

**WILL *CONCEPCION* AND *STOLT-NIELSEN* END CLASS LITIGATION?
A REVIEW OF THE SUPREME COURT DECISIONS AND THEIR IMPACT ON
EMPLOYMENT CLASS ACTIONS**

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By
Joseph Jaramillo
Goldstein Demchak Baller Borgen & Dardarian
300 Lakeside Drive, Suite 1000
Oakland, CA 94612
(510) 763-9800
www.gdblegal.com

Rachel Bien
Outten & Golden LLP
3 Park Avenue, 29th floor
New York, New York 10016
(212) 245-1000
www.outtengolden.com

I. INTRODUCTION

The U.S. Supreme Court's decisions in two non-employment cases raise a specter over the future of employment class actions where the parties entered into an arbitration agreement subject to the Federal Arbitration Act ("FAA").¹ In *Stolt-Nielsen, S.A. v. Animalfeed International Corp.*, the Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so."² Relying on dicta hostile to class arbitration in *Stolt-Nielsen*, the Court concluded in *AT&T Mobility v. Concepcion* that the FAA preempts "California's rule classifying most collective-arbitration waivers in consumer contracts as unconscionable."³ Lower courts interpret *Stolt-Nielsen* and *Concepcion* in varying ways in the employment context. *Stolt-Nielsen* has left open the door for arbitrators and courts to find contractual grounds for class arbitration in agreements that do not explicitly address the topic. Some courts are also finding explicit class action waivers unenforceable where they preclude employees from vindicating their statutory rights by subjecting them to prohibitively expensive individual arbitration or where preclusion of collective claims makes it impossible to pursue a substantive statutory claim.⁴ However, many other courts and arbitrators read *Stolt-Nielsen* and *Concepcion* expansively to compel individual arbitration. While these cases do not spell the end of employment class actions, they have made it more difficult for employees to move forward on a collective basis where the availability of class claims in an arbitration agreement is at issue.

II. *STOLT-NIELSEN* AND THE AVAILABILITY OF CLASS ARBITRATION WHERE THE AGREEMENT DOES NOT ADDRESS CLASS CLAIMS.

A. The *Stolt-Nielsen* Decision

Stolt-Nielsen addressed the availability of class arbitration in an antitrust action by an animal feed ingredient company against its shippers where the arbitration clause did not explicitly address it. The two-sentence arbitration clause was contained in a standard "charter party" shipping agreement and provided for "[a]ny dispute arising from the making, performance or termination of" the agreement to be settled in the state of New

¹ 9 U.S.C. § 1, *et seq.* The FAA applies broadly to contracts evidencing interstate commerce, which the Supreme Court has interpreted to include employment contracts. *Circuit City Stores v. Adams*, 532 U.S. 105, 113 (2001). Section 1 of the FAA excludes "class[es] of workers engaged in foreign or interstate commerce," such as railroad workers and seamen. 9 U.S.C. § 1. Some courts have found the FAA inapplicable to contracts not involving interstate commerce where the relationship between the employee and employer did not relate to interstate commerce. *See, e.g., Hoover v. American Income Life Ins.*, No. E052864, 2012 WL 2126892, at *9 (Cal. App. Ct. May 16, 2012).

² 130 S. Ct. 1758, 1775 (2010).

³ 131 S. Ct. 1740, 1746, 1753 (2011).

⁴ The National Labor Relations Board decision in *In re D.R. Horton, Inc.*, 357 NLRB No. 184 (N.L.R.B. Jan. 3, 2012), *appeal pending* No. 12-600031 (5th Cir.), finding class action waivers unenforceable because they prevent employees from engaging in their substantive right to engage in protected concerted activity for mutual aid or protection under the National Labor Relations Act, and court interpretation of that decision, are discussed in Section IV below.

York by a panel of two arbitrators, one selected by each party.⁵ The parties stipulated that the arbitration clause was “silent” on whether the clause allowed for class arbitration – i.e., they had reached no agreement on it. The arbitration panel heard argument and evidence on the issue and concluded that the arbitration clause did allow class arbitration. The district court vacated the award, finding that the arbitrators acted in manifest disregard of the law by not conducting a choice-of-law analysis and analyzing the arbitration clause under federal maritime law. The Second Circuit reversed, holding that the arbitrators did not manifestly disregard the law because defendants pointed to no rule against class arbitration in federal maritime or state law. The Supreme Court granted certiorari to determine “whether imposing class arbitration on parties whose arbitration clauses are ‘silent’ on that issue is consistent with the [FAA].”⁶

First, the Supreme Court set forth the standard of review for vacating the arbitration panel’s award. Serious error is not enough to show that the arbitrator exceeded his or her powers under Section 10(a)(4) of the FAA. Because “the task of an arbitrator is to interpret and enforce a contract,” an arbitration award may be vacated “only when [an] arbitrator strays from interpretation and application of the agreement and effectively ‘dispens[es] his own brand of industrial justice.’”⁷

Next, the Court explained that arbitration panel’s decision must be evaluated based on “the basic precept that arbitration ‘is a matter of consent, not coercion.’”⁸ Arbitrators construing an agreement must effectuate “‘the contractual rights and expectations of the parties.’”⁹ Based on these principles, “it follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the parties *agreed* to do so.”¹⁰ Thus, an arbitrator may not infer “[a]n implicit agreement to authorize class arbitration . . . solely from the fact of the parties’ agreement to arbitrate.”¹¹ The Court noted that a class action arbitration fundamentally changes the nature of the proceeding by adjudicating the rights of absent parties in high stakes disputes with limited judicial review.¹² The Court found “the differences between bilateral and class-action arbitration . . . too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties’ mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings.”¹³

Applying these principles to the facts at issue, the Court held that the arbitration panel exceeded its powers by “impos[ing] class arbitration even though the parties concurred that they had reached ‘no agreement’ on that issue....”¹⁴ The panel’s decision

⁵ *Stolt-Nielsen*, 130 S. Ct. at 1765.

⁶ 130 S. Ct. at 1764.

⁷ *Id.* at 1767.

⁸ *Id.* at 1773 (citation omitted).

⁹ *Id.* (citation omitted).

¹⁰ *Id.* (emphasis in the original).

¹¹ *Id.* at 1775.

¹² *See id.* at 1775-76.

¹³ *Id.* at 1776.

¹⁴ *Id.* at 1775.

hinged on the fact that defendants failed to show that the parties “intended to *preclude* class arbitration” and “regarded the agreement’s silence on class arbitration as dispositive.”¹⁵ The panel failed to apply any rule of contractual interpretation to determine whether class arbitration was available under the agreement in the absence of express consent, but based its decision on its perception of an arbitral consensus in favor of class arbitration, which the Court viewed as the panel “impos[ing] its own conception of sound policy.”¹⁶ This contradicted the circumstances of the arbitration clause, where “the parties are sophisticated business entities,” “there is no tradition of class arbitration under maritime law,” and the standard shipping agreement chosen by the parties had never been the basis of a class action.¹⁷ Thus, the arbitrators impermissibly inferred the availability of class arbitration solely from the parties’ agreement to arbitrate. The Court was careful to note, however, that it had “no occasion to decide what contractual basis may support a finding that the parties agreed to class-action arbitration” because the parties stipulated that there was no agreement on this issue.¹⁸

B. Circuit Court Application of *Stolt-Nielsen*

Many thought that *Stolt-Nielsen* signaled the end to class arbitration because it found an arbitration agreement that was “silent” on the issue prohibited class claims. However, courts and arbitrators have still found contractual grounds to support a finding that arbitration clauses implicitly permit class arbitration in some cases. At least three circuits have considered whether class arbitration is available under an arbitration agreement that does not explicitly address the issue.¹⁹

The Second Circuit’s decision in *Jock v. Sterling Jewelers, Inc.*²⁰ is the only post-*Stolt-Nielsen* circuit court decision involving an employment dispute. In *Jock*, the Second Circuit reviewed the district court’s vacatur of an arbitration award finding class arbitration permissible in an employment discrimination case. The arbitration clause in the employment contract committed employees to pursuing “any dispute, claim, or controversy” against their employer regarding their employment under the rules of the American Arbitration Association (“AAA”), and granted the arbitrator “the power to award any types of legal or equitable relief” that a court could.²¹ The arbitrator applied Ohio state contract law, as required by the contract, to determine whether the arbitration clause permitted class arbitration. Because the arbitration clause did not mention class claims, the arbitrator found that the contract must be construed against the drafter because it was not a negotiated contract but one imposed by the employer. The arbitrator noted that the employer failed to revise the contract to address class arbitration even after

¹⁵ *Id.* (citation omitted).

