Arbitration Developments: Post-*Concepcion*—The Debate Continues

*By Alan S. Kaplinsky, Mark J. Levin, and Martin C. Bryce, Jr.**

Introduction

As discussed in the previous *Annual Survey*,[1] the last several years have seen divergent decisions reaching opposite legal conclusions on the enforceability of arbitration agreements with class action waivers. These decisions often turned on whether the Federal Arbitration Act ("FAA")[2] preempted the state laws in question. In April 2011, the Supreme Court issued its long-awaited decision in *AT&T Mobility LLC v. Concepcion*,[3] in which the Court held that the FAA preempts state laws that invalidate arbitration agreements containing class action waivers.[4] In the wake of that decision, courts have enforced arbitration agreements containing class action waivers, even in states previously hostile to arbitration, such as California.[5] Nevertheless, *Concepcion* has not ended all disputes regarding the enforceability of arbitration agreements that contain class action waivers.

In addition, the Supreme Court may not have the last word on the subject because Congress empowered the Bureau of Consumer Financial Protection

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1. *See* Alan S. Kaplinsky, Mark J. Levin & Martin C. Bryce, Jr., *Arbitration Developments:* Concepcion*—The Supreme Court Decisively Steps In*, 67 Bus. Law. 629 (2012).

2. Pub. L. No. 80-282, 61 Stat. 669 (1947) (codified as amended at 9 U.S.C.A. §§ 1–16 (West, Westlaw through Pub. L. No. 112-173)).

3. 131 S. Ct. 1740 (2011); *see* Alan S. Kaplinsky, Mark J. Levin & Martin C. Bryce, Jr., *Arbitration Developments: Has the Supreme Court Finally Stepped In?*, 66 Bus. Law. 529, 535–36 (2011) (in the 2011 *Annual Survey*) [hereinafter *Arbitration Developments 2011*].

4. *Concepcion*, 131 S. Ct. at 1756.

5. *See, e.g.*, Gordon v. Branch Banking & Trust, 453 F. App'x 949 (11th Cir. 2012); Aneke v. Am. Express Travel Related Servs., Inc., 841 F. Supp. 2d 368 (D.D.C. 2012); Alfeche v. Cash Am. Int'l, Inc., No. CV-09-0953, 2011 WL 3563504 (E.D. Pa. Aug. 12, 2011); Zarandi v. Alliance Data Sys. Corp., No. CV-10-8309-DSF (JCGx), 2011 WL 1827228 (C.D. Cal. May 9, 2011); Lewis v. 24 Hour Fitness USA, Inc., No. B227869, 2011 WL 5223153 (Cal. Ct. App. Nov. 3, 2011). *But see* Sanchez v. Valencia Holding Co., 135 Cal. Rptr. 3d 19 (Cal. Ct. App. 2011) (distinguishing *Concepcion*), *petition for review granted*, 272 P.3d 976 (Cal. 2012). Messrs. Kaplinsky and Bryce represented the defendants in *Zarandi* while Messrs. Kaplinsky and Levin represented the defendants in *Alfeche*.

("CFPB") to regulate arbitration agreements in consumer financial services contracts.[6] The CFPB has commenced a process that could result in regulations that would govern the arbitration of consumer disputes.

The Supreme Court Continues to Apply *Concepcion*

Since its decision in *Concepcion*, the Supreme Court has issued three additional decisions broadly reaffirming its commitment to arbitration. In *Marmet Health Care Center, Inc. v. Brown*,[7] the Court vacated a decision of the West Virginia Supreme Court of Appeals that held unenforceable all pre-injury arbitration agreements applying to claims alleging personal injury or wrongful death against nursing homes.[8] The court first noted that the FAA "includes no exception for personal-injury or wrongful-death claims [and] requires courts to enforce the bargain of the parties to arbitrate."[9] Quoting *Concepcion*, it reiterated its prior holding that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."[10] Accordingly, the Court concluded that West Virginia public policy had to give way in the face of the "emphatic federal policy in favor of arbitral dispute resolution."[11]

