Date October 5, 2018

To NYSBA Donnelly Act Review Committee

From NYSBA Class Action Committee

Barring Class Action Waivers Under the Donnelly Act

This memo discusses whether the Donnelly Act should be amended to bar or limit class action waivers under certain circumstances. After reviewing relevant state and federal precedent, as well as surveying state antitrust statutes nationwide, we believe that the Federal Arbitration Act ("FAA") would preclude any state law barring or limiting a class action waiver when joined with an agreement to arbitrate (as is typically the case), per *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), *American Express Co. v. Italian Colors Restaurant*, No. 12-133, 133 S. Ct. 2304 (2013); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); and *Epic Systems Corp. v. Lewis*, No. 16-285, 138 S. Ct. 1612 (2018). Given this conclusion, we do not recommend an amendment of this nature to the Donnelly Act.

This memo proceeds to discuss the salient U.S. Supreme Court cases addressing class action waivers, then describes our survey of state laws for class action waivers. Finally, the memo addresses the advisability of a bar on class action waivers that are not tethered to an agreement to arbitrate.

I. The U.S. Supreme Court Has Repeatedly Upheld the Permissibility of Class Action Waivers

A. *AT&T Mobility LLC v. Concepcion*

The Supreme Court first addressed the permissibility of class action waivers in *AT&T Mobility LLC v. Concepcion* in 2011.[1] In 2006, two individual plaintiffs sued AT&T Mobility over their contract, contending that the cell phone company had falsely claimed that its wireless plan included free cell phones when in fact consumers were responsible for paying applicable taxes on those phones. Their complaint was later consolidated with a putative class action. AT&T moved to dismiss this action and compel arbitration, per the individual arbitration clause in its contract with the plaintiffs. The plaintiffs contended that the arbitration agreement was unconscionable under California law because it disallowed class-wide arbitration procedures, and that this state policy fell squarely under the FAA § 2 "saving clause" as a basis that "exist[s] at law or in equity for the revocation of any contract."[2] The lower courts denied AT&T's motion to compel arbitration and held that the arbitration clause was unconscionable under California state contract law.

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[1] In 2010, in *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp*., 130 S. Ct. 1758 (2010), the Supreme Court ruled that arbitrators exceeded their authority under the FAA by allowing class arbitration when the arbitration agreement in question did not address that issue. Specifically, the Court ruled that the contract's silence on class arbitration was not evidence of the parties' intent to participate in it. The following year, the Court addressed the issue of class action waivers more directly in *Concepcion.*

[2] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

The Supreme Court reversed, holding that the FAA preempts state contract law that conditions the enforceability of arbitration clauses on the availability of certain procedures. As a result, businesses that include arbitration agreements with class action waivers can require consumers to bring claims only via individual arbitrations, rather than in court as part of a class action. Specifically, the Court ruled that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[3]

The FAA's liberal policy favoring arbitration prevents a state from adopting procedures inconsistent with the Act, even if those procedures may otherwise be desirable for unrelated reasons. The Court found that although the "saving clause" in FAA § 2 preserves generally applicable contract defenses, "nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives."[4] Since California's unconscionability law would have invalidated a large portion of arbitration agreements, the Court determined that the rule clearly violated the policy in favor of arbitration. The Court further observed that "[a]rbitration is poorly suited to the higher stakes of class litigation" and concluded that Congress never intended to allow state law to force defendants to bet their companies given arbitration's expedited procedures and absence of multilayered review.[5]

B. *American Express Co. v. Italian Colors Restaurant*

The Supreme Court again addressed the issue of class action waivers two years later in *American Express Co. v. Italian Colors Restaurant*. This case arose out of a dispute between American Express ("Amex") and a group of merchants that accept American Express cards. The merchants claimed that Amex violated federal antitrust laws by using its monopoly power in the credit card market to charge inflated fees.[6] The merchants' agreements with Amex required all disputes to be resolved by arbitration, and further provided that there was "no right or authority for any Claims to be arbitrated on a class action basis." The merchants argued that these provisions should be invalidated given that the cost to an individual merchant to arbitrate vastly exceeded each merchant's potential recovery.