¹⁶ *Id.* at 1769.

¹⁷ *Id.* at 1769, 1775.

¹⁸ *Id.* at 1776, n.10.

¹⁹ A First Circuit court decision, *Fantastic Sams Franchise Corp. v. FSRO Assoc. Ltd.*, 683 F. 3d 18, 21, 25-26 (1st Cir. 2012), rejected defendant’s argument that, under *Stolt-Nielsen*, franchise agreements that do not expressly permit class and/or associational arbitration necessarily prohibit them, and determined that this was an issue for the arbitrator, not the trial court, to decide.

²⁰ 664 F.3d 113 (2d Cir. 2011).

²¹ *Id.* at 116-117, 123-24.

several arbitral decisions finding class arbitration permissible where not prohibited. The arbitrator found that reading a prohibition on class arbitration into the contract would be impermissible under state contract law, which does not allow the insertion of a term for the benefit of one of the parties that it omits from its own contract.²²

Stolt-Nielsen came down after the arbitrator's award and an initial district court order declining to vacate the award. On remand from the Second Circuit to determine the impact of *Stolt-Nielsen*, the district court vacated the award on the ground that the arbitrator acted in excess of her powers because she should have examined whether the arbitration clause permitted class arbitration rather than whether there was intent to preclude it, and that there was no evidence in the record that the parties intended to allow class arbitration.²³

The Second Circuit reversed the district court's decision for not applying the appropriate level of deference under the narrow standard of review for vacating an arbitration award by "re-examining the record to determine the question that the arbitrator had already decided" and "substitut[ing] its own legal analysis for that of the arbitrator's...."²⁴ Under the narrow standard of review for vacatur of an arbitration award set forth in Section 10(a)(4) of the FAA, the district court should have considered "whether the agreement or the law categorically prohibited the arbitration from reaching [the] issue" of the permissibility of class arbitration under the agreement.²⁵ Instead, the district court interpreted plaintiffs' acknowledgement that the agreement did not explicitly permit class arbitration to mean that the parties had reached no agreement on the issue, as in *Stolt-Nielsen*. However, the Second Circuit explained that *Stolt-Nielsen* "did not create a bright-line rule requiring that arbitration agreements can only be construed to permit class arbitration where they contain express provisions permitting class arbitration."²⁶ Thus, the arbitrator "had a colorable justification" to decide that "Ohio law does not bar class arbitration."²⁷ The district court erred by engaging in a *de novo* review of the arbitrator's award rather than examining whether the arbitrator exceeded her authority.

The Second Circuit found that the arbitrator acted within her authority by analyzing the arbitration clause under the applicable law.²⁸ The arbitrator made the decision before *Stolt-Nielsen*, in a legal context in which the focus was on whether the parties intended to prohibit class arbitration rather than on whether they agreed to allow it. Nonetheless, defendant framed the question to the arbitrator as whether the agreement did not allow class arbitration, and the arbitrator's decision answered both questions (i.e., that the agreement did not prohibit but allowed class arbitration).²⁹ In determining the intent of the parties, the arbitrator "relied solely on the terms of the agreement and Ohio

²² *Id.* at 117, 124.

²³ *Jock v. Sterling Jewelers, Inc.*, 725 F. Supp. 2d 444, 448 (S.D.N.Y. 2010).

²⁴ *Jock*, 646 F.3d at 115.

²⁵ *Id.* at 123.

²⁶ *Id.* at 124 (citing *Stolt-Nielsen*, 130 S. Ct. at 1776 n.10).

²⁷ *Id.*

²⁸ *Id.* at 124, 126.

²⁹ *Id.* at 125.

law.”³⁰ By contrast, the arbitration panel in *Stolt-Nielsen* “went beyond the terms of the agreement and governing law, and . . . relied on public policy grounds to support its finding that the arbitration agreement permitted class arbitration.”³¹ The arbitration clause in *Stolt-Nielsen* was not worded as broadly as the agreement at issue, which empowered the arbitrator to award any type of relief available in court.³² Thus, it was within the arbitrator’s discretion “to construe this to mean that the parties . . . intended to include the right to proceed as a class and seek class remedies.”³³

In *Sutter v. Oxford Health Plans LLC*,³⁴ the Third Circuit considered whether the arbitrator exceeded his powers in a breach of contract case by construing an arbitration clause to permit class arbitration. The clause provided that “[n]o civil action concerning any dispute arising under [the] Agreement shall be instituted before any court,” but must be submitted to arbitration in New Jersey under AAA rules.³⁵ The arbitrator construed this language to unambiguously encompass “all conceivable court actions, including class actions.”³⁶ The district court denied defendant’s motion to vacate prior to *Stolt-Nielsen* and a subsequent motion to vacate after the Supreme Court’s decision.

In considering whether the arbitrator exceeded his powers under Section 10(a)(4) of the FAA, the Third Circuit recognized that *Stolt-Nielsen* prohibits arbitrators from inferring “parties’ consent to class arbitration procedures solely from the fact of their agreement to arbitrate.”³⁷ Defendant argued “that the arbitrator imposed his own default rule, in derogation of *Stolt-Nielsen* and New Jersey law, based on his own conception of public policy.”³⁸ However, the arbitrator “was not constrained to conclude that the parties did not intend to authorize class arbitration or, on the other hand, to identify a contrary default rule of New Jersey law” because, unlike in *Stolt-Nielsen*, the parties disputed whether they intended to authorize class arbitration.³⁹ Thus, the arbitrator was within his authority to find class arbitration permissible to the extent his decision stood “on a contractual basis.”⁴⁰

The Third Circuit concluded that the arbitrator based his decision on contractual grounds by construing “no civil action . . . shall be instituted in any court” to mean that class actions cannot be initiated in court and interpreting “all such disputes shall be submitted to . . . arbitration” to include class actions.⁴¹ Thus, “the arbitrator performed his duty appropriately and endeavored to give effect to the parties’ intent.”⁴² Defendant argued that the arbitrator erred by not viewing plaintiff’s opposition to enforcement of the

³⁰ *Id.* at 126.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ 675 F.3d 215 (3rd Cir. 2012).

³⁵ *Id.* at 217.

³⁶ *Id.* at 218.

³⁷ *Id.* at 220 (citing *Stolt-Nielsen*, 130 S. Ct. at 1775).

³⁸ *Id.* at 222.

³⁹ *Id.* at 222-23.

⁴⁰ *Id.* at 223 (citing *Stolt-Nielsen*, 130 S. Ct. at 1775).

⁴¹ *Id.*

⁴² *Id.* at 224.

arbitration clause in court on the basis that it would require individual arbitration in combination with defendant's position that the clause did not allow for individual arbitration as a *de facto* stipulation that the parties did not authorize class arbitration. The court rejected this argument "because [plaintiff's] litigation position is not conclusive, or even particularly probative, of the meaning of a clause drafted solely by [defendant]." ⁴³ The court also rejected the contention that the arbitrator impermissibly inferred the availability of class arbitration solely from the agreement to arbitrate, in violation of *Stolt-Nielsen*, by finding that an express carve-out for class arbitration would be required to make it unavailable under the clause's broad language. This was "merely corroborative of his primary holding that the parties' clause authorized class arbitration." ⁴⁴

In *Reed v. Florida Metropolitan University, Inc.*, ⁴⁵ the Fifth Circuit applied *Stolt-Nielsen* broadly to find that the arbitrator exceeded his powers by finding that the parties implicitly agreed to class arbitration. The plaintiff in *Reed* alleged that an online university unlawfully solicited students without appropriate certifications. The arbitration clause in the student enrollment agreement required that "any dispute" be submitted to arbitration under the AAA Commercial Rules and not in court, and that "any remedy available from a court" be available in arbitration. ⁴⁶ The arbitrator entered an award finding that the parties implicitly agreed to class arbitration. He found that the "any dispute" and "any remedy" provisions of the clause, when read together, provided a contractual basis to find class arbitration available. ⁴⁷ He also found that the availability of a class action for plaintiff's statutory claims under Texas state law weighed in favor of finding class arbitration available. ⁴⁸ The arbitrator found it further probative that the drafting party did not include an express class action waiver in the clause. The district court confirmed the award, finding it consistent with *Stolt-Nielsen*, the FAA and Texas law.

