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Arbitration Provisions and Class Action Waivers in California Post-*Concepcion*: The Unconscionability Doctrine Revisited

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In This Issue

In April 2011, the United States Supreme Court in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (*Concepcion*) held in a 5-4 decision that the Federal Arbitration Act (FAA) preempted the California Supreme Court's ruling in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005) (*Discover Bank*) that class waivers are unconscionable if the waiver is in an adhesion contract, disputes between the parties are likely to involve a small amount of damages, and the party with inferior bargaining power alleges a deliberate scheme to defraud. *The New York Times Editorial Board* described *Concepcion* as "a devastating blow to consumer rights,"[1] and many commentators predicted that it would be a death knell for aggregate litigation.[2] Three-and-a-half years after *Concepcion*, however, it is clear that reports of the death of class litigation were greatly exaggerated.[3]

The California Supreme Court has acknowledged that *Concepcion* overturned its *Discover Bank* rule[4] but has reiterated that courts retain the capacity to invalidate class arbitration waivers, and arbitration provisions generally, on the grounds specified in the FAA's section 2 savings clause.[5] As the *Sonic II* Court recognized, "[a]lthough courts may not rewrite agreements and impose terms to which neither party has agreed, it has long been the proper role of courts enforcing the common law to ensure that the terms of a bargain are not unreasonably harsh, oppressive, or one-sided . . . . After *Concepcion*, ***the exercise of that judicial function as applied to arbitration agreements remains intact***, as the FAA expressly provides."[6] Indeed, even after *Concepcion*, state and federal courts in California have invalidated arbitration provisions found to be unreasonably harsh, oppressive, or one-sided based on the standard California state law unconscionability analysis.[7]

I. Brief History of *Discover Bank* and *Concepcion*

In *Discover Bank*, the California Supreme Court articulated a broad public policy against class action waivers. The *Discover Bank* Court engaged in a historical analysis of the underpinnings of class-based litigation and canvassed extant California case law on class action waivers. Then, the Court stated a new rule, ostensibly based on California's unconscionability doctrine, which was applicable to class action waivers. Specifically, the Court held:

> [W]hen the waiver is 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, then . . . the waiver becomes in practice the exemption of the party "from responsibility for [its] own fraud, or willful injury to the person or property of another." Under these circumstances, such waivers are unconscionable under California law and should not be enforced.[8]

The California Supreme Court's *Discover Bank* ruling "ushered in a flood of state court decisions invalidating class action waivers on grounds of unconscionability."[9] The *Discover Bank* rule governed class action waivers in California until 2011, when the United States Supreme Court issued the seminal *Concepcion* decision.

In 2002, Vincent and Liza Concepcion entered into an agreement for the sale and servicing of cellular telephones with AT&T Mobility LLC (AT&T). The agreement included an arbitration provision which encompassed all disputes between the parties and which expressly provided that all claims be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding."[10] The arbitration provision provided that customers may initiate dispute proceedings by completing a one-page Notice of Dispute form available on AT&T's website. AT&T could then offer to settle the claim; if it did not, or if the dispute was not resolved within 30 days, the customer could invoke arbitration by filing a separate Demand for Arbitration, also available on AT&T's website.

The arbitration agreement included various pro-claimant features likely intended to preclude a finding of unconscionability. In the event that the parties proceed to arbitration, the agreement specified that AT&T must pay all costs for nonfrivolous claims; that arbitration must take place in the county in which the customer is billed; that, for claims for $10,000 or less, the customer may elect whether the arbitration proceeds in person, by telephone, or based only on submissions; that either party may bring a claim in small claims court in lieu of arbitration; and that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages.[11] The arbitration provision also expressly precluded AT&T from seeking reimbursement of its attorney's fees, and it provided that, in the event that a customer receives an arbitration award greater than AT&T's last written settlement offer, AT&T is required to pay a $7,500 minimum recovery and twice the amount of the claimant's attorney's fees.[12]