In *KPMG LLP v. Cocchi*,[12] the Supreme Court confronted another state court's refusal to apply the FAA and to follow Supreme Court precedent that requires the arbitration of arbitrable claims even where a complaint also contains nonarbitrable claims. In that case, the Florida Court of Appeal upheld a trial court's order denying arbitration because two of the four claims in the complaint were nonarbitrable.[13] The Supreme Court initially explained that the issue in the case "is the Court of Appeal's apparent refusal to compel arbitration on any of the four claims based solely on a finding that two of them . . . were nonarbitrable."[14] The Court reiterated its conclusion that the FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed."[15] A court must do so "even where the result would be the possibly inefficient maintenance of separate proceedings in

6. 12 U.S.C. § 5518 (Supp. IV 2010).

7. 132 S. Ct. 1201 (2012) (per curiam).

8. Brown v. Genesis Healthcare Corp., 724 S.E.2d 250 (W. Va. 2011), *vacated sub nom.* Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012) (per curiam).

9. *Brown*, 132 S. Ct. at 1203.

10. *Id.* (quoting AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1747 (2011)).

11. *Id.* (quoting KPMG LLP v. Cocchi, 132 S. Ct. 23, 25 (2011) (per curiam)). *Accord* Nitro-Lift Tech., LLC v. Howard, 133 S. Ct. 500 (2012) (reversing Oklahoma Supreme Court and emphasizing that the FAA (a) is "'the supreme Law of the Land,'" (b) "forecloses . . . 'judicial hostility towards arbitration'" and (c) "'declare[s] a national policy favoring arbitration.'" *Id.* at 503–04 (citations omitted). The Court further admonished that once it has interpreted the FAA, "'it is the duty of other courts to respect that understanding of the governing rule of law.'" *Id.* at 503 (citation omitted).

12. 132 S. Ct. 23 (2011) (per curiam).

13. *Id.* at 24.

14. *Id.* at 25.

15. *Id.* at 25–26 (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985)).

different forums."[16] Thus, the Supreme Court vacated and remanded, concluding that, by not addressing the arbitrable claims, the Florida court "failed to give effect to the plain meaning of the [FAA] and to the holding of *Dean Witter*."[17]

The Supreme Court addressed the arbitrability of claims brought under federal statutes in *CompuCredit Corp. v. Greenwood*.[18] The plaintiffs in *CompuCredit* alleged that the defendant violated the Credit Repair Organizations Act ("CROA"),[19] which regulates the practices of credit repair organizations, by misrepresenting that a subprime credit card could be used to rebuild poor credit and by improperly assessing fees upon opening accounts.[20] The defendant moved to compel arbitration pursuant to an arbitration agreement contained in the parties' contract.[21] The district court and the United States Court of Appeals for the Ninth Circuit refused to compel arbitration.[22] The Ninth Circuit relied upon the facts that CROA gave consumers the right to sue that "clearly involves the right to bring an action in a court of law" and CROA contains a no waiver provision prohibiting the waiver of any right under the statute.[23]

The Supreme Court reversed, holding that CROA could not be read to prohibit enforcement of arbitration agreements because the statute contains no explicit prohibition.[24] Consistent with several recent decisions, including *Concepcion*, the Court stressed that the FAA establishes "a liberal federal policy favoring arbitration agreements,"[25] and that this policy applies "even when the claims at issue are federal statutory claims."[26] The Court rejected the argument that CROA's no waiver provision[27] precluded enforcement of the arbitration agreement because that provision only required that "*the guarantee of the legal power to impose liability* [be] preserved" as the Court had "repeatedly recognized that contractually required arbitration of claims satisfies the statutory prescription of civil liability in court."[28] Thus, the Supreme Court set forth a simple bright-line test to be used when a court is faced with determining the arbitrability of a federal claim: if the federal statute does not expressly prohibit arbitration, the FAA controls and claims brought under that statute are arbitrable.[29]

