
RECENT CASES

ARBITRATION AND CLASS ACTIONS — NATIONAL LABOR RELATIONS ACT — DISTRICT COURT ENFORCES CLASS ACTION WAIVER IN EMPLOYMENT ARBITRATION AGREEMENT. — *Morvant v. P.F. Chang's China Bistro, Inc.*, No. 11-CV-05405 YGR, 2012 WL 1604851 (N.D. Cal. May 7, 2012).

In *AT&T Mobility LLC v. Concepcion*,¹ the Supreme Court held that the Federal Arbitration Act² (FAA) required the enforcement of class action waivers in consumer arbitration agreements, even though the waivers at issue were deemed unconscionable under state law.³ Commentators predicted that lower courts would extend *Concepcion*'s reach to the employment context,⁴ but confidence in that prediction dampened early last year when the National Labor Relations Board (NLRB) ruled in *D.R. Horton, Inc.*⁵ that the National Labor Relations Act⁶ (NLRA) protects the nonwaivable right of covered employees to bring class actions against their employers.⁷ Recently, in *Morvant v. P.F. Chang's China Bistro, Inc.*,⁸ the U.S. District Court for the Northern District of California confronted this altered landscape. The court held that the class action waivers at issue were enforceable under the FAA, finding that the NLRA does not constrain the reach of *Concepcion*.⁹ In so doing, the court failed to apply the appropriate standard to the issue of congressional override. In the preemption context, *Concepcion* remains a bulwark against state law efforts to safeguard class actions. But in the displacement context, *Concepcion* actually cuts the other way: when federal law provides a substantive right to bring class actions, class action waivers may be unenforceable precisely because class actions “interfere[] with fundamental attributes of arbitration.”¹⁰

¹ 131 S. Ct. 1740 (2011).

² 9 U.S.C. §§ 1–16 (2006).

³ See *Concepcion*, 131 S. Ct. at 1746–48, 1753.

⁴ See, e.g., Andrée P. Laney, *AT&T Mobility's Impact on Employers' Arbitration Agreements*, A.B.A. CORP. COUNS. (Sept. 6, 2011), <http://apps.americanbar.org/litigation/committees/corporate/articles/summer2011-att-mobility-arbitration.html> (“The Court’s pro-arbitration analysis and holding in *AT&T Mobility* suggest that employers without arbitration agreements should consider them. Employers who have such agreements should consider amending them to add class action waivers.”).

⁵ 357 N.L.R.B. No. 184, 2012 WL 36274 (Jan. 3, 2012).

⁶ 29 U.S.C. §§ 151–169 (2006).

⁷ *D.R. Horton*, 2012 WL 36274, at *1. Employers may continue to require arbitration of employment claims so long as a class vehicle is available in arbitration. See *id.* at *16.

⁸ No. 11-CV-05405 YGR, 2012 WL 1604851 (N.D. Cal. May 7, 2012).

⁹ *Id.* at *1, *9.

¹⁰ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011).

The FAA requires that courts enforce arbitration agreements “in accordance with their terms”¹¹ — terms that may include class action waivers¹² — unless one of two exceptions applies. First, under the FAA’s saving clause a court may decline to enforce an agreement “upon such grounds as exist at law or in equity for the revocation of any contract.”¹³ These grounds include “generally applicable contract defenses”¹⁴ such as unconscionability, but not “defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.”¹⁵ Second, Congress may preclude the application of the FAA through statute if “such an intent ‘[is] deducible from . . . text or legislative history,’ or from an inherent conflict between arbitration and the statute’s underlying purposes.”¹⁶

Zachary Morvant was employed by P.F. Chang’s China Bistro (P.F. Chang’s) as a food runner and bartender from 2005 until 2006; Jean Andrews, a food server, was employed from 2008 to 2009.¹⁷ In 2006, P.F. Chang’s implemented a Dispute Resolution Policy in which employees agreed in writing to arbitrate all disputes arising out of their employment and waived their right to bring classwide claims.¹⁸ Morvant insisted that he never signed the agreement, and P.F. Chang’s was unable to produce a copy bearing his signature, while Andrews signed the agreement on the day she was hired.¹⁹ Morvant filed suit in state court in 2010, alleging various state labor law violations.²⁰ In 2011, Andrews was added as a plaintiff, and the lawsuit was converted to a putative class action and removed to federal district court.²¹ P.F. Chang’s moved to compel arbitration on an individual basis.²²

Judge Rogers of the U.S. District Court for the Northern District of California held that Morvant had never consented to the arbitration agreement and thus could not be bound by its terms under the FAA.²³

¹¹ Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989).

¹² See *Concepcion*, 131 S. Ct. at 1748–49.

¹³ 9 U.S.C. § 2 (2006).

¹⁴ *Concepcion*, 131 S. Ct. at 1746 (quoting *Doctor’s Assocs., Inc. v. Cosarotto*, 517 U.S. 681, 687 (1996)) (internal quotation mark omitted).

