority to exercise control over a class action and to enter the appropriate orders governing the conduct of counsel and the parties." Notably, courts have repeatedly barred direct communication by defendants with putative class members even before a class has been certified. *See, e.g., In Re Currency Conversion Fee Antitrust Litigation*, 361 F.Supp.2d 237, 253 (S.D.N.Y. 2005) (ruling that the defendants' pre-certification communications with potential class members about the subject matter of litigation were improper).

2. *E.g.*, in *Williams v. Securitas Security Services USA, Inc.*, Case No. 10-7181, 2011 WL 2713741 (E.D. Pa. July 13, 2011), the court ordered the employer to rescind the contractual class, collective, and representative action waiver it distributed to all its employees after a collective action asserting violations of the FLSA had been filed. The court cited its duty under *Hoffman-LaRouche, Inc. v. Sperling*, 493 U.S. 165 (1989), to prevent confusion among and unfair communications with employees during the pendency of an FLSA action and found *Concepcion*'s preemption analysis to be inapposite. The court requires the employer to advise its employees that the waiver is not binding with regard to their ability to participate in the case at bar, even if they signed the waiver or failed to opt out of its terms.

C. Waiver – Defendant is not entitled to compel arbitration if it has already waived its right to arbitrate.

1. It is black-letter law that even where a valid arbitration agreement exists, a party may waive its right to avail itself of the right to arbitrate. *See, e.g., Lewallen v. Green Tree Serv., L.L.C.*, 487 F.3d 1085, 1090 (8th Cir. 2007).

2. Courts look at a variety of factors, for example: how many months or years the parties have engaged in litigation prior to the party moving to compel arbitration; whether significant motion practice and/or discovery

has taken place; whether the party sought a judicial ruling on the merits; and whether the party invoked its arbitration clause only after receiving an unwelcome ruling from a court. Only where a party can demonstrate that there was a change in the governing law that was so significant that it would have been *futile* to seek arbitration any earlier will a court find that a change in the law excuses waiver of the right to arbitrate.

Many courts have held that *Concepcion* does not excuse a party's waiver of arbitration, because defendants in other cases had raised FAA preemption notwithstanding that the argument had not been accepted by any appellate courts prior to the U.S. Supreme Court's decision in *Concepcion*. E.g., *Barkwell v. Sprint Communications Co.*, 2012 WL 112545 (M.D. Ga. Jan. 12, 2012); *In re: Checking Account Overdraft Litig.*, 2011 WL 6225275 (S.D. Fla. Dec. 15, 2011).

IV. Class Arbitration in Practice

A. The Decisionmaker

Selecting a decisionmaker from the suite of available arbitrators is, not surprisingly a non-trivial matter and will depend on the arbitration agreement. Some agreements provide for an alternating strike procedure, wherein each side rules out decisionmakers until you are left with one. It has been our experience that identifying an arbitrator with knowledge or experience in employment class actions can narrow the field considerably.

B. Multiple Bites at the Apple: Review of Clause Construction and Class Certification Awards

The Federal Arbitration Act describes the procedure for judicial review of an arbitral award for confirmation, vacatur or modification of that award. 9 U.S.C. §§ 9-11. Under the AAA Supplementary Rules for Class Arbitration, judicial review of both the arbitrator's clause construction award and class certification award is by right. *See* Rules 3 and 5(d), This process, granting review by right at multiple intermediate stages of the litigation, stands in stark contrast to federal court litigation, where interlocutory review and appeals under Rule 23(f) are not guaranteed. Permitting judicial review at both the clause construction and class certification stages of the proceeding amounts to at least two bites at the apple for the defendant employers.

C. Subpoenas

1. Parties in arbitration have little leverage to compel compliance with a subpoena of a non-party outside the jurisdiction of the court in which the arbitrator's jurisdiction resides, depending on the law of the relevant circuit.

2. Under the FAA, arbitrators "may summon in writing any person to attend before them as a witness." The summons, which is issued and signed by the arbitrator, is served in the same manner as a subpoena to appear before a court. If that summons is refused, the party seeking to subpoena the witness must petition the relevant district court, "the United States district court for the district in which such arbitrators, or a majority of them, are sitting," to compel the attendance of the witness. 9 U.S.C. § 7.

3. In the Second Circuit, Fed. R. Civ. P. 45 governs the issuance of subpoenas in arbitration. *Dynegy Midstream Servs. v. Trammochem*, 451 F.3d 89, 94 (2d. Cir. 2006). Because Rule 45 imposes territorial limitations on the service and enforcement of a subpoena, the Federal Rules to which Section 7 of the FAA refers do not contemplate nationwide service of process of enforcement. The Second Circuit in *Dynegy* held "that FAA Section 7 does not authorize nationwide service of process, and the district court therefore erred in asserting personal jurisdiction over DMS." *Id*. at 96. Because the party issuing the subpoena had no contacts with New York, the district court had no power to enforce the subpoena.

4. The Second Circuit appears to consider it an open question whether under Section 7, arbitrators may issue subpoenas to compel non-parties to appear at depositions. *Stolt-Nielsen SA v. Celanase AG*, 430 F.3d 567, 577 (2d Cir. 2005).