16. *Id.* at 26 (quoting *Dean Witter*, 470 U.S. at 217).
17. *Id.*
18. 132 S. Ct. 665 (2012).
19. Pub. L. No. 104-208, § 2451, 110 Stat. 3009, 3009-454 (1996) (codified at 15 U.S.C. §§ 1679–1679j (2006)).
20. *Greenwood*, 132 S. Ct. at 668.
21. *Id.*
22. *Id.*
23. Greenwood v. CompuCredit Corp., 615 F.3d 1204, 1208, 1214 (9th Cir. 2010), *rev'd*, 132 S. Ct. 665 (2012).
24. *Greenwood*, 132 S. Ct. at 670–73.
25. *Id.* at 669 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).
26. *Id.*
27. 15 U.S.C. § 1679f(a) (2006).
28. *Greenwood*, 132 S. Ct. at 671 (citations omitted).
29. *See id.* at 672–73.

Can Arbitration Be Denied Premised Upon an Inability to Vindicate Statutory Rights?

Whether a plaintiff's alleged inability to vindicate rights in arbitration can serve as a basis to invalidate an arbitration agreement, an issue that first arose before *Concepcion*, continues to occupy the courts. This issue was reached by the United States Court of Appeals for the Second Circuit in *In re American Express Merchants' Litigation* on three separate occasions.[30] In *Amex I*, the Second Circuit invalidated arbitration provisions in contracts between American Express and merchants that accepted its credit cards and sued under antitrust laws, finding that the plaintiffs would be unable to vindicate their statutory rights if they were compelled to arbitrate individually because it would be prohibitively expensive to arbitrate individual claims.[31] The court noted that the individual merchants could not share expert costs because cost sharing would be prohibited under the confidentiality provision in the arbitration agreement.[32]

In *Amex III*, the Second Circuit concluded that neither *Concepcion* nor *Stolt-Nielsen S.A. v AnimalFeeds International Corp*.[33] addressed whether an arbitration agreement containing a class action waiver is enforceable if plaintiffs can demonstrate that "the practical effect of enforcement would be to preclude their ability to vindicate their federal statutory rights."[34] While it conceded that *Concepcion* "plainly offer[ed] a path for analyzing whether a state contract law is preempted by the FAA[, the court stated that its] holding rest[ed] squarely on a vindication of statutory rights analysis, which is part of the federal substantive law of arbitrability."[35] The Second Circuit relied almost entirely upon dicta from *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[36] in which the Court recognized that arbitration is an appropriate forum for vindicating statutory rights "so long as the prospective litigant may *effectively* vindicate its statutory cause of action in the arbitral forum"[37] and *Green Tree Financial Corp.-Alabama v. Randolph*,[38] in which the

30. *In re* Am. Express Merchants' Litig., 554 F.3d 300 (2d Cir. 2009) ("*Amex I*"), *vacated sub nom.* Am. Express Co. v. Italian Colors Rest., 130 S. Ct. 2401 (2010); *In re* Am. Express Merchants' Litig., 634 F.3d 187 (2d Cir. 2011) ("*Amex II*"); *In re* Am. Express Merchants' Litig., 667 F.3d 204 (2d Cir.) ("*Amex III*"), *cert. granted sub nom.* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 594 (2012). *Amex I* was vacated by the Supreme Court after its decision in *Stolt-Nielsen S.A. v. Animal Feeds International Corp.*, 130 S. Ct. 1758 (2010). On remand, the court in *Amex II* adhered to *Amex I* because "the cost of plaintiffs[] individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws." *Amex II*, 634 F.3d at 197–98. Following *Concepcion*, the court revisited the issue in *Amex III*, but it reached the same conclusion. *Amex III*, 667 F.3d at 206 (instructing the district court to deny defendant's motion to compel arbitration because "*Concepcion* does not alter [the court's earlier] analysis").