The Fifth Circuit reversed, holding that the arbitrator exceeded his powers in contravention of *Stolt-Nielsen* by "forc[ing] the parties into class arbitration without a contractual basis for doing so..." ⁴⁹ The court found that the arbitrator read the "any dispute" phrase too broadly to include class arbitration when it "merely reflects an agreement between the parties to arbitrate their disputes." ⁵⁰ Likewise, it concluded that the "any remedy" provision did not speak to class arbitration, which is a procedural device, not a remedy. ⁵¹ Nor did the availability of a class action in court under the Texas statute upon which plaintiff based his claims mean that the parties agreed to allow class arbitration by not excluding it from the arbitration clause, according to the court. ⁵²

⁴³ *Id.* at 223.

⁴⁴ *Id.* at 224.

⁴⁵ 681 F.3d 630 (5th Cir. 2012).

⁴⁶ *Id.* at 632.

⁴⁷ *See id.* at 641.

⁴⁸ *Id.* at 642.

⁴⁹ *Id.* at 638.

⁵⁰ *Id.* at 642.

⁵¹ *Id.* at 643.

⁵² *Id.*

The Fifth Circuit rejected the arbitrator's construction of the arbitration clause against the drafter, finding this to impermissibly presume "that the parties' mere silence ... constitutes consent' to class arbitration."⁵³

While purporting to follow the dictates of *Stolt-Nielsen*, this case applies a less deferential standard of review of the arbitration decision that goes beyond determining whether the arbitrator imposed his own view of policy and second guesses the arbitrator's interpretation of the contract. The *Reed* decision arguably creates a circuit split on how much deference the courts must give to an arbitrator's interpretation of an arbitration agreement.

C. District Court and Arbitrator Application of *Stolt-Nielsen*

While *Stolt-Nielsen* has provided defendants with additional arguments against the availability of class treatment, it has by no means spelled the end of class actions in arbitration. Although some decisions have applied *Stolt-Nielsen* to find class arbitration unavailable in employment cases where the agreement does not provide for it,⁵⁴ a substantial number of courts and arbitrators have come out the other way and found sufficient contractual grounds to allow class claims to proceed.⁵⁵ While employees may no longer rely on policy arguments to support the permissibility of class arbitration, they may still point to a number of contractual grounds that may be present in their arbitration agreement. For example, if *Jock* is followed over *Reed*, the arbitrator may construe ambiguities in the arbitration agreement against the employer that drafted it, particularly where it is imposed on employees with little or no bargaining power on a take-it-or-leave-it basis as a condition of employment. Broad language that all claims are subject to arbitration and that the arbitrator may award all relief available in court tends to show that class claims are included within the scope of the agreement under *Jock* and *Sutter*. Likewise, contractual language excluding some specific types of claims but not class claims would bolster such a finding. Other contractual grounds supporting an interpretation that an agreement allows class arbitration might also include: the contract's incorporation of procedural rules that include class certification, the arbitration clause's presence in an employee handbook that lists federal and state employment rights

⁵³ *Id.* at 644 (quoting *Stolt-Nielsen*, 130 S. Ct. at 1776).

⁵⁴ *See, e.g., Corrigan v. Domestic Linen Supply Co., Inc.*, No. 12 C 0575, 2012 WL 2977262, at *5 (N.D. Ill. July 20, 2012); *Chen-Oster v. Goldman, Sachs & Co.*, 785 F. Supp. 2d 394, 408-10 (S.D.N.Y. 2011); *Goodale v. George S. May Intern. Co.*, No. 10 C 5733, 2011 WL 1337349, at *2-3 (N.D. Ill. Apr. 5, 2011).
⁵⁵ *See, e.g., Rame, LLC v. Popovich*, No. No. 12 Civ. 1684, 2012 WL 2719159, at *12 (S.D.N.Y. July 9, 2012); *Mork v. Loram Maint. of Way, Inc.*, No. 0:11-cv-02069-MJD-FLN, 2012 WL 38628, at *4-6 (D. Minn. Jan. 9, 2012); *S. Commc'ns Servs., Inc. v. Thomas*, 829 F. Supp. 2d 1324, 1336-37 (N.D. Ga. 2011); *Smith & Wollensky Rest. Grp., Inc. v. Passow*, 831 F. Supp. 2d 390 (D. Mass. 2011); *Amerix Corp. v. Jones*, No. CIV. JFM-11-2844, 2012 WL 141150 (D. Md. Jan. 17, 2012); *Caruso v. The Cheesecake Factory Restaurant, Inc.*, Judicial Arbitrator Group Case No. 12-0101A (June 1, 2012); *Colquhoun v. Chemed Corp.*, American Arbitration Association ("AAA") No. 11-160-001581-1 (May 6, 2011); *Calma v. Hooters of Am., Inc.*, AAA No. 30-160-00560-10 (Nov. 18, 2010); *SWLA Hosp. Assocs. v. Corvel Corp.*, AAA No. 11-193-02760-06 (Sept. 3, 2010); *Demetriou v. Earthlink, Inc.*, AAA No. 11-117-00273-10 (Sept. 1, 2010); *Benson v. CSA-Credit Solutions of Am., Inc.*, AAA No. 11-160-M-02281-08 (July 6, 2010); *Knudsen v. N. Motors, Inc.*, AAA No. 11-255-02699 09 (May 18, 2010); *Galakhova v. Hooters of Am., Inc.*, Minute Order, No. 34-2010-00073111-CU-OE-GDS (Cal. Super. Ct. of Sacramento July 27, 2010).

that are subject to class or collective treatment, the tradition, custom or usage of collective treatment of employment claims, the employer's subsequent insertion of an explicit class action waiver into the arbitration agreement, and the reasonable expectation of the parties under the circumstances.

III. *CONCEPCION* AND THE ENFORCEABILITY OF EXPLICIT CLASS ACTION WAIVERS IN ARBITRATION AGREEMENTS

A. The *Concepcion* Decision

In *Concepcion*, the Supreme Court considered “whether [Section] 2 [of the FAA] preempts California’s rule classifying most collective-arbitration waivers in consumer contracts as unconscionable.”⁵⁶ Plaintiffs entered into cell phone contracts with AT&T that provided for arbitration of all disputes and explicitly prohibited all class claims. The arbitration agreement at issue in *Concepcion* required AT&T to pay all costs for nonfrivolous claims and, in the event that a customer received an arbitration award greater than AT&T’s last written settlement offer, required it to pay a \$7,5000 minimum recovery, which increased to \$10,000 in 2009, and twice the amount of claimant’s attorneys’ fees.⁵⁷ They filed a putative class action for false advertising in federal court. The district court denied AT&T’s motion to compel arbitration and the Ninth Circuit affirmed. Both courts found the class action waiver unenforceable under the California Supreme Court’s decision in *Discover Bank v. Superior Court*,⁵⁸ which held that class action waivers are unconscionable when “found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money....”⁵⁹

The Supreme Court reversed the Ninth Circuit, holding that the *Discover Bank* rule is preempted by the FAA. Section 2 of the FAA makes arbitration agreements “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”⁶⁰ It noted that Section 2 allows invalidation of arbitration agreements “by ‘generally applicable contract defenses, such as fraud, duress, or unconscionability,’ but not by defenses that apply only to arbitration or derive their meaning from the fact that an [arbitration] agreement is at issue.”⁶¹ The Court characterized the *Discover Bank* rule as one that “classif[ies] most collective-arbitration waivers in consumer contracts as unconscionable.”⁶² The *Discover Bank* rule does not fall within the FAA’s savings clause because “[r]equiring the availability of classwide

⁵⁶ 131 S. Ct. at 1746.