The Concepcions purchased AT&T service, which was advertised as including free phones, and AT&T did not charge them anything for the phones. But AT&T did charge them $30.22 in sales tax based on the phones' retail value and, notwithstanding this charge, the Concepcions proceeded with their purchase. In March 2003, the Concepcions filed a complaint against AT&T in the United States District Court for the Southern District of California and their complaint was later consolidated with a putative class action alleging, among other things, that AT&T had engaged in false advertising and fraud by charging sales tax on phones it advertised as free. AT&T moved to compel arbitration under the terms of its agreement with the Concepcions. The Concepcions opposed the motion, arguing that the arbitration agreement was unconscionable under the *Discover Bank* rule. The district court denied AT&T's motion to compel arbitration, finding that the arbitration provision was unconscionable because AT&T had not shown that bilateral arbitration would adequately substitute for the deterrent effect of a class action.[13] The Ninth Circuit affirmed,[14] and the United States Supreme Court granted *certiorari*.[15]

With Justice Scalia writing for the majority, the Supreme Court reversed in a 5-4 decision.[16] The Court began its analysis by recognizing that the FAA's savings clause "permits arbitration agreements to be declared unenforceable upon such grounds as exist at law or in equity for the revocation of any contract."[17] According to the Court, the "saving clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."[18]

Further, although the "saving clause 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."[19]

The Court found that the *Discover Bank* rule interferes with arbitration because, although it "does not *require* classwide arbitration, it allows any party to a consumer contract to demand it *ex post*."[20] Thus, the *Discover Bank* rule stood as an obstacle to the accomplishment of the FAA's objectives because it categorically allowed consumers to demand classwide arbitration, which the *Concepcion* majority viewed as inconsistent with the fundamental attributes of arbitration; *i.e.*, informality and the resulting lower costs, greater efficiency, and speed.[21] As such, the United States Supreme Court held that California's *Discover Bank* rule was preempted by the FAA.[22]

II. California's Unconscionability Doctrine Post-*Concepcion*

As explained above, *Concepcion* recognized that the FAA's "saving clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability" but cautioned that any such rules could not apply "in a fashion that disfavors arbitration."[23] Since 2011, courts nationwide, including in California, have struggled in toeing this line.[24]

a. The Unconscionability Doctrine in California

California's unconscionability doctrine ensures that contracts, particularly contracts of adhesion,[25] do not impose terms that are overly harsh,[26] unduly oppressive,[27] "so one-sided as to shock the conscience,"[28] or unfairly one-sided.[29] The "core concern" of the unconscionability analysis is the "absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."[30] Thus, "the unconscionability doctrine is concerned not with 'a simple old-fashioned bad bargain,' but with terms that are 'unreasonably favorable to the more powerful party.'"[31]

Unconscionability consists of both procedural and substantive elements. Procedural unconscionability "addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power."[32] "Oppression occurs where a contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form."[33] In contrast, substantive unconscionability "pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided."[34] Both procedural unconscionability and substantive unconscionability must be shown, but they are evaluated on a sliding scale. "[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa."[35]

b. California Unconscionability Case Law Post-*Concepcion*

In the wake of *Concepcion*, a putative class action plaintiff cannot simply point to the existence of a class action waiver to establish that an arbitration agreement is unconscionable.[36] Further, a plaintiff challenging an arbitration provision must establish that the unconscionable terms taint with illegality the arbitration agreement as a whole, such that the unconscionable terms cannot be severed and the entire arbitration agreement is unenforceable.[37] This is a heavy burden, and whether a putative class action plaintiff can satisfy it depends on the reasonableness of the arbitration provision at issue in a case. In general, where the plaintiff is given notice of the arbitration provision and the arbitration provision is reasonable, courts will enforce such provisions.[38] Conversely, where the plaintiff is not notified of the provision and, further, the arbitration provision is unreasonably harsh, oppressive, or one-sided, courts will refuse to enforce such unconscionable arbitration provisions.[39]