31. *See Amex I*, 554 F.3d at 317 (noting plaintiffs' expert's "conclusion that 'in a non-class action involving an individual plaintiff . . . even a relatively small economic antitrust study will cost at least several hundred thousand dollars' was essentially uncontested").

32. *Id.* at 318. The Second Circuit cited no authority and failed to explain how the confidentiality clause would prevent the merchants from sharing expert costs.

33. 130 S. Ct. 1758 (2010).

34. *Amex III*, 667 F.3d at 212.

35. *Id.* at 213 (quotations and citations omitted).

36. 473 U.S. 614 (1985).

37. *Amex III*, 667 F.3d at 214 (quoting *Mitsubishi Motors*, 473 U.S. at 637).

38. 531 U.S. 79 (2000).

Court stated in dicta that "the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum."[39] The Second Circuit concluded that, because "neither *Stolt-Nielsen* nor *Concepcion* overrule[d] *Mitsubishi*, and neither . . . mention[ed] . . . [*Randolph*, *Randolph* was] 'controlling . . . to the extent that it holds that when a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.' "[40]

The decision of the United States Court of Appeals for the Eleventh Circuit in *Cruz v. Cingular Wireless, LLC*[41] also suggested that a class action waiver in an arbitration agreement is unenforceable because it may prevent a plaintiff from being able to vindicate statutory rights. In *Cruz*, the plaintiffs brought a putative class action under Florida law contending that AT&T charged them $2.99 for a roadside assistance plan they never ordered.[42] The plaintiffs' service agreement with AT&T contained the same arbitration agreement as the one at issue in *Concepcion*.[43] The plaintiffs argued that *Concepcion* was distinguishable because "*Concepcion* only preempts inflexible, categorical state laws that mechanically invalidate class waiver provisions in a generic category of cases, without requiring any evidentiary proof regarding whether parties could vindicate their statutory rights in arbitration."[44] The Eleventh Circuit concluded that "such an argument is foreclosed . . . because the *Concepcion* Court examined this very arbitration agreement and concluded that it did not produce such a result."[45] However, the court did "not reach the question of whether *Concepcion* leaves open the possibility that[,] in some cases, an arbitration agreement may be invalidated on public policy grounds where it effectively prevents the claimant from vindicating her statutory cause of action."[46]

The Second Circuit's ruling in *Amex III* and the Eleventh Circuit's suggestion in *Cruz* appear to contravene the Supreme Court's ruling in *Concepcion*. In *Concepcion*, the Supreme Court reversed the Ninth Circuit's holding that the *Discover*

39. *Amex III*, 667 F.3d at 216 (quoting *Randolph*, 531 U.S. at 90).

40. *Id.* (quoting *Amex II*, 634 F.3d at 197) (citations omitted). The U.S. Supreme Court granted American Express's petition for a writ of certiorari. *In re* Am. Express Merchants' Litig., 667 F.3d 204 (2d Cir.), *cert. granted sub nom.* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 594 (2012); Petition for Writ of Certiorari, Am. Express Merchants' Litig., 667 F.3d 204 (2d Cir.), *cert. granted sub nom.* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 594 (2012), 2012 WL 3091064.

41. 648 F.3d 1205 (11th Cir. 2011).

42. *Id.* at 1207–08.

43. *Id.* at 1210–11 & n.11.

44. *Id.* at 1213.

45. *Id.* at 1215 (emphasis removed). The Eleventh Circuit also recognized that whether the same argument could be made with respect to rights under a state statute remained an open question. *Id.* This issue was presented in *Brewer v. Missouri Title Loans, Inc.*, 364 S.W.3d 486 (Mo.) (en banc), *cert. denied*, 133 S. Ct. 191 (2012), where the Missouri Supreme Court, after being ordered by the U.S. Supreme Court to reconsider its original decision invalidating an arbitration agreement because it contained a class action waiver, again denied arbitration because the plaintiff presented evidence that she would not be able to vindicate her state statutory rights in an individual arbitration. *Id.* at 494. Messrs. Kaplinsky and Levin represented Missouri Title Loans, Inc. in *Brewer*.