⁵⁷ *Id.* at 1744 & n.3.

⁵⁸ 36 Cal. 4th 148 (2005).

⁵⁹ *Id.* at 162.

⁶⁰ *Concepcion*, 131 S. Ct. at 1745 (quoting 9 U.S.C. § 2).

⁶¹ *Id.* at 1746 (quoting *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

⁶² *Id.*

arbitration interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”⁶³

The Court found that the *Discover Bank* rule makes class arbitration inevitable in the consumer context because all that is required are damages that are “predictably small” and an allegation that defendant engaged in a scheme to cheat consumers.⁶⁴ The requirement of small damages is “toothless and malleable” depending on what any given court considers to satisfy that criterion, and there is “no limiting effect” on the “scheme” factor because it need only be alleged.⁶⁵

Next, the Court detailed how class arbitration runs counter to the FAA’s purpose: ensuring enforcement of arbitration agreements according to their terms to facilitate speedy and efficient dispute resolution.⁶⁶ First, by requiring the invalidation of express class action waivers in arbitration agreements, class arbitration “is manufactured by *Discover Bank* rather than consensual...”⁶⁷ Second, class arbitration “makes the process slower, more costly, and more likely to generate procedural morass than final judgment.”⁶⁸ Third, it “requires procedural formality,” noting that the AAA rules mimic Rule 23.⁶⁹ Fourth, “it greatly increases risks to defendants” by subjecting high stakes disputes to a process that is subject to narrow review for misconduct rather than mistake.⁷⁰ Thus, the Court concluded that the *Discover Bank* rule is preempted because it “stands as an obstacle” to accomplishing the purposes of the FAA.⁷¹

The Court noted that even if class actions are necessary to allow small value claims to be prosecuted where they otherwise might not proceed individually, states cannot mandate a procedure inconsistent with the FAA.⁷² It also commented that the claim at issue was likely to be resolved individually because it guarantees the claimants a minimum recovery of \$7,500 and double their attorneys’ fees if their award is greater than the last settlement offer.

A subsequent decision of the Supreme Court makes clear that, even after *Concepcion*, arbitration agreements are still subject to traditional state common law principles, such as unconscionability, “that are not specific to arbitration.”⁷³

⁶³ *Id.* at 1748.

⁶⁴ *Id.* at 1750.

⁶⁵ *Id.*

⁶⁶ *Id.* at 1749-52.

⁶⁷ *Id.* at 1750.

⁶⁸ *Id.* at 1751.

⁶⁹ *Id.* (emphasis in original).

⁷⁰ *Id.* at 1752.

⁷¹ *Id.* at 1753 (quotation omitted).

⁷² *Id.*

⁷³ *Marmet Health Care Ctr., Inc. v. Brown*, 132 S.Ct. 1201, 1203–04 (2012) (per curiam).

B. Circuit Court Application of *Concepcion* in Employment Cases

At least two circuit courts of appeal have applied *Concepcion* in the employment context to find state law rules against the enforcement of class action waivers preempted by the FAA. In *Green v SuperShuttle International, Inc.*,⁷⁴ shuttle bus drivers alleged that SuperShuttle misclassified them as franchisees rather than employees and denied them benefits, wages and reimbursement for franchise fees. The franchise agreement provided for mandatory arbitration and included an express class action waiver. The drivers filed suit and the district court granted defendant's motion to compel arbitration and held that the claims must proceed on an individual rather than class basis. On appeal, plaintiff argued that the class action waiver was unenforceable under Minnesota law. The Eighth Circuit held that "the state-law-based challenge involved here suffers from the same flaw as [that] in *Concepcion* – it is preempted by the FAA."⁷⁵

In *Quilloin v. Tenet Healthsystem Philadelphia, Inc.*,⁷⁶ the Third Circuit considered whether the district court erred in finding genuine disputes of material fact over the enforceability of the arbitration agreement in a wage and hour dispute. The agreement required the arbitration of all employment disputes, subject to limited exceptions, but did not address whether class arbitration was available. The Third Circuit reversed the district court's finding that the arbitration agreement might be substantively unconscionable on a number of grounds, including the possibility that the agreement might be unconscionable should the arbitrator determine the agreement prohibited class arbitration.⁷⁷ As an initial matter, the Third Circuit held that the district court erred by deciding a "hypothetical situation that might or might not arise depending on the arbitrator's interpretation of the arbitration agreement."⁷⁸ The court then went on to note in dicta that "even if the agreement explicitly waived [plaintiff's] right to pursue class actions, the Pennsylvania law prohibited class action waivers is surely preempted by the FAA under *Concepcion*...."⁷⁹ The Pennsylvania case law made class action waivers unconscionable if "class action litigation is the only effective remedy," including where "the high cost of arbitration compared with the minimal potential value of individual damages denie[s] every plaintiff a meaningful remedy."⁸⁰ The Third Circuit held that the state law impermissibly singled out arbitration agreements, creating an obstacle to the fulfillment of the FAA's purposes.⁸¹

⁷⁴ 653 F.3d 766 (8th Cir. 2011).

⁷⁵ *Id.* at 769.

⁷⁶ 673 F.3d 221 (3rd Cir. 2012).

⁷⁷ *Id.* at 232.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 233 (quoting *Thibodeau v. Comcast Corp.*, 912 A.2d 874, 883-84 (Pa. Super. Ct. 2006)).

⁸¹ *Id.*

C. The Enforceability of Class Action Waivers that Preclude Employees from Vindicating Their Statutory Rights

1. *In Re American Express Merchants' Litigation*

Prior to *Concepcion*, the Second Circuit's decision in an antitrust case, *In re American Express Merchants' Litigation* ("AmEx I") found class action waivers invalid where it prevented plaintiffs from vindicating their statutory rights.⁸² In *AmEx*, plaintiff merchants alleged that American Express violated the Sherman Act by illegally requiring them, as a condition of accepting American Express charge cards for payment, to accept all other American Express cards and products at fees above competitive levels. The card acceptance agreement required submission of all disputes to arbitration, except individual claims in small claims court, and prohibited the right to participate in any representative or class action. Plaintiffs claimed median damages of \$5,252 with treble damages.⁸³ Plaintiffs filed suit, presenting evidence from an economist that their claims would be prohibitively expensive to pursue individually. However, the district court compelled arbitration, leaving the determination of the enforceability of the class action waiver to the arbitrator. The Second Circuit reversed, relying on the Supreme Court's holding in *Green Tree Financial v. Randolph* that an arbitration agreement is invalid when arbitration would be prohibitively expensive,⁸⁴ and finding that the class action waiver "would grant AmEx de facto immunity from antitrust liability by removing the plaintiffs' only reasonable means of recovery."⁸⁵ The court found this to be a valid ground for revocation of the class action waiver under Section 2 of the FAA. The Supreme Court vacated the Second Circuit's original decision and remanded for further consideration in light of its holding in *Stolt-Nielsen*, which the Second Circuit found did not alter its analysis in a second opinion.⁸⁶

In a third opinion ("*AmEx III*"), the Second Circuit considered supplemental briefing on the impact of *Concepcion*. The court concluded that *Concepcion* did not apply because it involved the preemption of state contract law by the FAA and not the "vindication of statutory rights analysis" applied in *AmEx I*.⁸⁷ While *Concepcion* and *Stolt-Nielsen* preclude parties from being forced to arbitrate disputes on a class basis unless they agreed to do so, the court ordered litigation, not class arbitration.⁸⁸ The court found that the two Supreme Court cases do not "require that all class-action waivers be deemed per se enforceable."⁸⁹

⁸² 554 F.3d 300, 304 (2d Cir. 2009), *affirmed on reconsideration in AmEx II*, 634 F.3d 187 (2d Cir. 2011) (finding original analysis unaffected by *Stolt-Nielsen*) and in *AmEx III*, 667 F.3d 204 (2d Cir. 2012) (finding original analysis unaffected by *Concepcion*). On July 30, 2012, American Express filed a petition for *certiorari* with the U.S. Supreme Court.