The post-*Concepcion* cases in which courts applying California law have found arbitration provisions to be unconscionable serve as a cautionary reminder

not to overreach in drafting arbitration provisions and class action waivers. In *Trompeter v. Ally Fin., Inc*., Judge Wilkin of the United States District Court for the Northern District of California found a provision in an arbitration provision to be unconscionable and refused to enforce the arbitration agreement as a whole.[40] At issue in *Trompeter* was a form contract, which included an arbitration provision and a class action waiver, for the sale of a vehicle.[41] The plaintiff in *Trompeter* did not challenge the class action waiver itself, but rather attacked various other provisions in the arbitration agreement as unconscionable.[42] On the facts of the case, the *Trompeter* court found that the arbitration clause included at least a minimal level of procedural unconscionability "based on the adhesive nature of the form arbitration agreement and the lack of opportunity for [plaintiff] to negotiate its terms."[43] In addition, the court identified the following provisions as substantively unconscionable: (1) a party does not waive the right to arbitrate by using self-help remedies or filing suit; (2) if the arbitrator's award against a party is in excess of $100,000, that party may request a new arbitration by a three-arbitrator panel; (3) if the arbitration award includes injunctive relief, the enjoined party may demand re-arbitration by a three-arbitrator panel; and (4) the appealing party requesting a new arbitration is responsible for the filing fees and other arbitration costs subject to a final determination by the arbitrators of a fair apportionment of costs.[44] The court found that these provisions either lacked "a modicum of bilaterality" or were designed wholly or largely for defendant's benefit at the expense of the party on which the arbitration was imposed (*i.e*., the plaintiff).[45] Moreover, the court also determined that the agreement was "tainted with illegality," and to enforce the agreement "would encourage overreaching by creditors drafting consumer contracts."[46] Importantly, the court rejected the defendant's invocation of *Concepcion* in its attempt to enforce the arbitration agreement, stating that "*Concepcion* does not preclude this Court's finding that the arbitration agreement in the present case is unconscionable. . . ."[47]

Another instructive case is *Lima v. Gateway, Inc*. In *Lima*, Judge Gee of the United States District Court of the Central District of California found an arbitration clause, which included a class action waiver, to be unconscionable and denied defendant's motion to compel arbitration.[48] As in *Trompeter*, the plaintiff in *Lima* did not challenge the class arbitration waiver itself, but instead challenged other aspects of the arbitration agreement as unconscionable.[49] *Lima* involved defendant Gateway's telephonic sale of a computer monitor to plaintiff Lima. At the time of the sale, Gateway had a policy requiring its phone sales representatives to disclose to customers that Gateway's limited warranty agreement applied to all purchases and that a copy of the limited warranty agreement would ship with the product—the limited warranty included the arbitration provision and class arbitration waiver at issue. Gateway's phone sales representative did not disclose the terms of the limited warranty, including the inclusion of the arbitration provision and class arbitration waiver.

The *Lima* court found that the contract formation between Gateway and Lima involved a "high degree of procedural unconscionability."[50] The circumstances the court pointed to in making this finding include: (1) the contract was an atypical contract of adhesion in which Lima could not simply "take it or leave it" because the terms of the agreement arrived in a preprinted box along with his monitor when it was shipped, and Lima had an affirmative duty to reject the agreement by notifying Gateway and returning the monitor; (2) Lima had only 15 days to reject the limited warranty and the arbitration agreement thereto; (3) not only did Lima have to return the monitor to reject the agreement, but by returning the monitor, Lima was subject to a 15% restocking fee; and (4) the arbitration provision was a surprise to Lima because Gateway's phone sales representative had only informed him that the purchase of the monitor was subject to a limited warranty, not that the warranty included an arbitration provision; Lima only discovered the limited warranty's arbitration clause weeks after his purchase when he received the monitor in the mail.[51]

Due to the high degree of procedural unconscionability, Lima only had to establish a minimal degree of substantive unconscionability under California's sliding scale approach to the unconscionability

analysis, and the court found that the facts satisfied that threshold.[52] First, Lima's claims had little to do with the limited warranty, but the "sweeping scope" of the arbitration agreement would have captured Lima's claims because it covered "*all* disputes between the parties—including those beyond the scope of the warranty coverage."[53] The court found that the broad scope of the arbitration provision exceeded a consumer's reasonable expectations and was, therefore substantively unconscionable. Second, the arbitration clause raised mutuality concerns because it insufficiently defined the fees that Lima could have incurred in arbitration.[54] Finally, the arbitration agreement demonstrated a further lack of mutuality because it required confidentiality. Here, the court observed that "[a]lthough facially neutral, confidentiality provisions usually favor companies over individuals . . . because companies continually arbitrate the same claims."[55]