The Supreme Court held that Amex could compel individual arbitration because the FAA does not permit courts to invalidate a contractual waiver of class arbitration on the grounds that the plaintiff's cost of individually arbitrating a federal statutory claim would exceed the potential recovery. According to the Court, nothing in federal law guarantees plaintiffs "an affordable procedural path to the vindication of every claim."[7] The Court noted that Congress has taken some measures to facilitate the litigation of antitrust claims—for example, treble damages. "In enacting such measures, Congress has told us that it is willing to go, in certain respects, beyond the normal limits of law in advancing its goals of deterring and remedying unlawful trade practice. But to say that Congress must have intended whatever departures from those normal

[3] *Id.* at 344.
[4] *Id.* at 343.
[5] *Id.* at 350.
[6] *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308 (2013).
[7] *Id.* at 2309.

limits advance antitrust goals is simply irrational. No legislation pursues its purposes at all costs."[8]

C. *DIRECTV, Inc. v. Imburgia*

In *DIRECTV, Inc. v. Imburgia*, the Supreme Court reversed a California state appellate court and enforced an arbitration clause and class action waiver applicable to consumer claims relating to their satellite cable TV service. Notably, the arbitration provision specified that the entire arbitration provision was unenforceable if the "law of your state" made class-arbitration waivers unenforceable. The lower courts held that California law would render class-arbitration waivers unenforceable, because at the time of contracting, the law of California would have made the contract's class-arbitration waiver unenforceable.

The Supreme Court reversed, noting that since the time of contracting, it had held in *Concepcion* that the California law at issue violated the FAA. The Court held that the California Court of Appeal's interpretation of the phrase "law of your state" did not give due regard to the federal policy favoring arbitration and was therefore preempted by the FAA.[9] The Court determined that the phrase "law of your state" should take the ordinary meaning of valid state law, rather than invalid state law as the California courts held.[10]

D. *Epic Systems Corp. v. Lewis*

Most recently, the Supreme Court addressed the class action waiver issue in *Epic Systems Corp. v. Lewis*. In this case, employees at Epic Systems, a Wisconsin healthcare software company, alleged violations of the Fair Labor Standards Act and state law related to overtime pay. Epic moved to dismiss the aggregated suit, arguing that the arbitration agreement signed by the employees required individual arbitration and prevented them from taking collective action. The district court declined to dismiss the case, finding that the employees' action was a protected "concerted activity" under Section 7 of the National Labor Relations Act ("NLRA") and that the company's arbitration agreement violated those terms. The Seventh Circuit affirmed, holding that the FAA's "saving clause" was applicable to the NLRA in this context.[11]

The Supreme Court reversed the Seventh Circuit's ruling, confirming once again that individual arbitration agreements do not violate the NLRA. The Court reasoned that NLRA Section 7 "secures [] employees rights to organize unions and bargain collectively" but "says nothing about how judges and arbitrators must try legal disputes."[12] Given this, and especially contrasted against the "liberal federal policy favoring arbitration," the NLRA must be read without any intent toward dispute resolution. The Court also rejected the Seventh Circuit's "saving clause" argument by largely repeating its holding in *Concepcion*—namely, that the

[8] *Id.*
[9] *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015).
[10] *See id.* at 470-71
[11] *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1620 (2018).
[12] *Id.* at 1619.

clause was limited to general contract defenses such as fraud, duress, or unconscionability, and not to broad defenses which "interfere[e] with fundamental attributes of arbitration."[13]

II. State Antitrust Statutes

Our research into state antitrust statutes did not uncover any other state antitrust laws precluding class waivers in their text. Indeed, the general view of scholarly articles discussing the issue note that the Supreme Court's expansive interpretation of the FAA in *Concepcion* and *Amex* will greatly restrict any state policies that aim to restrict class action arbitration waivers in consumer contracts.[14]

III. Class Action Waivers Unaccompanied by an Agreement to Arbitrate

We do note that the Supreme Court's rulings upholding class action waivers have primarily focused on such waivers when they are part of an agreement to arbitrate disputes arising out of the contract at issue. We have accordingly evaluated an amendment to the Donnelly Act that bars or limits standalone class action waivers unaccompanied by arbitration agreements. We do not think such an amendment is advisable, for the following reasons:

