Confronting the ever-mounting challenges to class actions

Current cases may clarify class-action certifications

By F. Paul Bland

The last few years have been exceptionally turbulent for class action practitioners. There have been a number of major changes in the law, a few of which create new opportunities for advocates for consumers and employees, and some have which have been unmitigated losses. The central fact has been rapid change, however, and that promises to continue.

The U.S. Supreme Court has not only decided two enormously important cases that dramatically shook up class- action practice in the last few years, but currently has pending *four* cases involving crucial issues of class-action procedure, and two huge cases involving challenges to the use of arbitration clauses to wipe away class actions.

Things are even busier for California class-action attorneys. The California Supreme Court is currently handling at least three cases raising issues related to the enforceability of arbitration clauses, and the Ninth Circuit issued a pair of disastrous arbitration decisions in 2012, one of which has been taken up en banc.

There are two main complexes of issues in all this pending litigation. First, what must plaintiffs prove to get a class certified? In the wake of the Supreme Court's decision in *Dukes v. Wal-Mart* (2011) 131 S. Ct. 2541, there has been a great deal of pressure in the direction of demanding more and more evidence and scrutiny in class-certification proceedings. Second, what limits will remain on the use of arbitration clauses to wipe away class actions? This article will offer a few reflections on the developments in both of these areas.

Class-certification issues

A generation ago, class-certification motions were decided on the allegations of the complaint, much like motions to dismiss. Courts routinely said that these motions were not to consider issues going to the merits of a case, because those issues should be held to a later date. Times have really changed, and the trend is increasingly toward class-certification proceedings which resemble full-blown merits trials.

In *Dukes,* for example, the Supreme Court heaped scorn on a detailed evidentiary showing that the employee plaintiffs had made in support of certifying the class, and stressed the view that greater levels of proof were necessary to establish that issues could be resolved on a class-wide basis. The decision had immediate implications in the Ninth Circuit, with that court sending a case back to a district judge to conduct a more rigorous analysis than it had previously done in certifying a class. (*Ellis v. Costco Wholesale Corp.* (9th Cir. 2011) 657 F.3d 970.)

The dust had not settled on *Dukes* when the U.S. Supreme Court decided to revisit the complex of issues swirling around the decision of when a class can be certified. In *Comcast Corp. v. Behrend,* No. 11-864, for example, last summer the Court took the question of "Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis." *Comcast* involved a class-certification hearing that had lasted for four days, with the district court hearing numerous witnesses, reviewing a large number of documents, and writing an opinion of more than 80 pages. Despite all that work, *Comcast* argued that the district court should have done much more.

On the same day that the Court heard the argument in *Comcast,* it also heard argument in *Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds,* No. 11-1085, where the Questions Presented were (1) Whether, in a misrepresentation case under Securities and Exchange Commission Rule 106-5, the district court must require proof of materiality before certifying a plaintiff class based on the fraud-on the-market theory; and (2) whether, in such a case, the district court must allow the defendant to present evidence rebutting the applicability of the fraud-on-the-market theory before certifying a plaintiff class based on that theory."[1] As with *Comcast,* the Supreme Court is being asked to make the class certification still more rigorous (perhaps onerous would be a better world) and to demand still more evidence from plaintiffs on still more topics.

While the outcome of these cases is not yet known (the oral arguments in both *Comcast* and *Amgen* were fractured and very hard to read, for example), some observations can be made. It is likely that plaintiffs will be required to prove much more in many future class-certification proceedings than was expected in the past, to establish with quality evidence the feasibility of proving each element of Rule 23.

There is one significant opportunity for plaintiffs in all of this, however. It should become easier and easier for plaintiffs to get access to full discovery prior to class certification. It will be hard for defendants to insist on class-

certification hearings that are like trials, while refusing to respond to discovery.

The arbitration wars

It is hard to imagine that any lawyer who handles class actions can fail to have noticed that most consumer and employment contracts contain arbitration clauses that bar individuals from joining or bringing class actions. For half a dozen years, California law blocked the enforcement of these agreements in many circumstances.

All that changed in April of 2011, when the U.S. Supreme Court held that, in general, arbitration clauses that bar class-wide relief are enforceable. (*See AT&T Mobility LLC v. Concepcion* (2011) 131 S. Ct. 1740, 1748, 1753.) Since *Concepcion* was decided, a large number of class actions have been dismissed from courts and compelled to individual arbitration (meaning that the named representative plaintiffs can proceed for themselves, but no one else, in arbitration, and that the class-action portion of the case is now dismissed). One study released in April of 2012 identified 73 putative class actions where this had occurred. (Public Citizen, *Justice Denied – One Year Later: The Harms to Consumers from the Supreme Court's Concepcion Decision Are Plainly Evident* at 4 (April 2012).) That study focused only upon published decisions, and much has happened since then, so that at this point it is likely that several hundred class actions have been eliminated.