⁸³ *AmEx I*, 554 F.3d at 317.

⁸⁴ 531 U.S. 79, 92 (2000).

⁸⁵ *AmEx I*, 554 F.3d at 319.

⁸⁶ *AmEx II*, 634 F.3d at 197-98.

⁸⁷ *AmEx III*, 667 F.3d at 213.

⁸⁸ *Id.*

⁸⁹ *Id.* at 214.

AmEx III pointed to other Supreme Court cases that recognized the viability of the “vindication of statutory rights” theory as a basis to render an arbitration agreement unenforceable. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*,⁹⁰ the Supreme Court held that statutory rights can be vindicated in arbitration “so long as the prospective litigant may effectively vindicate its statutory cause of action in the arbitral forum.”⁹¹ In *Randolph*, the Supreme Court recognized in dicta that excessive costs in arbitration, such as filing fees, arbitrators’ costs and other expenses, “could preclude a litigant ... from effectively vindicating her federal statutory rights in the arbitral forum.”⁹² Because “[n]either *Stolt-Nielsen* nor *Concepcion* overrules *Mitsubishi*, and neither makes mention of *Randolph*,” the Second Circuit found *Green Tree* controlling.⁹³

The Second Circuit also noted that other circuits recognize that a class action waiver could be invalidated if shown that it would make arbitration prohibitively expensive, though plaintiffs in those cases did not demonstrate that the waivers prevented them from vindicating their statutory rights.⁹⁴ *Amex III* concluded that the arbitration clause was unenforceable because plaintiffs presented sufficient evidence to show that cost of individually arbitrating their dispute would be so expensive as to deprive them of their statutory rights.⁹⁵ The court was careful to explain, however, that “each waiver must be considered on its own merits, based on its own record, and governed with a healthy regard for the fact that the FAA ‘is a congressional declaration of liberal federal policy favoring arbitration agreements.’”⁹⁶

2. Class Action Waivers that Preclude Vindication of Statutory Rights Due to the Prohibitive Cost of Individual Arbitration

Some federal district courts have applied *AmEx* to determine whether class action waivers would be invalid for precluding employees from vindicating their statutory rights because proceeding individually would be prohibitively expensive. In *Sutherland v. Ernst & Young, LLP*, plaintiff alleged that her employer misclassified her and others as exempt from the overtime requirements of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201, *et seq.*, and New York law and failed to pay her overtime wages.⁹⁷ She sought overtime backpay for herself in the amount of \$1,867.02. She signed an arbitration agreement as a condition of her employment that required her to submit all claims to binding, individual arbitration, but filed her claims in court. The court denied defendant’s motion to compel arbitration, finding that the class action waiver would prevent plaintiff from vindicating her statutory rights under *AmEx* because her potential

⁹⁰ 473 U.S. 614 (1985).

⁹¹ *AmEx III*, 667 F.3d at 214 (quoting *Mitsubishi*, 473 U.S. at 632).

⁹² *Id.* at 216 (quoting *Randolph*, 531 U.S. at 84, 90).

⁹³ *Id.*

⁹⁴ *Id.* at 217 (citing *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274 (4th Cir. 2007); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 274 (7th Cir. 2003); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496 (4th Cir. 2002)).

⁹⁵ *Id.*

⁹⁶ *Id.* at 219 (quotation omitted).

⁹⁷ 768 F. Supp. 2d 547 (S.D.N.Y. 2011), *reconsideration denied*, No. 10 Civ. 3332. 2012 WL 130420 (S.D.N.Y. Jan. 17, 2012).

recovery would be too small in comparison to the expenses required for individual arbitration.⁹⁸

Defendant moved for reconsideration on the basis that the district court's decision was inconsistent with the Supreme Court's interpretation of the FAA in *Concepcion* because, like the *Discover Bank* rule, it set no limits and would lead to the invalidation of most or all class action waivers.⁹⁹ The court disagreed, distinguishing *Concepcion* in three ways. First, the plaintiff, unlike those in *Concepcion*, is unable to vindicate her rights individually. Second, unlike the *Discover Bank* rule that the Supreme Court held was "without limits" and "mechanistically applied" to nearly all adhesive consumer contracts, "the *AmEx* rule ... applies only to the limited set of class action waivers that, after a case-by-case analysis, are found to meet the factors set out in *AmEx I and II* and that preclude an individual from being able to vindicate her statutory rights."¹⁰⁰ Third, the *AmEx* analysis is not a state common law doctrine that can be preempted by the FAA, but "is based on federal courts' interpretation of the FAA itself."¹⁰¹ *Concepcion* did not overrule the Supreme Court's statements in *Mitsubishi* and *Randolph* that a contract preventing litigants from enforcing their federal statutory rights is unenforceable under Section 2 of the FAA.¹⁰²

By contrast, in *LaVoice v. UBS Financial Services, Inc.*, the court applied *AmEx* to find enforcement of a class action waiver would not preclude plaintiff from vindicating his statutory rights under the FLSA.¹⁰³ The court found that plaintiff's estimated overtime claims of \$127,000 or more contrasted sharply with the less than \$6,000 damages claimed in *AmEx* and *Sutherland*.¹⁰⁴ It also found the availability of attorneys' fees under the arbitration agreement to weigh in favor of a finding that individual arbitration would not prevent plaintiff from vindicating his rights. It found plaintiff's estimated expert costs too speculative to consider because he was unclear on whether and how he would use the testimony. The court gave no weight to plaintiff's and counsel's unwillingness to pursue the claims individually in light of the amount of damages claimed. Finally, the court declined to consider plaintiff's proffered 10% probability of success to reduce his damages claim.¹⁰⁵ Other district courts have applied *AmEx* to conclude that plaintiffs failed to carry their burden of demonstrating that proceeding individually in arbitration would not be so prohibitively expensive as to preclude employees from vindicating their statutory rights.¹⁰⁶

⁹⁸ 768 F. Supp. 2d at 551.

⁹⁹ See *Chen-Oster*, 2012 WL 130420, at *5.

¹⁰⁰ *Id.* at *5, *7.

¹⁰¹ *Id.*

¹⁰² *Id.* at 9.

¹⁰³ No. 11 Civ. 2308, 2012 WL 124590 (S.D.N.Y. Jan. 13, 2012).

¹⁰⁴ *Id.* at *7.

¹⁰⁵ *Id.* at *8.

¹⁰⁶ See, e.g., *D'Antuono v. Service Road Corp.*, 789 F. Supp. 2d 308, 343-44 (D. Conn. 2011) (each plaintiff's potential recovery was at least \$20,000 compared to \$175 filing fee); *Pomposi v. GameStop, Inc.*, 2010 WL 147196, at *7 (D. Conn. Jan. 11, 2010) (potential recovery at least \$11,000 compared to costs of up to \$2,000); *Raniere v. Citigroup, Inc.*, 827 F. Supp. 2d 294, 315-17 (S.D.N.Y. 2011) (plaintiff's potential recovery of at least \$84,875 not prohibitively expensive, but noting if any one potential class

The California Supreme Court may soon decide whether the rule it set forth in *Gentry v. Superior Court*¹⁰⁷ that a pre-dispute class action waiver is impermissible when it prevents employees from vindicating unwaivable statutory rights under California's overtime laws survives *Concepcion*. Under *Gentry*, courts must apply several factors to determine whether a class action waiver prevents employees from vindicating their unwaivable "statutory right to receive overtime pay embodied in [California Labor Code] section 1194."¹⁰⁸ These factors include the modest size of the potential individual recovery, the potential for retaliation against members of the class, the fact that absent members of the class may be ill informed about their rights, and other real world obstacles to the vindication of class members' right to overtime pay through individual arbitration.¹⁰⁹ The *Gentry* decision acknowledged "that there may be circumstances under which individual arbitrations may satisfactorily address the overtime claims of a class of similarly aggrieved employees, or that an employer may devise a system of individual arbitration that does not disadvantage employees in vindicating their rights."¹¹⁰ California appellate courts are split on whether *Concepcion* preempts *Gentry*,¹¹¹ and the plaintiff in one of these cases filed a petition for review of the issue before the California Supreme Court in July 2012.¹¹²

3. Class Action Waivers that Preclude Vindication of Substantive Statutory Rights As a Matter of Law

At least two federal district courts have applied *AmEx* to find class action waivers that preclude the vindication of substantive statutory rights unenforceable as a matter of law. Both cases are currently on appeal before the Second Circuit. In *Chen-Oster v. Goldman, Sachs & Co.*, the court applied *AmEx* to find an implied class action waiver invalid where it operated to preclude one of the plaintiffs from vindicating her statutory

member meets burden of proving prohibitive costs, then arbitration clause is unenforceable as to the whole class).