- As an initial matter, class actions in New York courts are not permitted under the Donnelly Act. Under New York's class-action rule (CPLR §901(b)), a class-action cannot be brought under any law that imposes a penalty on offenders, unless the particular statute explicitly authorizes a class action.[15] The New York Court of Appeals has held that the Donnelly Act's treble damages provision should be considered a penalty,[16] and the Donnelly Act does not explicitly authorize class actions. Accordingly, a class waiver untethered to an arbitration provision would have little practical effect on the currently permissible state procedures for asserting a Donnelly Act claim.[17]

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[13] See *id.* at 1622-23.

[14] *See, e.g.*, Alan S. Kaplinsky, Mark J. Levin, and Martin C. Bryce, Jr., *2014 Arbitration Developments-Courts Continue to Apply Concepcion and Italian Colors*, 70 THE BUSINESS LAWYER 649, 649 (2015) (commenting how "in the wake of *Concepcion* and *Italian Colors*, state and federal courts have enforced arbitration agreements containing class action waivers, even in states heretofore hostile to arbitration, such as California"); E. Gary Spitko, *Federal Arbitration Act Preemption of State Public-Policy-Based Employment Arbitration Doctrine: An Autopsy and an Argument for Federal Agency Oversight*, 20 HARVARD NEGOT. L. REV. 1, 3 (2015) (surmising that any state still enacting arbitration legislation must be doing so as a symbolic gesture, given that such legislation "is so evidently preempted at its inception under the U.S. Supreme Court's . . . FAA jurisprudence."); Olga Bykov, *Vindication of Federal Statutory Rights: The Future of Cost-Based Challenges to Arbitration Clauses After* American Express v. Italian Colors Restaurant *and* Green Tree v. Randolph, 50 U.C. DAVIS L. REV. 1323, 1325 (discussing how "the Supreme Court has continued its 'hammering' approach to clearing the path for FAA dominance"); *see also* 4D N.Y.Prac., Com. Litig. in New York State Courts § 101:13 (4th ed.) (noting that commercial arbitration of Donnelly Act disputes had traditionally been held to be against public policy (*see Aimcee Wholesale Corp. v. Tomar Products, Inc*., 21 N.Y.2d 621 (1968)), but that the Supreme Court has subsequently held that nothing in the Federal Arbitration Act prevents the arbitration of antitrust claims).

[15] N.Y. C.P.L.R. §901(b).

[16] *See Sperry v. Crompton Corp.*, 8 N.Y.3d 204 (2007).

[17] Some federal courts have generally permitted Donnelly Act class actions to proceed in federal court. *In re Wellbutrin XL Antitrust Litig.*, 756 F. Supp. 2d 670, 679 (E.D. Pa. 2010); *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 2010 U.S. Dist. LEXIS 97398, at *30–33 (N.D. Cal. Aug. 4, 2010); *In re Packaged Ice Antitrust Litig.*, 779 F. Supp. 2d 642, 661 (E.D. Mich. 2011).

- The same freedom and flexibility of parties to contract, which the Supreme Court has promoted in the arbitration context, warrants enforcement of class action waivers untethered to an agreement to arbitrate. Indeed, such plaintiffs will retain the full procedural protections of the federal and state courts.

- Both under the U.S. Supreme Court's rulings and New York law, if a contract containing a class action waiver is procured by fraud or duress, or is deemed unconscionable, the class action waiver will be unenforceable.

- As noted above, we have not seen any analogous state statutes containing such a waiver.

- As a practical matter, we have not seen many class action waiver clauses that are not accompanied by an arbitration clause.

IV. Conclusion

The Supreme Court's recent decisions make clear that class action waivers are permissible in the context of arbitration agreements, due to the FAA's preemption over state law. Given the recent Supreme Court precedent outlined above, and the lack of existing state antitrust statutes to point to as successful models, we do not recommend an amendment to the Donnelly Act barring or limiting class action waivers at this time.