There remains an argument that there may be an exception to *Concepcion* in cases where there is an evidentiary showing that an arbitration clause would prevent parties from effectively vindicating their substantive statutory rights. The leading case adopting this approach is *In re Am. Express Merchs.' Litig.* (2d Cir. 2012) 667 F.3d 204, where the U.S. Supreme Court has already granted *certiorari*. Once again, the U.S. Supreme Court will have the last word. At the moment, however, the *In re Am Express Merchants* argument has been rejected by the Ninth Circuit for cases involving claims under state statutes (although the Court has not squarely faced the issue for claims involving federal statutes), and is pending before the California Supreme Court.

First, though, it is worth taking the time to understand the logic of *In re American Express*. The case relied on a line of U.S. Supreme Court cases holding that statutory claims are arbitrable "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum"– and that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." (*Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth* (1985) 473 U.S. 614, 628, 637.) The Second Circuit noted that *Concepcion* did not overrule the *Mitsubishi Motors* line of cases.

Accordingly, the question for courts is how to harmonize *Concepcion*'s rule of enforceability with the *Mitsubishi Motors* exception. We believe that the Second Circuit rightly focused on evidence and that the best answer to this quandary lies in whether the party claiming that enforcement of the arbitration clause would bar the vindication of substantive statutory rights is able to *prove* that fact. In *Green Tree Fin. Corp.-Ala. v. Randolph* (2000) 531 U.S. 79 the Supreme Court declined to rule on the claim that the existence of large arbitration costs precluded the plaintiff from effectively vindicating her rights because the record included no evidence beyond the actual arbitration agreement itself. (*See* 531 U.S. at 91-92.) As the Court explained, the record did not contain any particularized evidence to afford a sufficient basis to determine the actual costs associated with the arbitration of the plaintiff's claims. (*Id.* at 91 n.6.) Thus, the Court enforced the clause, concluding that "we lack information about how claimants fare under Green Tree's arbitration clause." (*Id.* at 91.)

Unfortunately, as alluded to above, the Ninth Circuit has joined the ranks of the courts that have read *Concepcion* in extraordinarily broad ways that reject the effective vindication argument, however, at least for plaintiffs asserting state law claims. Based on an extensive record in a case, for example, a federal district made a factual finding that an arbitration clause would bar all but an "infinitesimal" number of consumers from vindicating their rights under consumer protection laws. (*Coneff v. AT&T Corp.* (W.D. Wash. 2009) 620 F. Supp. 2d 1248, 1258.) Notwithstanding this finding, on appeal the Ninth Circuit overturned the district court and compelled arbitration, finding that the FAA (as interpreted by the Supreme Court in *Concepcion* required that result. ((9th Cir. 2012) 673 F. 3d 1155.)

While there are a host of cases involving challenges to arbitration clauses pending in the California Supreme Court, one is of particular great significance, and may result in the Court splitting from Ninth Circuit's cramped result.[2] The most important case pending in the California Supreme Court dealing with a challenge to arbitration clauses is likely to be *Iskanian v. CLS Transp. Los Angeles, LLC*, No. S204032. *Iskanian* raises at least three significant issues. The first is whether the California Supreme Court's decision in *Gentry v. Superior Court* (2007) 42 Cal.4th 443, survives *Concepcion*.

The argument in favor of the survival of the *Gentry* rule tracks that of the *In re American Express Merchants* case described above. *Concepcion* struck down as preempted by the Federal Arbitration Act ("FAA") the *Discover Bank* rule, which the U.S. Supreme Court found would mechanically invalidate a class-action ban in an arbitration clause – and force the parties into non-consensual class arbitration – whenever three common factors are present: (a) a consumer contract of adhesion; (b) predictably small damages; and (c) an allegation that the defendant corporation engaged in a scheme to cheat consumers. (*Concepcion*, 131 S. Ct. at 1746.) In keeping with the approach of the Second Circuit in *In re Am. Express*

Merchants, here is a good argument that *Concepcion*'s preemption analysis does not apply to doctrines such as the *Gentry* test where the trial court is tasked with determining whether the admissible evidence demonstrates that parties would be unable to vindicate their rights on an individual basis in their particular case, as opposed to a generic category of cases. In this critical way, the *Gentry* test is consistent with the FAA – which, as noted above, the U.S. Supreme Court has repeatedly emphasized must permit parties to vindicate their statutory rights.

Concepcion makes clear that the Court was concerned only with broad *categorical* rules of state law. "When state law prohibits outright the arbitration of a *particular type of claim*, the analysis is straightforward: The conflicting rule is displaced by the FAA." (*Concepcion*, 131 S. Ct. at 1747 (emphasis added, citation omitted).) The Court noted, likewise, that a state law that accomplishes the same goal (prohibiting arbitration *of a type of claim*) indirectly is also preempted. (*Ibid*.) However, a holding that a term in an arbitration clause is unenforceable under state law when the particular facts and circumstances of the case prove that the term prevents one or both of the parties from vindicating their statutory rights is entirely consistent with the FAA. (*Cf. Randolph*, 531 U.S. at 92 ("[A] party seek[ing] to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive … bears the burden of showing the likelihood of incurring such costs."); *14 Penn Plaza LLC v. Pyett* (2009) 129 S. Ct. 1456, 1462-63 (declining to rule on the issue whether a collective bargaining agreement's rule on arbitration would "prevent respondents from 'effectively vindicating' their 'statutory rights in the arbitral forum,'" because the issue had not been fully briefed below, and the Court would not "invalidate arbitration agreements on the basis of speculation").)

