The Federal Arbitration Act (FAA)

"Congress enacted the FAA to replace judicial indisposition to arbitration with a ‘national policy favoring [it] and placing arbitration agreements on equal footing with all other contracts.’" Hall Street Assoc., L.L.C. v. Mattel, Inc., 552 U.S. 576, 581 (2008).
FAA Preempts Contrary State Law

- “States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.” *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2010)

Enforcement of Arbitration Agreements as Written

- The “primary purpose” of the FAA is “ensuring that private agreements to arbitrate are enforced according to their terms.” *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989).

Contract Defenses

- “[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2.”
- “Courts may not, however, invalidate arbitration agreements under state laws applicable only to arbitration provisions.”

The Cases

- *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011)
- *Carey v. 24 Hour Fitness, USA, Inc.*, 669 F.3d 202 (5th Cir. 2012)

Rent-A-Center West

**Issue:** Whether a district court or an arbitrator should decide claims that an arbitration agreement under the FAA is unconscionable, when the parties to the agreement have clearly and unmistakably assigned this “gateway” issue to the arbitrator for decision.

Rent-A-Center West

**Holding:** Under the FAA, where an agreement to arbitrate includes an agreement that the arbitrator will determine the enforceability of the agreement, if a party challenges the enforceability of the agreement as a whole, the challenge is for the arbitrator.
Effect of Rent-A-Center West

- Delegation clauses are presumptively valid unless it can be shown that other provisions of the agreement inhibit the arbitrator from addressing the challenge.
- So long as the terms do not prevent enforcement of the delegation clause, courts must enforce the delegation clause as written.
- If the Agreement contains a delegation clause, almost all challenges to enforceability will be for the arbitrator.

AT&T Mobility v. Concepcion

- Issue: “Whether the Federal Arbitration Act prohibits states from conditioning the enforcement of certain arbitration agreements on the availability of class-wide arbitration procedures.”

AT&T Mobility v. Concepcion

- Holding: California law limiting the enforcement of class action waivers in arbitration agreements “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”
AT&T Mobility v. Concepcion
- Class arbitration waivers are enforceable.
- “Principal purpose” of the FAA is to “ensure that private arbitration agreements are enforced according to their terms.”
- Parties may agree to limit issues subject to arbitration.
- California’s Discover Bank rule improperly targets adhesion contracts and applies arbitrary rules.
- FAA preempts contrary state law.

After Concepcion
- Concepcion has been applied in the employment context:
  - E.g. Green v. Super Shuttle Inc., 2011 U.S. App. LEXIS 18483 (8th Cir. Sept. 6, 2011);
  - On October 31, 2011, the United States Supreme Court vacated Sonic Calabasas A, Inc. v. Moreno, 51 Cal. 4th 659 (2011), a case which invalidated an arbitration agreement in the employment context, requiring reconsideration in light of Concepcion.

NLRB General Counsel Memo GC-10-06
- Issued on June 16, 2010
- Applies to non-union employees
- Recognizes that the United States Supreme Court “determined that an employer can require an employee, as a condition of employment, to channel his or her individual non-NLRA employment claims into a private arbitral forum.”
- BUT...
In order for a class action waiver to be valid, it must contain specific language. Employee retains the right to exercise Section 7 rights; and Employees will not be retaliated against forconcertedly challenging class action waiver by filing class or collective actions. But, employer may enforce its class action waiver.

Not So Fast...
D.R. Horton, Inc., 357 NLRB No. 184 (Jan. 3, 2012)

National Labor Relations Board: employees have the right to engage in “concerted, protected activity.”
Class actions are such activity.
Arbitration agreement requiring an employee “as a mandatory condition of employment” to waive the right to bring a class action violates the NLRA.
GC 10-06 expressly repudiated.

According to the NLRB

Employment class actions, as distinguished from those involving consumers (as in the AT&T Mobility case), are limited in scope, and thus, “class-wide arbitration . . . is far less cumbersome and more akin to an individual arbitration proceeding.”
The ruling only applies to “employees” as defined by the National Labor Relations Act — supervisors, for example are not covered by the NLRA.
What’s Next?

- Decided by two members of a three-member board.
  - One member’s appointment may have been expired.
- An appeal is pending.
- Most – but not all – courts have rejected Horton:
  - LaVoice v. UBS Financial Services, Inc., Case No. 11 Civ. 2308 (S.D. N.Y., Jan. 13, 2012)
  - Oliveira v. Citicorp North America, Inc., Case No. 8:12-cv-251-T-26T6W (M.D. Fla, May 18, 2012)

Attacking Horton

- The NLRA must accommodate the FAA:
  - Southern S.S. Co. v. NLRB, 316 U.S. 31 (1942)
    - “[T]he Board has not been commissioned to effectuate the [NLRA’s] policies . . . so single-mindedly that it may wholly ignore other and equally important Congressional [objectives].”
    - “Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of [the Board] that it undertake this accommodation . . .”
    - “Where the Board’s chosen remedy trenches upon a federal statute or policy outside the Board’s competence to administer, the Board’s remedy may be required to yield.”

Attacking Horton Cont.