¹⁰⁷ 42 Cal. 4th 443 (2007).

¹⁰⁸ *Id.* at 456.

¹⁰⁹ *Id.* at 457-463.

¹¹⁰ *Id.* at 464.

¹¹¹ Compare *Arguelles-Romero v. Superior Court*, 184 Cal. App. 4th 825, 836 (*Concepcion* inapplicable because "while *Discover Bank* is a case about unconscionability, the rule set forth in *Gentry* is concerned with the effect of a class action waiver on unwaivable rights") with *Iskanian v. CLS Transportation Los Angeles, LLC*, 206 Cal. App. 4th 949, 960-61 (2012) (under *Concepcion*, "impos[ing] class arbitration on parties who contractually rejected it" is inconsistent with the FAA's "objective of enforcing arbitration agreements according to their terms").

¹¹² *Iskanian*, *supra*, note 111. Another related issue presented by the petition is whether *Concepcion* preempts a state common law rule that renders any waiver of representative actions under the state's Labor Code Private Attorney General Act ("PAGA"), Cal. Labor Code § 2698, *et seq.*, unenforceable. The PAGA created a statutory right for employees to bring a representative action on behalf of themselves and other aggrieved employees to collect civil penalties payable to the state and the employees for Labor Code violations that the state's law enforcement agencies would otherwise seek but for lack of adequate resources to prosecute such claims. Courts are split on whether a rule finding PAGA representative action waivers invalid is preempted by *Concepcion*. Compare *Brown v. Ralphs Grocery Co.*, 197 Cal. App. 4th 489, 501-03 (2011), *review denied* (Oct. 19, 2011), *cert. denied*, No. 11-880, 2012 WL 136923 (U.S. Apr. 16, 2012) (not preempted) with *Iskanian*, 206 Cal. App. 4th at 965 (preempted).

right to bring pattern and practice claims of discrimination under Title VII of the Civil Rights Act.¹¹³ Plaintiffs brought a putative class action alleging that their employer engaged in a pattern and practice of discrimination against its female employees. As a condition of one of the plaintiff's promotion to a managing director position, she signed an employment contract that contained an arbitration clause that provided for arbitration of all employment-related matters but did not address class claims. Defendant moved to compel this plaintiff's claims to individual arbitration. The court found the agreement unambiguously silent on class arbitration, denied plaintiff's request to consider extrinsic evidence on the parties' intent, and held that the agreement precluded class arbitration under *Stolt-Nielsen*.¹¹⁴

Nonetheless, the court applied the vindication of statutory rights analysis of the *AmEx* cases to find that enforcement of the implied class action waiver in the employment agreement would preclude plaintiff from vindicating her statutory right to bring pattern and practice claims under Title VII.¹¹⁵ Under the burden-shifting analysis for pattern and practice claims, plaintiffs "rely on statistical evidence and 'testimony from protected class members' to meet [their initial] burden...."¹¹⁶ Individual proof is only required in the damages phase, after liability is established, and prospective relief can be awarded even without evidence of individual discrimination.¹¹⁷ Thus, "Title VII ... makes substantively distinct claims available to those victims of alleged discrimination proceeding individually and those proceeding as a class."¹¹⁸ Therefore, any implied waiver of plaintiff's class claims would preclude her from vindicating her statutory rights under Title VII. Because *Stolt-Nielsen* precludes class arbitration in the absence of a contractual basis, the court denied defendant's motion to compel arbitration in its entirety.¹¹⁹

Defendant moved for reconsideration because the court's decision did not discuss *Concepcion*, which had come down the day before. The court denied the motion, finding *Concepcion* inapplicable because it involved the FAA's preemption of a state contract law disfavoring arbitration by requiring class arbitration, not whether the FAA requires individual arbitration when federal statutory rights "are infringed by an agreement to arbitrate."¹²⁰ "[T]he right at the center of this case is not the right to proceed on a class basis but rather the right to vindicate a claim that an employer has engaged in a pattern and practice of discrimination," which is unavailable to the plaintiff on an individual basis.¹²¹ Finally, the court explained that it was duty-bound to follow Second Circuit law

¹¹³ 785 F. Supp. 2d 394 (S.D.N.Y. 2011).

¹¹⁴ *Id.* at 403-04.

¹¹⁵ *See id.* at 408-10.

¹¹⁶ *Id.* at 409 (citing *International Brotherhood of Teamsters v. United States*, 431 U.S. 329, 360 & n.46).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 409-10. Consistent with this reading of Title VII, the Second Circuit recently held that individual plaintiffs in a non-class action case could not use the pattern-or-practice method of proof to shift the burden to employers after showing a pattern or practice of discrimination. *Chin v. Port Authority of New York & New Jersey*, 685 F.3d 135, 150 (2d Cir. 2012).

¹¹⁹ *Id.* at 411.

¹²⁰ *Chen-Oster v. Goldman, Sachs & Co.*, No. 10 Civ. 6950, 2011 WL 2671813, at *3 (S.D.N.Y. July 7, 2011).

¹²¹ *Id.*

that arbitration clauses “preclud[ing] plaintiffs from enforcing their statutory rights are unenforceable.”¹²²

In *Raniere v. Citigroup, Inc.*, the court applied *AmEx* to find that the right to proceed collectively under the FLSA is substantive and cannot be waived.¹²³ It distinguished statutorily-created FLSA collective actions from Rule 23 class actions in that the former requires each employee to affirmatively join the case.¹²⁴ The grouping together of small claims was necessary to ensure the statute fulfilled its purposes of preventing substandard wages and private contracts that “endangered national health and efficiency.”¹²⁵ Because FLSA is an enforcement statute, “the ability of employees to pool resources in order to pursue a collective action” is an integral part of FLSA’s remedial provisions.¹²⁶ Thus, the court concluded that an FLSA collective action waiver is unenforceable as a matter of law....¹²⁷

4. Other Ways to Avoid *Concepcion*

Employees with class claims have avoided the application of *Concepcion* for reasons unrelated to whether the class action waiver is preempted by the FAA. For example, a court refused to enforce an arbitration clause with a class action waiver imposed by an employer on potential class members that gave no notice of pending litigation on the basis that it was an improper *ex parte* communication with class members.¹²⁸ The court declined to reach whether the class action waiver was preempted by the FAA under *Concepcion* because judicial control of class communications is based on federal, not state, law.¹²⁹ In another case, the court found that an employer waived its right to compel arbitration despite its citation to *Concepcion* as a new, favorable rule of law because it acted in a manner inconsistent with individual arbitration by litigating the case for several years.¹³⁰ Employees can also seek to invalidate arbitration agreements with class action waivers based on other contract defenses of general applicability unrelated to the waiver itself, such as unconscionability.¹³¹ Employees can also avoid *Concepcion* if the applicable arbitration agreement or the class of work they perform is not covered by the FAA.¹³²

¹²² *Id.* at *4.

¹²³ 827 F. Supp. 2d 294, 314 (S.D.N.Y. 2011).

¹²⁴ *Id.*

¹²⁵ *Id.* at 313-14 (quoting *Brooklyn Sav. Bank*, 324 U.S. at 706-07).

¹²⁶ *Id.* at 314.