46. *Cruz*, 648 F.3d at 1215.

Bank rule applied by the California courts to invalidate arbitration agreements with class action waivers[47] was inconsistent with, and therefore preempted by, the FAA.[48] The Supreme Court's analysis rested on the language of the "savings clause" of the FAA,[49] which provides that a state law contract defense to arbitration must apply to "any contract," not just to an arbitration contract. The Court concluded that, "[a]lthough § 2's savings 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."[50] Therefore, the Court held, the FAA preempts state laws, such as the *Discover Bank* rule, that invalidate class action waivers in arbitration agreements because "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[51]

Arguments that a plaintiff cannot vindicate rights under federal or state law in arbitration should fare no better because the premise of the validation of statutory rights argument is the same premise that was rejected by the Supreme Court in *Concepcion*. Both premises assert that a case must be allowed to proceed on a class action basis for plaintiffs to assert their rights effectively. Such arguments and premises run counter to the position articulated by the *Concepcion* majority: "The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."[52]

Several courts have rejected vindication of statutory rights arguments. In *Coneff v. AT&T Corp.*,[53] for example, the plaintiffs raised a vindication of statutory rights argument, relying primarily upon *Randolph*.[54] The United States Court of Appeals for the Ninth Circuit concluded that *Concepcion* was not inconsistent with *Randolph* and explained that, "[a]lthough Plaintiffs argue that the claims at issue in this case cannot be vindicated effectively because they are worth much less than the cost of litigating them, the *Concepcion* majority rejected that premise."[55] With respect to the argument made by the dissenters in *Concepcion*, the Ninth Circuit explained that their concern "is not so much that customers have no effective *means* to vindicate their rights, but rather that customers have insufficient *incentive* to do so. That concern is, of course, the primary policy ratio-

47. The rule stated in *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005), is that a class action waiver is unconscionable if: (a) the agreement is a consumer contract of adhesion drafted by a party with superior bargaining power, (b) the agreement occurs in a setting in which disputes between the contracting parties predictably involve small damages, and (c) it is alleged that the party with the superior bargaining power has carried out a scheme deliberately to cheat large numbers of consumers out of individually small sums of money.

48. *Concepcion*, 131 S. Ct. at 1753.

49. 9 U.S.C. § 2 (2006).

50. *Concepcion*, 131 S. Ct. at 1748.

51. *Id.*

52. *Id.* at 1753 (citation omitted).

53. 673 F.3d 1155 (9th Cir. 2012).

54. *Id.* at 1158.

55. *Id.* at 1158–59.

nale of class actions . . . ."[56] But the court recognized that "such unrelated policy concerns, however worthwhile, cannot undermine the FAA."[57] Finally, the Ninth Circuit held that, "[e]ven if we could not square *Concepcion* with previous Supreme Court decisions, we would remain bound by *Concepcion*, which more directly and more recently addresses the issue on appeal in this case."[58] The vindication of statutory rights argument has likewise been rejected in other cases.[59]

Do Arbitration Agreements that Are Silent as to Class Action Waivers Still Present an Issue?

In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,[60] the Supreme Court held that the parties could not be compelled to arbitrate on a class basis against their will if the arbitration agreement is silent with respect to the availability of class arbitration.[61] In so ruling, the Court concluded that arbitration is a matter of consent and class action arbitration "changes the nature of arbitration" with respect to its efficiency and speed, among other things.[62] The Court instructed that there must be evidence that the parties "agreed to authorize" class arbitration before class arbitration could be imposed.[63] In reaching its decision, the Supreme Court stated that *Green Tree Financial Corp. v. Bazzle*,[64] where the Court concluded that the arbitrator rather than the court should have decided whether the agreement—which did not contain an express class action waiver—permitted class arbitration, was not precedential or binding on that or any other issue.[65]