- Reading the NLRA to hold that the class action procedural device overrides the substantive right to enforce arbitration agreements conflicts with the Rules Enabling Act.
- CompuCredit requires that the NLRA expressly preclude enforcement of a FAA agreement, and the NLRA is silent on this point.
- Horton ignored the national and even state-wide class proceedings that involve multitudes of employees.
- Wal-Mart Stores, Inc. v. Dukes, involved a certified class of approximately 1.5 million employees.
The practical consequence of requiring class arbitration would force the abandonment of workplace arbitration and harm both employees and employers. Arbitration is a mutually beneficial means of dispute resolution. It is designed for bilateral dispute resolution. Concepcion makes clear that Congress intended that the FAA encourage, informal, inexpensive, efficient dispute resolution, and arbitration is ill-suited for class proceedings. D.R. Horton invalidates the very agreements Congress encourages in the FAA.

Attacking Horton Cont.

How is the Plaintiffs’ Bar Responding?

Horton as defense to motions to compel arbitration

Unfair labor practice charges at the NLRB

Compucredit v. Greenwood

Issue: “Whether the Credit Repair Organizations Act precludes enforcement of an arbitration agreement in a lawsuit alleging violations of that Act.”
Holding: Because the CROA is silent on whether claims may proceed to arbitration, the Federal Arbitration Act requires that the arbitration agreement be enforced as written.

General language in a statute giving a “right to sue” does not preclude arbitration. “If the mere formulation of the cause of action in this standard fashion were sufficient to establish the ‘contrary congressional command’ overriding the FAA, valid arbitration agreements covering federal causes of action would be rare indeed.”

“Had Congress meant to prohibit these very common provisions [arbitration] in the CROA, it would have done so in a manner less obtuse than what respondents suggest.”

Silent statute # Non-enforcement of arbitration agreement

Does NLRA specifically address arbitration under FAA agreements?

Issue: Whether the lower court erred in denying 24 Hour Fitness’ motion to compel arbitration because the arbitration provision relied upon by 24 Hour Fitness was illusory because 24 Hour Fitness "retain[ed] the unilateral right to modify or terminate the arbitration provision" at any time.
Carey

- **Holding:** The arbitration agreement contained in the 24 Hour Fitness employee handbook was illusory. Therefore, the employee was not bound by the arbitration provision.

Effect of Carey

- Arbitration agreements in handbooks can be dangerous if the handbook permits unilateral revisions/changes.
- Modifications should only apply prospectively—and not to existing claims.
- If arbitration provision allows for modification, state a quantifiable notice period before change becomes effective.

Reed v. Florida Metropolitan Univ., Inc.

- **Issue:**
  1. Whether the court or arbitrator decides if the parties agreed to class arbitration; and
  2. Whether the arbitrator exceeded his authority by allowing class proceedings when the agreement did not authorize class arbitration.
**Reed v. Florida Metropolitan Univ., Inc.**

**Holding:**

1. The district court correctly punted the class arbitration issue to the arbitrator because the parties agreed to the AAA Supplementary Rules for Class Arbitration, which expressly require the arbitrator to decide if the agreement allows for class proceedings.
2. The arbitrator exceeded his authority under the FAA by allowing class proceedings because an "implicit agreement" to arbitrate class proceedings is not good enough.

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**Elements of a Post-Concepcion Arbitration Agreement**

- FAA governs
- Coverage
  (wage/hour, discrimination)
- Carve outs
  - Administrative (EEOC/NLRB)
  - Claims (NLRA, Dodd Frank, Franken DoD)
- Selection of arbitrator (mutual agreement)
- Arbitrator qualifications (member of local bar, retired from local judiciary - see 9 U.S.C. 5)

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**Elements of a Post-Concepcion Arbitration Agreement**

- Venue (close to where employee last worked for company)
- Express class waiver
  - Court decides validity
  - Non-severability
  - NLRB section 7 disclaimer
- Remedies (individual only)
- Opt-out clause?
The Rollout

- Stand-alone agreement with wet signature (gold standard)
- Stand-alone policy – no signature/electronic signature or acknowledgment only
- Policy in handbook
- What to do with employees who refuse to sign...

Now Onto the Fun Stuff... Non-Competes

The Evolution

- Light (1994)
- Sheshunoff (2006)
- Mann Frankfort (2009)
- Marsh (2011)
Marsh: Where We Are Now

- "Gives Rise" standard
- Nexus (a/k/a reasonable relationship)
- No more “all or nothing” technical arguments?

Will Money Buy a Non-Compete?

- Marsh = stock options
- Majority opinion unclear
- What other forms of financial benefit are sufficient consideration in the name of protecting goodwill?

Reminder re Sale of Business

- Purchasing goodwill
- Covenants can be broader
Death of the “Gives Rise To” Reasoning?

How broad or narrow will the required nexus (reasonable relationship) between an item of consideration and a legitimate protectable interest turn out to be?

Time, Geography, Scope of Activity

Marsh: analysis should focus on whether the covenant is reasonable in terms of time, geographical area, and scope of activity.

Employee Nonsolicitation Clauses: Something Different or Not?

Marsh lumps together covenants re solicitation of customers and employees

Intentional? Inadvertent?
Drummond American, LLC v. Share Corp.

Texas law does not invalidate a restrictive covenant when the employer terminates an at-will employment relationship with an employee.

Around the Nation

- Employees accessing the company computer and criminal prosecution under the CFAA
- Social Media and the right to organize under the NLRA
- No-call agreements and anti-trust implications

Questions?

Littler

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