The plaintiffs' argument in *Iskanian* is that the *Gentry* rule is entirely different from the *Discover Bank* rule as interpreted by the U.S. Supreme Court in *Concepcion*. The Court deemed the key element of the standard for refusing to enforce a class-action ban under *Discover Bank* – that damages be "predictably small" – to be "toothless and malleable." (131 S. Ct. at 1750.) In contrast, the enforceability of a class action ban under *Gentry* depends upon the individualized facts and circumstances of the case, and whether the plaintiff can demonstrate that those particular circumstances render class treatment necessary to vindicate the plaintiff's statutory rights. One Court of Appeal strongly embraced the theory that *Concepcion* does not preempt the evidence based and non-categorical *Gentry* rule. (*See Franco v. Arakelian Enterprises, Inc.*, 2012 WL 5898063 (Nov. 26, 2012).)

Iskanian also raises the issue of whether an arbitration clause that bans class actions violates the National Labor Relations Act ("NLRA"), as the NLRB held in *D.R. Horton, Inc.* (2012) 357 NLRB No. 184, appeal pending (5th Cir. No. 12-60031). There is a very substantial argument that class-action bans violate Section 7 of the NLRA, which provides that "[e]mployees shall have the right … to engage in … concerted activities for the purpose of … mutual aid or protection …." (29 U.S.C. § 157.) Courts have divided over whether they agree or not with the NLRB's holding in *D.R. Horton* (although most courts so far have disagreed with the NLRB), but the issue is now clearly teed up before the California Supreme Court in *Iskanian*.

The third particularly noteworthy issue before the California Supreme Court in *Iskanian* involves whether claims under the Private Attorney General Act ("PAGA") may be arbitrated. There are two principal arguments as to why PAGA claims may not be arbitrated. First, the majority of the funds from PAGA recoveries go to the State of California itself. In light of the fact that the State of California is not a party to private employment agreements, there is a strong argument that those agreements may not force claims for the State's interests into arbitration. Second, because PAGA claims often seek broad injunctive relief that go far beyond the individual employee representative, and because arbitrators do not have the ability to provide this sort of relief, compelling arbitration of PAGA claims arguably would prevent the effective vindication of these statutory rights, thus violating the *Mitsubishi Motors* doctrine described above. While a number of federal courts have rejected this sort of argument,[3] the issue is now raised before the California Supreme Court.

Conclusion

Consumer and employee advocates who want to pursue class actions on behalf of their clients face a great many challenges, and those challenges are likely to become a great deal more significant in the coming year. There will almost certainly still be some significant opportunities to do justice, however, for advocates who understand the contours of the law and work hard in identifying and developing strong cases.


Bland

F. Paul Bland is Of Counsel with Chavez and Gertler, *and also a Senior Attorney at* Public Justice. *He has argued and won more than 30 cases that led to reported decisions for consumers and employees, in five of the U.S. Courts of Appeals and the high courts of nine different states. He was the 2006 recipient of the National Consumer Law Center's Vern Countryman Award, which "honors the accomplishments of an exceptional consumer attorney who, through the practice of consumer law, has contributed significantly to the well being of vulnerable consumers."*

Endnotes

[1] The Court is also hearing this term a case about whether defendants can pick off the named plaintiff in a Fair Labor Standards Act case by proffering a Rule 68 Offer of Judgment, *Genesis Health Care Corp. v. Symczyk*, No. 11-1059, and whether an admission as to the amount in controversy can keep a case in state court despite the Class Action Fairness Act, *Standard Fire Ins. Co. v. Knowles*, No. 11-1450. The Court seems to have more energy for cases about whether to

impose more barriers to class actions than it has for any other topics.

[2] Briefly, it is also worth noting the other two pending cases. In *Goodridge v. KDF Automotive Group, Inc.*, No. D060269, the Court is hearing issues as to whether a particular arbitration clause is one-sided or not. Similar issues arise in connection with a very different arbitration clause in *Sanchez v. Valencia Holding Co., LLC*, No. S199119, as well as the issue of whether the Federal Arbitration Act preempts state law if the Court were to hold that the clause was unconscionably one-sided.

[3] A panel in the Ninth Circuit rejected an arguably analogous claim under California's consumer laws in *Kilgore v. Key Bank, Nat'l Ass'n*, 673 F.3d 947 (9th Cir. 2012), but that case has gone up for an *en banc* hearing. Nos. 09-16703, 10-5934, 2012 WL 4327662 (Sept. 21, 2012).