¹²⁷ *Id.* The court noted that other circuits have come out differently but distinguished these cases based on the Second Circuit’s differing interpretation of in *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20 (1991), in *Amex II*. See *Raniere*, 827 F. Supp. 2d at 313.

¹²⁸ See, e.g., *Balasanyan v. Nordstrom, Inc.*, Nos. 11-cv-2609-JM-WMC, 10-cv-2671-JM-WMC, 2012 WL 760566 (S.D. Cal. Mar. 8, 2012).

¹²⁹ *Id.* at *2 & n.1.

¹³⁰ *Ho v. Ernst & Young, LLP*, 2011 WL 4403625, at *4-5 (N.D. Cal. Sept. 20, 2011).

¹³¹ See, e.g., *Samaniago v. Empire Today LLC.*, 205 Cal.App.4th 1138 (2012) (holding that FAA does not preempt general principles of unconscionability under California law).

¹³² See *Hoover*, 2012 WL 2126892, at *9 (FAA does not apply to contract at issue); 9 U.S.C. § 1 (FAA does not apply to classes of workers engaged in foreign or interstate commerce).

IV. CLASS ACTION WAIVERS AND EMPLOYEES COVERED BY THE NLRA.

The National Labor Relations Board, the government agency charged with enforcing the National Labor Relations Act (“NLRA”), held in January 2012 that a mandatory arbitration agreement containing a class action waiver violated the NLRA because it prohibited employees from exercising their right to “mutual protection” by preventing them from seeking to enforce their rights jointly in any forum.¹³³

D.R. Horton (“Horton”), a home builder, required employees to sign a Mutual Arbitration Agreement (“MAA”) as a condition of employment. The MAA purported to cover “all disputes and claims” between Horton and its employees, including “those relating to [the] Employee’s employment with [Horton]” and specified claims relating to “wages, benefits, or other compensation.” The MAA provided that, with respect to such claims, “[Horton] and Employee voluntarily waive all rights to trial in court before a judge or jury[.]” Other provisions of the MAA deprived the arbitrator of authority “to consolidate the claims of other employees into a proceeding originally filed by [Horton] or the Employee,” authorized the arbitrator to “hear only Employee’s individual claims,” and prevented the arbitrator from “fashion[ing] a proceeding as a class or collective action or . . . award[ing] relief to a group or class of employees in one arbitration proceeding.”

In 2008, Michael Cuda, a former Horton superintendent, who wished to file a collective action on behalf of allegedly misclassified similarly situated employees under the FLSA, filed an unfair labor practice charge, alleging that the MAA violated the NLRA.

A. The Board’s Order

The Board determined that the MAA’s prohibition of all types of concerted legal claims violated Section 7 of the NLRA, which confers on employees “the right to . . . engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157. Citing Supreme Court precedent, as well as its own precedent, the Board held that the MAA implicated Section 7’s “mutual aid or protection” provision because it protected employees’ efforts “to improve their working conditions through resort to administrative and judicial forums,” including efforts to protect FLSA rights.¹³⁴ The MAA’s prohibition on concerted litigation and arbitration violated this right.¹³⁵ The fact that Cuda had acted alone did not matter, the Board held, because he sought to file a class and collective action, which demonstrated his desire to “initiate or induce group action,” which is conduct covered by Section 7.¹³⁶

¹³³ The Board’s Decision and Order (“Order”) is available on its website at: <https://www.nlr.gov/cases-decisions/case-decisions/board-decisions>. The Order is dated January 3, 2012, and is case number 12-CA-025764.

¹³⁴ Order at 2.

¹³⁵ *Id.* at 3.

¹³⁶ *Id.*

The Board held that enforcement of Section 7 of the NLRA did not conflict with the Federal Arbitration Act (“FAA”), in which Congress sought to put arbitration agreements “upon the same footing as other contracts.”¹³⁷ Although the Board acknowledged that the Supreme Court has enforced agreements requiring federal statutory claims to be submitted to arbitration, the Board noted that the Court has drawn a line where enforcement of an arbitration agreement would require “a party . . . [to] forgo the substantive rights afforded by the statute.”¹³⁸ In other words, according to the Board, “arbitration may substitute for a judicial forum only so long as the litigant can effectively vindicate his or her statutory rights through arbitration.”¹³⁹ Because Section 7 rights are substantive rights that cannot be effected individually, the MAA’s prohibition on all class, collective, and joint claims was not enforceable.

The Board distinguished *Concepcion* and *Stolt-Nielsen* on several grounds:

- Neither *Concepcion* nor *Stolt-Nielsen* involved the waiver of NLRA rights or arbitration clauses found in employment agreements and so were not controlling.¹⁴⁰
- *Concepcion* involved supremacy clause considerations that were not present because the NLRA reflects substantive federal law.¹⁴¹
- There was no conflict between the FAA and the Board’s enforcement of the NLRA because the Board was not mandating class arbitration. Rather, its ruling prohibited employers from requiring employees to waive their right to bring class and collective claims in a judicial, not arbitral, forum.¹⁴²
- To the extent that the FAA and the NLRA conflicted, after weighing the interests of both laws in this area, the Board ruled that the NLRA’s interest was stronger. The FAA’s interest in individual arbitration was not as strong as it was in *Concepcion*, because, unlike consumer cases, which may involve tens of thousands of potential class members, employment cases involve far fewer class members. Thus, “[a] class-wide arbitration is . . . far less cumbersome and more akin to an individual arbitration proceeding along each of the dimensions considered by the Court in [*Concepcion*] – speed, cost, informality, and risk – when the class is so limited in size.¹⁴³
- The FAA should yield to the NLRA because it was passed before the Norris-LaGuardia Act, which made it illegal for a private agreement to prohibit “lawful means [of] aiding any person participating or interested in” a lawsuit arising out

¹³⁷ *Id.* at 8 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)).

¹³⁸ *Id.* at 9 (quoting *Gilmer*, 500 U.S. at 24).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 12.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 11-12.

of a labor dispute. “To the extent that the FAA requires giving effect to such an agreement, it would conflict with the Norris-LaGuardia Act,” which repealed “[a]ll acts and parts of act in conflict” with it.¹⁴⁴

The Board ordered Horton to revise the MAA to make it clear that it does not constitute a waiver of employees’ right to maintain a joint, class, or collective action in court or restrict employees’ right to file charges with the Board; to notify employees of the change, including electronically; and to post a remedial notice at office locations.¹⁴⁵

Horton petitioned for review of the Board’s decision on January 13, 2012 and the Board cross-applied for enforcement of the decision on March 19, 2012.¹⁴⁶

B. Issues Raised by Horton on Appeal Regarding the Board’s Authority.

In addition to challenging the substance of the Board’s Order, Horton has raised two arguments challenging whether the Board had the authority to issue it at all.

First, Horton argues that the Board lacked a properly constituted quorum when it issued the Order on January 3, 2012, because it claims that Board Member Craig Becker’s recess appointment ended in December 2011, when the Senate adjourned, and not when that session of Congress actually terminated on January 3, 2012.¹⁴⁷ In response, the Board has argued that, under the Constitution’s recess appointment clause,¹⁴⁸ such appointments expire at the end of the next Senate session following the appointment,¹⁴⁹ which, for Becker, would have been the end of the Senate’s first session of the 112th Congress or January 3, 2012.

Second, Horton argues that even if the appointment ended in December 2011, there was no quorum because one of the three Board members recused himself. The Board has countered that, under the NLRA’s delegation clause,¹⁵⁰ where authority has been delegated to a group of three or more members, only two members are required to constitute a quorum.¹⁵¹ Moreover, recently, in *New Process Steel, L.P. v. N.L.R.B.*, the Supreme Court left undisturbed the Board’s practice of deciding cases with a two-member quorum when one of the three panel members was disqualified.¹⁵²

¹⁴⁴ *Id.* at 12.

¹⁴⁵ Order at 13-14.

¹⁴⁶ See *D.R. Horton, Inc. v. Nat’l Lab. Rel. Bd.*, No. 12-60031 (5th Cir.).