As the arbitration agreement evinced both substantively and procedurally unconscionable elements, the *Lima* court found the arbitration provision as a whole unenforceable.[56] Finally, the *Lima* court observed that because "the scope of the arbitration provision exceeds a consumer's reasonable expectations and none of Lima's claims arise under the Limited Warranty, severing the offending language is not possible."[57]

III. Conclusion

The Supreme Court's *Concepcion* decision abrogated California's longstanding public policy against class action waivers, but courts applying California law have in certain cases continued to invalidate unfair and unreasonably one-sided arbitration provisions generally, and class arbitration waivers specifically, through the unconscionability doctrine. As discussed above, the core question under the unconscionability doctrine is whether there was an "absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."[58] Accordingly, to protect against unconscionability challenges, the consumer should be given actual notice of the terms and conditions of the arbitration provision, and the arbitration agreement should be drafted with an eye toward a potential challenge that it is unreasonably harsh, oppressive, or one-sided.

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1. Editorial, *Gutting Class Action*, N.Y. TIMES, May 13, 2011, at A26.
2. *See, e.g.*, Edwin Chemerinsky, *Abandoning the Courts*, Trial, July 2011, at 50, 52 ("The Court's decision will have a devastating effect on many class actions, as agreements requiring individual arbitration will now bar classwide relief."); Sarah Rudolph Cole, *On Babies and Bathwater: the Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 547, 463 (2011) ("[T]he Court appears to have placed the nail in the coffin on consumers' ability to pursue class processes when bound by an arbitration agreement in *AT&T v. Concepcion*.").
3. Megan Barnett, Note, *There Is Still Hope for the Little Guy: Unconscionability Is Still a Defense Against Arbitration Clauses Despite* AT&T Mobility v. Concepcion, 33 WHITTIER L. REV. 651 (2012); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v Concepcion*, 79 U. CHI. L. REV. 623, 623 (2012) (observing that "most class cases will not survive the impending tsunami of class action waivers" but contending that "some plaintiffs will be able to successfully challenge class waivers under certain circumstances").
4. *See, e.g., Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1124 (Cal. 2013) (*Sonic II*) (recognizing that *Concepcion* preempted California's state-law rule categorically prohibiting waiver of a Berman hearing in employee wage disputes but reaffirming that "state courts may continue to enforce unconscionability rules that do not 'interfere[] with fundamental attributes of arbitration") (quoting *Concepcion*, 131 S. Ct. at 1748); *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (Cal. 2014) (finding that *Concepcion* preempted California's *Gentry* rule, which disfavored class action waivers in employee compensation disputes where such waivers undermined the vindication of the employee's unwaivable statutory rights, and consequently overturning the *Gentry* rule).
5. *See, e.g., Sonic II*, 57 Cal. 4th at 1142-43 ("[T]he FAA 'permits arbitration agreements to be declared unenforceable upon such grounds as exist at law or in equity for the revocation of any contract, including generally applicable contract defenses, such as fraud, duress, or unconscionability") (quoting *Concepcion*, 131 S. Ct. at 1746) (internal quotations omitted); *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC*, 55 Cal. 4th 223, 246 (Cal. 2012) (*Pinnacle*) (a post-*Concepcion* case in which the California Supreme Court

reiterated that "[g]enerally applicable contract defenses, such as . . . unconscionability, may be applied to invalidate arbitration agreements without contravening the FAA") (internal quotations and citations omitted).

