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# Arbitration Report.

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# Hello Arbitration!
# Living in a Post-*Concepcion* World

**By Rebekah Kaufman**

Following the Supreme Court's recent decision in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (U.S. 2011), courts across the country have been bulldozing aside class action waivers as well as other remaining obstacles to consumer arbitration. The Third and the Eleventh Circuits, in particular, have taken the lead.

In *Cruz v. Cingular Wireless, LLC*, 2011 U.S. App. LEXIS 16811 (11th Cir. Aug. 11, 2011), the panel held that plaintiffs in a putative consumer protection class action against AT&T Mobility's predecessor, Cingular Wireless, must arbitrate their claims under the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") on a non-class basis. And in *Litman v. Cellco Partnership*, No. 08-4103 (3d Cir. Aug. 24, 2011), the Third Circuit agreed, upholding a class action waiver in the first federal appeals court decision to apply *Concepcion* to a non-AT&T arbitration agreement.

The plaintiffs in *Cruz* argued on appeal that the class action waiver in the arbitration provision of their wireless service agreement was unenforceable because it "hindered the remedial purposes of the FDUPTA by effectively immunizing ATTM from liability for unlawful business practices, in violation of public policy." That argument was a nonstarter after *Concepcion* and was readily rejected by the Eleventh Circuit. Like *Concepcion*, the plaintiffs did not allege any defects in the formation of the contract, aside from its adhesive nature. Further, the panel held that the Florida law is preempted by the Federal Arbitration Act to the extent it would require classwide arbitration "simply because the case involves numerous small-dollar claims by consumers against a corporation, many of which will not be brought unless the Plaintiffs proceed as a class."

The Third Circuit decision in *Litman* is notable because, just a few weeks earlier, a New Jersey state appellate court refused to enforce a class action waiver, finding the provisions "too confusing, too vague, and too inconsistent." *See NAACP of Camden County East v. Foulke Management Corp*., No. A-1230-09T3, 2011 N.J. Super. LEXIS 151, *2 (App. Div. Aug. 2, 2011). This schism is one we've seen in other states (read, California). Apparently, some state judges have a hard time with the Supremacy Clause.

Many district courts have similarly enforced class action waivers, and have rejected the usual bag of tricks employed to defeat motions to compel arbitration, such as waiver (*see*, *e.g.*, *Estrella v. Freedom Fin.*, 2011 U.S. Dist LEXIS 71606 (N.D. Cal. July 5, 2011) (rejecting argument that defendants waived their right to arbitrate by litigating the case for over two years)) and the lack of arbitration discovery (*see*, *e.g.*, *Hopkins v. World Acceptance Corp.*, 2011 U.S. Dist. LEXIS 79770 (N.D. Ga. June 29, 2011) (rejecting argument that limited discovery in arbitration prohibited full vindication of rights)). Even courts in California, where the original hostility to class action waivers was born, have been enforcing class action waivers in consumer agreements.

Meanwhile, consumer groups have been screaming like the monkeys in *Angry Birds*, demanding a legislative end to *Concepcion*. Congress has obliged by reintroducing the Arbitration Fairness Act. The bill, first introduced in 2007, would ban forced arbitration clauses in employment, consumer, and civil rights cases. It is hard to imagine the bill being passed by this particular Congress, but stay tuned.

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