

Class-Action Bans

Inside *Concepcion*: Consumers' Attorney Discusses Future of Class Actions

Nationally recognized attorney Deepak Gupta, who has advocated for consumers before the U.S. Supreme Court in several high-profile cases, sees federal agencies as the way to protect consumers' right to sue as a class after the high court approved contract clauses banning class actions last year.



Mike Kelly

At a recent lecture, attorney Deepak Gupta discussed the buildup to the AT&T Mobility LLC v. Concepcion decision and its impact going forward.

In a March 22 lecture at the John Marshall Law School titled "*AT&T v. Concepcion: Fine Print, Federalism and the Fate of the Class Action*," Gupta said he had little hope that Congress would pass legislation to force companies to allow consumer class actions.

Gupta, who recently left his governmental role as senior counsel for the newly formed Consumer Financial Protection Bureau, provided a candid take on the buildup to the *Concepcion* decision and its impact going forward.

In *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (Apr. 27, 2011), the Supreme Court ruled that an AT&T consumer contract containing a mandatory pre-dispute arbitration clause with a class-action waiver requiring customers to resolve disputes individually was enforceable.

In a 5-4 decision, the high court said the Federal Arbitration Act, 9 U.S.C. § 1, preempts state laws banning class-action waivers. The state statutes interfere with the aim of the federal law to make arbitration proceedings more efficient, the majority opinion said.

Gupta, who worked at the Public Citizen Litigation Group in Washington for seven years into 2011, unsuccessfully argued the case before the high court on behalf of the consumers.

THE BUILDUP TO CONCEPCION

The class action “is an important tool for delivering justice in our society,” Gupta said in his brief history of class-action bans.

According to Gupta, beginning in the 1980s, more and more companies began to insert clauses in consumer and employment contracts that said all disputes would go through an arbitrator. The clauses forced people to arbitrate individually, banning the use of class-wide arbitration and litigation.

The clauses are aimed not at increasing the use of the arbitration mechanism, Gupta said, but at eliminating class actions.

A consumer often signs a contract assuming it is fair, Gupta said, but in reality, companies use the contract clauses to avoid liability. The contracts serve as “an exit clause from the civil justice system,” he said.

State courts across the country began striking down contract class-action bans, ruling that the bans were unconscionable because a class action is the most efficient way to resolve disputes involving small damage amounts, Gupta said.

State supreme courts and federal appeals courts regularly came down on the side of consumers, Gupta said. Many courts determined that the Federal Arbitration Act does not preempt state laws prohibiting the use of class-action bans in contracts because the state laws applied equally to class actions in both arbitration and litigation.

CONCEPCION IN THE FEDERAL COURTS

The issue of class-action waivers found its way to the U.S. Supreme Court after a California federal judge and the 9th U.S. Circuit Court of Appeals ruled that AT&T Wireless’ customer contracts, which contained a waiver clause, shielded the company from small damage claims.

Vincent and Liza Concepcions’ suit involved AT&T’s charge of \$30 in sales tax for a phone advertised as free. The U.S. District Court for the Southern District of California denied the company’s motion to compel arbitration, and the 9th Circuit affirmed, finding the clause barring class-wide arbitration or litigation unconscionable.

Small damage amounts in many consumer suits discourage customers from pursuing individual cases, insulating companies from liability, the courts said.

The 9th Circuit determined that the Federal Arbitration Act does not prevent courts from applying state contract laws banning class-action waivers.

ARGUING BEFORE THE SUPREME COURT

According to Gupta, the question before the high court in *Concepcion* was whether “companies (can) use the fine print of standard form contracts with consumers and employees to ban class actions.”

Knowing that he was facing a conservative-leaning Supreme Court that had found the federal arbitration law preemptive, Gupta said, he believed his best strategy was to stress a federalism argument before Justices Antonin Scalia and Clarence Thomas.

According to Gupta, *Concepcion* presented a difficult position for the conservative justices. They had to balance their commitment to the belief that the federal government should not overstep its bounds and a commitment to the business community's interests in tort reform.

Justice Thomas has in the past expressed his view that the court should follow a law's actual text when determining the question of preemption, instead of considering Congress' intention or purpose in constructing the law, Gupta said.

Gupta wanted to stress to the justices the need to respect a local court's interpretations of its state's laws.

Paraphrasing Justice Scalia, Gupta said that during oral arguments, the justice asked AT&T's attorneys, "Are we supposed to tell California what its own law is?" This question caused the press to predict that the consumers' interests would prevail.

Ultimately, however, the court majority ruled that the Federal Arbitration Act preempts a law banning class-action waivers. A state law ban "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," the majority said.

AFTER CONCEPCION

Gupta, who recently started a private practice specializing in appellate litigation, went on to discuss the future of class actions in light of the high court's decision.

Legislation that would ban the use of mandatory binding pre-dispute arbitration clauses in contracts is pending before Congress.

The Arbitration Fairness Act, S. 987 and H.R. 1873, has been proposed on multiple occasions, Gupta said. U.S. Sens. Al Franken, D-Minn., and Richard Blumenthal, D-Conn., and U.S. Rep. Hank Johnson, D-Ga., proposed the latest iteration immediately after the *Concepcion* decision.

Gupta sees little chance the bill will pass in the current political climate.

Since wide-ranging legislation is unlikely, given corporations' political influence, Gupta said, more targeted work by federal governmental agencies is needed to protect class actions.

According to Gupta, an individual federal regulatory agency has the ability to interpret its own statutes and can take up the issues of arbitration and class action within its own jurisdiction.

The current case to watch, Gupta said, is a January decision in which the National Labor Relations Board ruled that a class-action ban in employment contracts is an unfair labor practice. *D.R. Horton Inc. and Cuda*, No. 12-CA-25764, 357 NLRB No. 184, 2012 WL 36274 (N.L.R.B. Jan. 3, 2012).

The NLRB decision has been appealed to the 5th Circuit.

TARGETED LEGISLATION AND AGENCY ACTION

The Dodd-Frank Act, aimed at financial reform, created a new federal agency — the Consumer Financial Protection Bureau — to protect consumers' financial interests.

The law charges the agency with studying the use of binding arbitration clauses in consumer financial services contracts, such as banking and credit card contracts. Following the study, the agency could then write a rule to restrict or ban arbitration in those contexts, Gupta said.

Dodd-Frank gave similar authority to the Securities and Exchange Commission.

With little hope that broad legislation will be enacted, Gupta concluded the lecture by discussing more targeted legislation that has been used already to enact changes for specific demographics.

Dodd-Frank, for instance, includes an outright ban on arbitration clauses in mortgage contracts. A provision added to the Defense Department spending bill set regulations for service member credit contracts to protect troops who are often in debt and targeted by payday lenders.

Additionally, Gupta said, bills have passed to protect such specialized groups as poultry farmers in their contracts with agribusinesses and nursing home patients in contracts with the facilities.

Efforts like these chip away at restrictive arbitration clauses and class-action bans and may be the most effective tool going forward, Gupta said.

John Marshall Law School professor **Margaret Kwoka**, who organized the event, said the law students and faculty were excited “to hear the perspective of someone centrally involved in the case.”

The audience was particularly interested in the details Gupta provided as to how he developed his strategy for litigating the case, Kwoka said.

Gupta also serves as an adjunct professor at Georgetown Law Center and American University Law School and is co-founder of the Consumer Law & Policy blog <http://pubcit.typepad.com>.

Related Court Document:

Supreme Court *Concepcion* opinion: 2011 WL 1561956

Westlaw subscribers can scan this QR code to see the *Concepcion* opinion on Westlaw.



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