6. *Sonic II*, 57 Cal. 4th 1143 (emphasis added); *see also id*. at 1145 ("After *Concepcion*, courts may continue to apply unconscionability doctrine to arbitration agreements. . . . As the FAA contemplates in its savings clause, courts may examine the terms of adhesive arbitration agreements to determine whether they are unreasonably one-sided. What courts may not do, in applying unconscionability doctrine, is to mandate procedural rules that are inconsistent with fundamental attributes of arbitration, even if such rules are desirable for unrelated reasons.") (internal quotations and citations omitted).
7. *See, e.g., Lima v. Gateway, Inc*., 886 F. Supp. 2d 1170 (C.D. Cal. 2012); *Trompeter v. Ally Fin., Inc*., 914 F. Supp. 2d 1067 (N.D. Cal. 2012); *Kanbar v. O'Melveny & Myers*, 849 F. Supp. 2d 902 (N.D. Cal. 2011); *Carmona v. Lincoln Millennium Car Wash, Inc*., 226 Cal. App. 4th 74 (Cal. App. 2014); *Sabia v. Orange County Metro Realty, Inc*., 227 Cal. App. 4th 11 (Cal. App. 2014).
8. *Discover Bank*, 36 Cal. 4th at 162 (quoting Cal. Civ. Code § 1668).
9. Gilles & Friedman, *supra* note 3, at 633 n.33 (2012) (collecting post-*Discover Bank* cases nationwide which invalidated class arbitration waivers as unconscionable under state law).
10. *Concepcion*, 131 S. Ct. at 1744.
11. *Id*.
12. *Id*.
13. *Laster v. T-Mobile USA, Inc*., Case No. 05cv1167 DMS, 2008 U.S. Dist. LEXIS 103712, at *34 (S.D. Cal. Aug. 11, 2008).
14. *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 855 (2009).
15. 560 U.S. 923, 130 S. Ct. 3322, 176 L. Ed. 2d 1218 (2010).
16. *Concepcion*, 131 S. Ct. 1740.
17. *Id*. at 1746 (internal quotations omitted).
18. *Id*. (internal quotations omitted).
19. *Id*. at 1748.
20. *Id*. at 1750 (emphasis in original).
21. *Id*. at 1738.
22. *Id*. at 1753.
23. *Id*. at 1747.
24. *Id*.
25. *Sonic II*, 57 Cal. 4th at 1145.
26. *Stirlen v. Supercuts, Inc*., 51 Cal. App. 4th 1519, 1532 (Cal. App. 1997).
27. *Perdue v. Crocker National Bank*, 38 Cal. 3d 913, 925 (Cal. 1985).
28. *Pinnacle*, 55 Cal. 4th at 246.
29. *Little v. Auto Stiegler, Inc*., 29 Cal.4th 1064, 1071 (Cal. 2003).
30. *Sonic II*, 57 Cal. 4th at 1145 (quotations omitted).
31. *Id*. (quoting *Schnuerle v. Insight Communs., Co. L.P*., 376 S.W.3d 561, 575 (Ky. 2012); 8 Williston on Contracts (4th ed. 2010) § 18:10, p. 91).
32. *Pinnacle*, 55 Cal. 4th at 246.
33. *Morris v. Redwood Empire Bancorp*, 128 Cal. App. 4th 1305, 1317 (Cal. App. 2005).
34. *Pinnacle*, 55 Cal. 4th at 246.
35. *Carmona*, 226 Cal. App. 4th at 83.
36. *See Bellows v. Midland Credit Mgmt*., No. 09CV1951-LAB, 2011 U.S. Dist. LEXIS 48237, at *10 (S.D. Cal. May 4, 2011) (rejecting unconscionability argument that relied "principally on the inclusion of a class action waiver to show that the Agreement is unconscionable"); Barnett, *supra* note 3, at 665 ("Plaintiffs can no longer point to the *Discover Bank* rule as their only reason why a contract at issue is unconscionable where a class action waiver exists.").
37. *Little*, 29 Cal. 4th at 1074.
38. *See, e.g., Laster v. T-Mobile USA, Inc*., Case No. 05cv1167 DMS, ECF No. 329 (S.D. Cal. May 9, 2012) (on remand from United States Supreme Court, district court rejected the Concepcions' standard California state law unconscionability challenge to the arbitration agreement, finding that the arbitration provision was not substantively unconscionable and, therefore, permissible); *see also Galen v. Redfin Corp*., 227 Cal. App. 4th 1525 (Cal. App. 2014); *Swift v. Zynga Game Network, Inc*., 805 F. Supp. 2d 904 (N.D. Cal. 2011).
39. *See Lima*, 886 F. Supp. 2d 1170; *Trompeter*, 914 F. Supp. 2d 1067.
40. *Trompeter*, 914 F. Supp. 2d 1067.
41. Notably, the same form arbitration agreement at issue in *Trompeter* has also been considered in several California state court cases. Thus far, however, the state courts are split on whether the arbitration clause and class action waiver in the form contract are unconscionable. *See, e.g., Sanchez v. Valencia Holding Co., LLC*, 201 Cal. App. 4th 74 (Cal. App. 2011) (finding the arbitration