¹⁴⁷ The 20th Amendment specifies the January 3rd date. See U.S. Const., amend XX, § 2.

¹⁴⁸ See U.S. Const. art. II, § 2, cl. 3.

¹⁴⁹ *Id.*

¹⁵⁰ 29 U.S.C. § 153(b).

¹⁵¹ *Id.*

¹⁵² 130 S.Ct. 2635, 2641, 2644 (2010) (“[T]he Board has throughout its history allowed two members of a three-member group to issue decisions when one member of a group was disqualified from a case”).

C. Horton's Impact on Courts.

Although it is probably too soon to tell what *Horton's* impact will be on courts, more courts appear to be rejecting *Horton* than embracing it.

1. Cases Rejecting Horton

Courts that have rejected *Horton's* application to mandatory class action waivers in arbitration agreements have done so based on a variety of grounds, some better reasoned than others.

While most courts have accorded deference to the Board's interpretation of Section 7 and rejected arguments that the NLRA's protections only apply in the context of collective bargaining or union organizing activity,¹⁵³ many have not deferred to its interpretation of *Concepcion* or to Section 7's interplay with the FAA on the ground that these are not areas where the Board has special "expertise."¹⁵⁴ In particular, several courts have challenged the Board's determination that the FAA should yield to the NLRA based on *Concepcion's* "broad language" regarding the FAA's "strong policy choice in favor of enforcing arbitration agreements" and the Supreme Court's recent decision, *CompuCredit Corp. v. Greenwood*,¹⁵⁵ which was decided after *Horton* and which held that there must be an express contrary congressional command to override the FAA.¹⁵⁶ These courts have not read Section 7 itself as a contrary command to enforcing agreements requiring individual arbitration, although most have not directly addressed the argument.¹⁵⁷

Other courts have rejected *Horton's* application for much more cursory reasons. For example, one court refused to consider *Horton's* impact on a mandatory class action waiver because the plaintiff had not alleged a violation of the NLRA in his complaint or raised the argument in opposition to the defendant's motion to compel, even though

¹⁵³ See *Jasso v. Money Mart Express, Inc.*, No. 11 Civ. 5500, 2012 WL 1309171, at *7 (N.D. Cal. Apr. 13, 2012) (citing "[w]ell-established federal precedent hold[ing] that the NLRA's mutual aid protections . . . [include] channels outside the immediate employee-employer relationship . . . [including] administrative and judicial forums") (quoting *Eastex Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978); *Iskanian v. CLS Transp. Los Angeles, LLC*, 206 Cal. App. 4th 949, 962 (2012) ("If *D.R. Horton* only involved application of the NLRA we would most likely defer to it."))

¹⁵⁴ *Nelsen v. Legacy Partners Residential, Inc.*, 207 Cal. App. 4th 1115, 1133-34 (2012), *as modified on denial of reh'g* (Aug. 14, 2012); *Iskanian*, 206 Cal. App. 4th at 962 ("As the FAA is not a statute the NLRB is charged with interpreting, we are under no obligation to defer to the NLRB's analysis."); *DeLock v. Securitas Security Servs. USA*, No. 11 Civ. 520, 2012 WL 3150391, at *3 (E.D. Ark. Aug. 1, 2012).

¹⁵⁵ 132 S.Ct. 665 (2012).

¹⁵⁶ *Jasso*, 2012 WL 1309171, at *9; *see also Truly Nolan of Am. v. Superior Ct.*, 145 Cal. Rptr.3d 432, 452 (2012) (citing *CompuCredit*); *Iskanian*, 206 Cal. App. 4th at 962 (citing *Concepcion* and *CompuCredit*); *Morvant v. P.F. Chang's China Bistro, Inc.*, No. 11 Civ. 05405, 2012 WL 1604851, at *11 (N.D. Cal. May 7, 2012) (same).

¹⁵⁷ Although the court addressed this argument in *DeLock*, 2012 WL 3150391, it appears to have likened Section 7 rights to procedural class and collective action rights, which, it held, can be waived. *Id.* at *5 ("The NLRA's text, even with the uncontroversial gloss that group litigation is concerted activity, likewise gives an insufficient common against the FAA.")

Horton was decided after both submissions were made.¹⁵⁸ However, most courts, even those that ultimately order arbitration, have acknowledged that the plaintiff is not required to file an NLRA charge in order to raise Section 7 as a basis for invalidating an allegedly unlawful arbitration provision and that the plaintiff may do so even though the underlying violation involves another employment statute.¹⁵⁹

2. Cases Applying *Horton*

At least two district courts have adopted *Horton*'s reasoning to invalidate mandatory arbitration agreements containing class action waivers.

In *Herrington v. Waterstone Mortgage Corp.*,¹⁶⁰ after determining that it had jurisdiction to invalidate a contractual provision that violated the NLRA,¹⁶¹ the court held that the class action waiver was unenforceable because it conflicted with the plaintiff's Section 7 rights.¹⁶² In reaching its decision, the court accepted *Horton*'s interpretation of Section 7's application to class and collective actions to enforce wage and hour claims.¹⁶³ The court rejected the defendant's argument that the plaintiff could not invoke Section 7 because he was a former employee, calling the argument "a red herring," because the plaintiff "was an employee at the time defendant interfered with her right to pursue a collective action by requiring her to sign a waiver."¹⁶⁴ The court distinguished *Concepcion* on the ground that it did not involve a conflict with the substantive right of a federal statute.¹⁶⁵

In *Owen v. Bristol Care, Inc.*,¹⁶⁶ the court relied on *Horton* to distinguish *Concepcion* on the ground that it was limited to consumer contracts and invalidated the class action waiver in the plaintiff's employment contract, which it held, violated her substantive right under the FLSA to bring their claims as a collective action.¹⁶⁷

V. THE FUTURE OF EXPLICIT CLASS ACTION WAIVERS IN THE EMPLOYMENT CONTEXT.

Concepcion curtailed the ability of states to apply rules finding class action waivers generally unenforceable, and cases now focus on whether the inability to proceed

¹⁵⁸ *Sanders v. Swift Transp. Co. of Arizona, LLC*, 843 F. Supp. 2d 1033, 1036 n.1 (N.D. Cal. Jan. 17, 2012).

¹⁵⁹ *Jasso*, 2012 WL 1309171, at *8; *DeLock*, 2012 WL 3150391, at *1; *but see Morvant*, 2012 WL 1604851, at *11 (agreeing with defendants' argument that "an arbitration agreement cannot require a party to forego the substantive rights afforded by the statute under which the plaintiff brings suit, not any statute").

¹⁶⁰ No. 11 Civ. 779, 2012 WL 1242318 (W.D. Wis. Mar. 16, 2012).

¹⁶¹ *Id.* at *3 (citing *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 86 (1982), for the proposition that "[w]hile only the Board may provide affirmative remedies for unfair labor practices, a court may not enforce a contract provision which violates" the NLRA).

¹⁶² *Id.* at *6.

¹⁶³ *Id.* at *4-5.

¹⁶⁴ *Id.* at *6.

¹⁶⁵ *Id.*

¹⁶⁶ No. 11 Civ. 4258, 2012 WL 1192005 (W.D. Mo. Feb. 28, 2012).

¹⁶⁷ *Id.* at *4-5.

collectively precludes employees from vindicating their statutory rights. It remains to be seen whether *In re D.R. Horton* and/or the statute-specific decisions in *Chen-Oster* and *Raniere* finding class action waivers unenforceable as a matter of law will withstand appellate scrutiny, but employees still have arguments that the preemption analysis of *Concepcion* does not apply in these contexts because the FAA must be harmonized with other federal statutes. Nor does *Concepcion* prohibit a case-by-case showing that the costs of individual arbitration would be prohibitively expensive as set forth in *Randolph* and applied in *AmEx* and *Sutherland*. Employees can also make similar showings under state law vindication of statutory rights theories, as in *Gentry*. Nonetheless, employees with class claims will have to increasingly turn to other grounds to invalidate arbitration agreements containing class action waivers since *Concepcion* makes it more difficult to invalidate the waiver itself. Future Supreme Court review of these issues seems likely. Stay tuned.