¹⁵ *Id.* In *Concepcion*, the Supreme Court held that California’s unconscionability rule “[r]equiring the availability of classwide arbitration” did not fall within the saving clause and was thus preempted by the FAA. *Id.* at 1748 (arguing that classwide causes of action defeat the “overarching purpose” of the FAA, which is “to facilitate streamlined proceedings”).

¹⁶ *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 227 (1987) (citation omitted) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

¹⁷ *Morvant*, 2012 WL 1604851, at *1–2.

¹⁸ *Id.* at *1.

¹⁹ *Id.* at *1–2.

²⁰ *Id.*

²¹ *Id.* at *2.

²² *Id.* at *1.

²³ *Id.* at *3–4.

With respect to Andrews, the parties agreed that she had consented to the agreement and Judge Rogers further concluded that it was enforceable against her.²⁴ She rejected Andrews's three principal arguments to the contrary, holding that the agreement did not fall within the FAA's saving clause on grounds of unconscionability or on grounds of the "public policy" contract defense, and that no act of Congress overrode the FAA in this context.²⁵

First, Judge Rogers concluded that the agreement did not fall within the FAA's saving clause even though the class action waiver was unconscionable under state precedent.²⁶ In *Concepcion*, the Supreme Court rejected a similar argument in the consumer context, upholding the enforceability of an arbitration agreement that included a class action waiver deemed unconscionable under a different state precedent.²⁷ Andrews argued that *Concepcion* was distinguishable because class actions are necessary in the employment context to ensure that the labor laws are enforced, whereas the class action waiver in *Concepcion* did not "impermissibly interfere with an [individual's] ability to vindicate . . . statutory rights."²⁸ Judge Rogers found that there was no principled way to cabin *Concepcion* to the consumer context.²⁹ She noted that the Supreme Court held in *Concepcion* that "the FAA prohibits state-law created barriers to arbitration,"³⁰ and that one such barrier is a judicial rule requiring the availability of class actions.³¹

Second, Judge Rogers concluded that the agreement did not fall within the FAA's saving clause on grounds of being contrary to public policy, a contract defense under California law. Andrews argued that class action waivers were prohibited under section 7 of the NLRA, which grants employees the right "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection."³² In *D.R. Horton*, the NLRB determined that these associational rights include the right to pursue claims against employers on a classwide basis — a right that cannot be waived under any employment contract per section 8(a)(1) of the NLRA.³³ Judge Rogers rejected Andrews's argument, citing *Concepcion* for the proposition that "collective arbitration is contrary to the purposes of the FAA and thus the FAA requires . . . compelling ar-

²⁴ *Id.* at *1, *4.

²⁵ *Id.* at *4–13.

²⁶ *Id.* at *6–8.

²⁷ See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750–53 (2011).

²⁸ *Morvant*, 2012 WL 1604851, at *7.

²⁹ *Id.* at *6–8.

³⁰ *Id.* at *7.

³¹ See *id.* at *7–8; see also *Concepcion*, 131 S. Ct. at 1748 ("[C]lasswide arbitration interferes with fundamental attributes of arbitration and . . . creates a scheme inconsistent with the FAA.").

³² 29 U.S.C. § 157 (2006).

³³ *D.R. Horton*, 357 N.L.R.B. No. 184, 2012 WL 36274, at *1 (Jan. 3, 2012).

bitration *on an individual basis* in the absence of a clear agreement to proceed on a class basis.”³⁴

Third, Judge Rogers rejected Andrews’s argument that other federal statutes overrode the FAA with regard to employment contracts.³⁵ Andrews argued that since *Concepcion* dealt with preemption of state law by the FAA, it did not apply to a case where the FAA conflicts with another *federal* statute, such as the NLRA.³⁶ Judge Rogers’s response was twofold: First, she argued that “[*Concepcion*’s] statement of the meaning and purposes of the FAA applies equally in the context of determining which federal statute controls here.”³⁷ Second, where the FAA appears to conflict with another federal statute, the FAA prevails unless its application has been “overridden by a contrary congressional command.”³⁸ Citing the Supreme Court’s decision last Term in *CompuCredit Corp. v. Greenwood*,³⁹ Judge Rogers interpreted this requirement to mean that Congress must “expressly provide” that it intends to bar application of the FAA.⁴⁰ Finding that the NLRA did not contain such a provision, Judge Rogers held that it did not evince Congress’s intent to bar application of the FAA.⁴¹ Having rejected all of Andrews’s arguments, Judge Rogers granted the motion to compel individual arbitration with respect to Andrews.⁴²

In deciding the congressional override issue, Judge Rogers was correct to ask whether application of the FAA has been “overridden by a contrary congressional command.”⁴³ But she assumed, relying on *CompuCredit*, that such a “command” must amount to a “clear statement” by which Congress “expressly provide[d] that it was overriding [a] provision in the FAA.”⁴⁴ This requirement conflicts with the well-established test in *Shearson/American Express Inc. v. McMahon*,⁴⁵ which asks whether such a command is “deducible from . . . text or

³⁴ *Morvant*, 2012 WL 1604851, at *9.