clause unconscionable and unenforceable); *Caron v. Mercedes-Benz Financial Services USA LLC*, 208 Cal. App. 4th 7 (Cal. App. 2012) (finding the class action waiver enforceable); *Goodridge v. KDF Automotive Group, Inc*., 209 Cal. App. 4th 325 (Cal. App. 2012) (finding the arbitration clause unconscionable and unenforceable); *Flores v. West Covina Auto Group*, 212 Cal. App. 4th 895 (Cal. App. 2013) (finding the arbitration clause not unconscionable and the class action waiver enforceable). The California Supreme Court has granted review and its forthcoming decision will likely shed further light on the status of California's unconscionability doctrine in the post-*Concepcion* legal landscape. *See, e.g., Sanchez v. Valencia Holding Company LLC*, 2012 Cal. LEXIS 2629 (Cal. March 21, 2012) (granting petition for review).

42. *Trompeter*, 914 F. Supp. 2d at 1073.

43. *Id*.

44. *Id*. at 1073-76.

45. *Id*.

46. *Id*. at 1076.

47. *Id*. at 1077 (holding, additionally, that the court's unconscionability "finding does not undermine the fundamental attributes of arbitration as an alternative form of dispute resolution that is neutral, speedy, economical and informal. The Court's review of the arbitration agreement applies the generally applicable contract principle of unconscionability and, thus, does not offend the FAA's policy objective favoring arbitration").

48. *Lima*, 886 F. Supp. 2d 1170.

49. *See generally id*.

50. *Id*. at 1183.

51. *Id*. at 1182.

52. *Id*. at 1183.

53. *Id*. (emphasis in original).

54. *Id*. at 1184-85.

55. *Id*. at 1185 (further noting that a "company requiring arbitration under a confidentiality agreement place[s] itself in a far superior legal posture by ensuring that none of its potential opponents have access to precedent while, at the same time, [it] accumulates a wealth of knowledge on how to negotiate the terms of its own unilaterally crafted contract") (internal quotations omitted).

56. *Id*. at 1186.

57. *Id*. at 1186 n.12.

58. *Sonic II*, 57 Cal. 4th at 1145 (quotations omitted).

Counting Darts: U.S. Supreme Court to Address Circuit Split on Evidence Required in Notice of Removal Under CAFA

By Kevin Meade

The U.S. Supreme Court will soon address whether a defendant seeking removal to federal court is required to include evidence supporting the amount in controversy requirement in the notice of removal or whether it is sufficient to allege a "short and plain statement of the grounds for removal," as required under 28 U.S.C. § 1446(a).

In *Dart Cherokee Basin Operating Co., LLC v. Owens*, the defendants were sued in state court on claims relating to royalty payments on gas wells. Alleging jurisdiction under the Class Action Fairness Act of 2005 (CAFA), the defendants removed the case to federal court. The district court, however, remanded the case, concluding that the defendants had failed to include evidence to support the amount in controversy allegations with their removal notice.[1] Defendants sought review from the Tenth Circuit, but a divided Tenth Circuit denied the defendants' petition for an appeal of the remand, thus effectively imposing a requirement that defendants submit proof of jurisdiction along with the removal notice.[2] Defendants then sought rehearing *en* banc, but the Tenth Circuit denied that petition in a split 4-to-4 vote. The dissenting opinion, however, warned that the district court's decision "imposes an evidentiary burden on the notice of removal that is foreign to federal-court practice and … has never been imposed by a federal appellate court." The dissent noted that "nothing in the removal statutes of Supreme Court decisions, or any holdings of this court, require the submission of such evidence before the jurisdictional allegations are challenged."[3]

The Supreme Court granted the defendants' petition for a writ of certiorari.