The *Stolt-Nielsen* Court further stated that whether a silent arbitration provision permits class arbitration is not a question that must be decided by the arbitrator:

> Unfortunately, the opinions in *Bazzle* appear to have baffled the parties in this case at the time of the arbitration proceeding. For one thing, the parties appear to have believed that the judgment in *Bazzle* requires an arbitrator, not a court, to decide whether a contract permits class arbitration. . . . In fact, however, only the plurality decided that question. But we need not revisit that question here . . . .[66]

56. *Id.* at 1159 (footnote omitted).
57. *Id.*
58. *Id.*
59. *See, e.g.*, Brokers' Servs. Mktg. Grp. v. Cellco P'ship, No. 10-cv-3973 (JAP), 2012 WL 1048423, at *4–5 (D.N.J. Mar. 28, 2012); Kaltwasser v. AT&T Mobility LLC., 812 F. Supp. 2d 1042, 1047–50 (N.D. Cal. 2011); *In re* DirecTV Early Cancellation Fee Mktg. Sales Practices Litig., 810 F. Supp. 2d 1060, 1067 (C.D. Cal. 2011); Arellano v. T-Mobile USA, Inc., No. C-10-05663 (WHA), 2011 WL 1842712, at *2 (N.D. Cal. May 16, 2011).
60. 130 S. Ct. 1758 (2010).
61. *Id.* at 1775; *see Arbitration Developments 2011*, *supra* note 3, at 533–37.
62. *Stolt-Nielsen*, 130 S. Ct. at 1775–76.
63. *Id.* at 1776.
64. 539 U.S. 444 (2003).
65. *Stolt-Nielsen*, 130 S. Ct. at 1771–72 (explaining that, because Justice Stevens concurred in the judgment of the plurality but not its rationale, *Bazzle* did not produce a majority opinion on the pertinent issues).
66. *Id.* at 1772.

Nevertheless, since this ruling, the courts have split on whether the court or the arbitrator should decide whether a class action is permitted by an arbitration agreement that is silent on the subject. In *Reed Elsevier, Inc. v. Crockett*,[67] for example, the court analyzed the Supreme Court's recent jurisprudence at length, including *Stolt-Nielsen*'s repudiation of *Bazzle*, and held that it is for the court, not an arbitrator, to decide whether a silent arbitration provision authorizes class arbitration: "[T]his Court concludes that the issue of whether an arbitration agreement authorizes class arbitration fits more closely with the decisions of the Supreme Court, addressing the question of arbitrability, and that, therefore, this Court must resolve the question of whether the parties' arbitration agreement authorizes such arbitration."[68]

The United States Court of Appeals for the Third Circuit reached the opposite conclusion in dicta in *Quilloin v. Tenet HealthSystem Philadelphia, Inc.*,[69] stating, without any analysis, that "[s]ilence regarding class arbitration generally indicates a prohibition against class arbitration, but the actual determination as to whether class action is prohibited is a question of interpretation and procedure for the arbitrator."[70] However, the court in *Quilloin* did not discuss post-*Bazzle* jurisprudence, most notably the repudiation of *Bazzle* in *Stolt-Nielsen*, and it appears to have relied upon *Bazzle* as if it were still good law.[71] Other courts have reached conflicting conclusions on this issue.[72]

Congressional Action and the Possible Regulation of Arbitration Agreements

The CFPB must "conduct a study of, and . . . provide a report to Congress concerning, the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services."[73] It is also authorized to impose limits or conditions upon the use of pre-dispute arbitration agree-

67. No. 3:10-cv-248, 2012 WL 604305 (S.D. Ohio Feb. 24, 2012).

68. *Id.* at *6 (footnote omitted).

69. 673 F.3d 221 (3d Cir. 2012).

70. *Id.* at 232 (citing *Stolt-Nielsen*, 130 S. Ct. at 1775).

