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LITIGATION

Courts of Appeal inconsistent when applying *Concepcion*

By Jeff E. Scott and Joseph R. Wetzel

Trial and appellate courts throughout California continue to struggle with the scope and breadth of the U.S. Supreme Court's decision in *AT&T Mobility v. Concepcion*, 2011 DJDAR 5846 (2011).

Recently, in *Caron v. Mercedes-Benz*, 2012 DJDAR 10502 (Cal. App. 4th Dist. July 30, 2012), Division 3 of the 4th District Court of Appeal held that the Federal Arbitration Act preempts the California Consumer Legal Remedy Act's prohibition against class action waivers (California Civil Code Section 1751) in arbitration agreements. The Court of Appeal relied on the *Concepcion* decision in reversing the superior court, which found itself bound by an earlier Court of Appeal decision reaching the opposite conclusion in *Fisher v. DCH Temecula Imports LLC*, 187 Cal. App. 4th 601 (Cal. App. 4th Dist. Aug. 13, 2010). The *Caron* opinion thus arguably creates a split in authority with *Fisher* that may warrant later resolution by the state Supreme Court.

The decision in *Caron* stands in contrast with an even more recent decision from Division 1 of the 4th District, which declined to apply *Concepcion* in the context of enforcing an arbitration clause requiring employees to individually arbitrate their disputes with their employer. See *Truly Nolen of America v. Superior Court*, No. D060519 (Cal. App. 4th Dist., filed Aug. 9, 2012) (unpublished). The leading California case relating to the enforceability of class action waivers in arbitration agreements in the employment context has been *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007). In *Gentry*, the state Supreme Court tracked California's *Discover Bank* rule, a rule expressly overruled in *Concepcion*, and found that class action waivers may be invalid in wage and hour cases, even though those do not necessarily involve miniscule amounts at issue (a key part of the *Discover Bank* holding), because enforcement could result in a *de facto* waiver of otherwise unwaivable statutory rights. The Supreme Court then set forth a four-factor test that must be applied in considering class action waivers in arbitration clauses in the employment context.

With that background, the 4th District in *Truly Nolen* tackled the application of *Gentry* in a post-*Concepcion* world. In *Truly Nolen*, the court found that "[a]lthough Concepcion's reasoning strongly suggests that *Gentry*'s holding [that class action waivers are unenforceable where they stand as obstacles to the vindication of class members' statutory rights] is preempted by federal law, the U.S. Supreme Court did not directly rule on the class arbitration issue in the context of unwaivable statutory rights and the California Supreme Court has not yet revisited *Gentry*. Thus, we continue to be bound by *Gentry* under California's stare decisis principles."

> Is the difference in outcome between *Caron* and *Truly Nolen* simply a matter of some courts' willingness to apply *Concepcion* to its logical conclusion and others' rigid adherence to precedent?

In some regards, the *Truly Nolen* outcome was forecast by the 2nd District in *Kinecta Alternative Financial Solutions, Inc. v. Superior Court (Malone)*, 205 Cal. App. 4th 506 (Cal. App. 2nd Dist. Apr. 25, 2012, modified May 1, 2012), when it observed that "[a] question exists about whether *Gentry* survived the overruling of *Discover Bank* in *Concepcion*, but it is not one we need to decide. *Gentry* decided a different issue from *Discover Bank*. In contrast to the unconscionability analysis in *Discover Bank*, the rule in *Gentry* concerns 'the effect of a class action waiver on unwaivable statutory rights regardless of unconscionability.' Specifically, *Gentry* addresses whether a class arbitration 'is a significantly more effective practical means of vindicating unwaivable statutory rights[.]' *Discover Bank* and *Gentry* established two different tests of whether to enforce a class arbitration waiver, which should be considered separately. Since it has not been expressly abrogated or overruled, *Gentry* appears to remain the binding law in California."

Is the difference in outcome between *Caron* and *Truly Nolen* simply a matter of some courts' willingness to apply *Concepcion* to its logical conclusion and others' rigid adherence to precedent, since *Gentry* was a state Supreme Court case and was not expressly addressed in *Concepcion*? We don't think so. It appears that there are some fundamental philosophical differences that are driving these decisions. The U.S. Supreme Court likely would not distinguish *Gentry* from *Concepcion* in the manner suggested by the 2nd District in *Kinecta*. But who knows what the state Supreme Court may do with this set of circumstances?

In fact, this issue may and should find its way to the state Supreme Court very soon. The losing plaintiff/appellant in a case called *Iskanian v. CLS Transportation Los Angeles, LLC*, 206 Cal. App. 4th 949 (Cal. App. 2nd Dist. June 4, 2012), has filed a Petition for Review with the state Supreme Court. The 2nd District's opinion in *Iskanian* went where the *Truly Nolen* and *Kinecta* court did not and held that "the *Concepcion* decision conclusively invalidates the *Gentry* test. ... A rule like the one in *Gentry* — requiring courts to determine whether to impose class arbitration on parties who contractually rejected it — cannot be considered consistent with the objective of enforcing arbitration agreements according to their terms."

Plainly, this area cries out for clear guidance from the state Supreme Court. Until that happens, we will see a hodgepodge of appellate decisions in this area, some strictly enforcing the clear language in *Concepcion*, and others looking for opportunities to distinguish that opinion. Stay tuned.

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