The removal statute, 28 U.S.C. § 1446(a), requires a defendant seeking removal to file a notice "containing a short and plain statement of the grounds for removal" and to attach the state court filings served on the defendant. It contains no express requirement

that a defendant submit evidence supporting its jurisdictional allegations. In enacting CAFA,[4] Congress expanded federal subject matter jurisdiction over class action lawsuits, including by expanding the applicability of diversity jurisdiction over such actions.

Dart is relevant for several reasons. First, the Tenth Circuit created a circuit split on this issue, and the *Dart* defendants argue that other circuits faced with this issue have not required evidence of jurisdiction to be included with the notice of renewal, which is consistent with the *Dart* dissent.[5]

The defendants also devote their attention to the "plain language" of the removal statute and argue that it requires only allegations, not evidence, at the notice stage. To further support this position, defendants note that § 1446(c) allows defendants to "assert" the amount of controversy when it is not clear on the face of the complaint — but it does not say "prove" or require evidence. Only in the case of a dispute must the court weigh the evidence and make findings of fact based on a preponderance of the evidence.[6]

Another consideration is the potential waste of judicial and party resources. In general, a defendant must remove a civil action within 30 days of service of the initial pleading. A defendant may argue that requiring a removing defendant to include evidence supporting the amount in controversy requirement in the notice of removal would require an upfront investment to gather facts and evidence. Being forced to gather such facts and evidence in a very short amount of time would inevitably drive up expenses. The defendant could also argue that requiring evidence to be submitted before the jurisdictional assertions are challenged also potentially undermines judicial economy — a concern that may be more troubling to the Court than the parties' litigation costs.

Moreover, a defendant could argue that the language of § 1446(a) mirrors that of Federal Rules of Civil Procedure (FRCP) 8(a). Both require a "short and plain statement of the grounds for jurisdiction." Typically, parties do not plead detailed facts and submit evidence to demonstrate that the amount in controversy exceeds the jurisdictional limit. Rather, such evidence is generally submitted only after those jurisdictional allegations have been challenged as insufficient. To the extent § 1446(a) requires evidence at the pleading stage, a defendant could argue that this could impact how courts address jurisdictional allegations under FRCP 8(a).

Finally, in deciding this issue, the Supreme Court may try to stake out a middle ground. Upholding the *Dart* decision would require defendants to submit substantial evidence with the notice of removal. The *Dart* defendants advocate a complete reversal, arguing that the "short and plain statement of the grounds for jurisdiction" requires no evidence at all to be submitted with the notice of removal. The Court, however, could decide that the answer is somewhere in between — that is, the Court may choose to expand the meaning of "short and plain statement" to include fairly substantive allegations as to the basis for alleging the amount in controversy. Such a decision might soften the blow (somewhat) for defendants if they are not required to submit actual evidence at the time of removal. But it would still pose interpretive headaches for courts, which would then need to determine where the line between "short and plain" and "too short and too plain" should be.

In sum, there are a number of considerations for the Court to weigh in determining whether the Tenth Circuit got it right in *Dart*.

1. *Owens v. Dart Cherokee Basin Operating Co., LLC*, 2013 WL 2237740 *1 (D. Kan. May 21, 2013).
2. *Dart Cherokee Basin Operating Co., LLC v. Owens*, 730 F.3d 1234 (10th Cir. 2013).
3. *Dart*, 730 F.3d at 1234 (Hartz, J., dissenting).
4. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(b)(2), 119 Stat. 4.
5. *See Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 205 (2nd Cir. 2001); *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 194 (4th Cir. 2008); *Rachel v. Georgia*, 342 F. 2d 336, 340 (5th Cir. 1965); *Spivey v. Vertrue, Inc.*, 528 F.3d 982, 986 (7th Cir. 2008); *Hartis v. Chi. Title Ins. Co.*, 694 F.3d 935, 944-45 (8th Cir. 2012); *Janis v. Health Net, Inc.*, 472 F.App'x 533, 534-35 (9th Cir. 2012); *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 774 n.29 (11th Cir. 2010).
6. *See also* H.R. Rep. No. 112-10, at 16.

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