71. *See id.* Although it acknowledged that "[s]ilence regarding class arbitration generally indicates a prohibition against class arbitration," *id.*, the court cited *Stolt-Nielsen* for the proposition that "the actual determination as to whether a class action is prohibited is a question of interpretation and procedure for the arbitrator," *id.*, even though *Stolt-Nielsen* clarified that such is not the law when it repudiated *Bazzle*. *See Stolt-Nielsen*, 130 S. Ct. at 1770–76.

72. *Compare, e.g.*, Vilches v. Travelers Cos., 413 F. App'x 487, 491–92 (3d Cir. 2011) (giving force to expansive contract term that all employment disputes would be resolved by arbitration), *and* Medicine Shoppe Int'l, Inc. v. Edlucy, Inc., No. 4:12-CV-161-CAS, 2012 WL 1672489, at *3–4 (E.D. Mo. May 14, 2012) (giving force to contract term whereby parties could arbitrate gateway questions of arbitrability), *with* Corrigan v. Domestic Linen Supply Co., No. 12-CV-0575, 2012 WL 2977262, at *4–5 (N.D. Ill. July 20, 2012) (*Stolt-Nielsen* dictates that a court, not an arbitrator, must decide whether parties agreed to arbitrate on class basis where the arbitration agreement is silent), *and* Goodale v. George S. May Int'l Co., No. 10-CV-5733, 2011 WL 1337349, at *2 (N.D. Ill. Apr. 5, 2011) (same).

73. 12 U.S.C. § 5518(a) (Supp. IV 2010).

ments if such would be in the public interest and for the protection of consumers.[74]

The CFPB announced on April 24, 2012, that it had initiated its study of consumer arbitration[75] and issued a request for information on consumer arbitration agreements ("Request").[76] It described the Request as "a preliminary step in undertaking the Study" mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act.[77] The Request stated that comments were to be limited to the appropriate scope of the Study, as well as appropriate methods and sources of data for conducting the Study, and it further stated that the CFPB was not seeking comments on whether it should exercise its rulemaking authority or whether any regulations would serve to protect consumers or be in the public interest.[78]

The Request asked for comments on four main topics dealing with the scope, methodology, and data sources of the study: (1) the prevalence of pre-dispute arbitration agreements in consumer financial services products, other than credit card agreements, for which the CFPB already has data; (2) claims brought by consumers against financial services companies in arbitration; (3) claims brought by financial services companies against consumers in arbitration; and (4) the impact of pre-dispute arbitration agreements on consumers outside particular arbitral proceedings.[79] However, the Request failed to mention class actions or the Supreme Court's decision in *Concepcion*. In response to the Request, several trade groups, banking groups, and consumer groups have submitted comments.[80]

Conclusion

In 2011 and 2012, the United States Supreme Court continued to issue decisions that broadly interpreted the FAA and supported arbitration. However, only time will tell whether the CFPB will promulgate regulations that will govern arbitration agreements in consumer contracts following the conclusion of its study, or whether such regulations may limit the impact of *Concepcion*.

74. *Id.* § 5518(b). The U.S. Code prohibits the inclusion of arbitration agreements in residential mortgage loans. 15 U.S.C. § 1639c(e) (2006 & Supp. IV 2010).

75. Press Release, Consumer Fin. Prot. Bureau, Consumer Financial Protection Bureau Launches Public Inquiry into Arbitration Clauses (Apr. 24, 2012), *available at* http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-launches-public-inquiry-into-arbitration-clauses/.

76. Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements, 77 Fed. Reg. 25148 (Apr. 27, 2012).

77. *Id.* at 25148 (citing 15 U.S.C. § 5518(a)).

78. *Id.* at 25149.

79. *Id.* at 25149–50.

80. *See Notice and Comment–Closed Notices*, Consumer Fin. Prot. Bureau, http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;D=CFPB-2012-0017 (last visited Feb. 6, 2013 (collecting 61 comments)).