³⁵ At times, Judge Rogers wrote as if the congressional override issue went only to the “public policy” saving clause inquiry. *See id.* at *12 (“As a result, the inclusion of a class action waiver provides no basis to hold the Arbitration Agreement unenforceable as contrary to public policy.”). But at other times she seemed to recognize that congressional override also offered an independent basis for barring application of the FAA, one that did not run through state law. *See id.* at *11 (discussing “the context of determining which federal statute controls here”).

³⁶ *See id.*

³⁷ *Id.*

³⁸ *Id.* (quoting *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012)) (internal quotation marks omitted).

³⁹ 132 S. Ct. 665.

⁴⁰ *Morvant*, 2012 WL 1604851, at *11.

⁴¹ *Id.* at *11–12.

⁴² *Id.* at *13.

⁴³ *Id.* at *11 (quoting *CompuCredit*, 132 S. Ct. at 669) (internal quotation marks omitted).

⁴⁴ *Id.*

⁴⁵ 482 U.S. 220 (1987).

legislative history,' or from an inherent conflict between arbitration and the statute's underlying purposes"⁴⁶ — a test that the Court did not abandon in *CompuCredit*.⁴⁷ Had Judge Rogers applied the appropriate test, she would have found that the NLRA evinces congressional intent to bar application of the FAA.

In *CompuCredit*, the Court upheld the enforceability of a consumer arbitration agreement when the claims at issue derived from the Credit Repair Organization Act⁴⁸ (CROA). The CROA mandates that credit repair organizations provide customers with a written statement advising them of their "right to sue" a credit repair organization that violates the CROA.⁴⁹ The Court found that this disclosure provision — the only provision in the CROA mentioning a "right to sue" — did not evince a congressional intent to bar application of the FAA: First, the Court held that the disclosure provision did not establish the right to bring an action in a judicial forum, but merely the "the right to receive the statement."⁵⁰ Second, the Court determined that if Congress had intended to bar application of the FAA in this context, "it would have done so in a manner less obtuse."⁵¹

Morvant is distinguishable in both respects. First, it is the NLRA itself — not the content of a required disclosure statement — that establishes the right of employees to engage in concerted activities. Second, as Justice Sotomayor noted in her concurrence in *CompuCredit*, the Court did not say that Congress must *always* issue a "clear statement" to bar application of the FAA.⁵² Rather, the Court offered an argument for why a "less obtuse" statement was necessary in this context: ever since consumer arbitration agreements began proliferating in the early 1990s, Congress has spoken with a fairly clear voice when it has barred application of the FAA in the consumer context; yet Congress failed to do so in passing the CROA in 1996.⁵³ By implication, one would not expect so clear a statement with respect to earlier legislation enacted when arbitration agreements were much less common.

⁴⁶ *Id.* at 227 (citation omitted) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

⁴⁷ See *CompuCredit*, 132 S. Ct. at 669 (citing *McMahon* with approval).

⁴⁸ 15 U.S.C. §§ 1679–1679j (2006).

⁴⁹ *Id.* § 1679c(a).

⁵⁰ *CompuCredit*, 132 S. Ct. at 670.

⁵¹ *Id.* at 672; see *id.* at 669–72.

⁵² See *id.* at 675 (Sotomayor, J., concurring in the judgment) ("I do not understand the majority opinion to hold that Congress must speak so explicitly in order to convey its intent to preclude arbitration of statutory claims. We have never said as much, and on numerous occasions have held that proof of Congress' intent may also be discovered in the history or purpose of the statute in question.")

⁵³ See *id.* at 672–73 (majority opinion) ("[T]he early 1990's saw the increased use of arbitration clauses in consumer contracts generally . . . Had Congress meant to prohibit these very common provisions in the [statute], it would have done so in a manner less obtuse . . .").

For this reason, *CompuCredit* is more plausibly interpreted not as abandoning the *McMahon* test, but as amending it to include a threshold inquiry. According to the *McMahon* test, Congress's intent is deducible from the text, history, or purposes of the statute in question.⁵⁴ *CompuCredit* adds a threshold inquiry before reaching this test: If Congress had intended to bar application of the FAA in the given context, would it have done so in explicit terms? If the answer is "yes," but no explicit language is found, then Congress has not evinced the requisite intent. But if the answer is "no," then courts may look more broadly to text, history, and purpose. This interpretation has the virtue of reconciling *CompuCredit*'s demand for a "less obtuse" statement in the case of the CROA with its reaffirmation of *McMahon*.⁵⁵

Applying the threshold inquiry to the NLRA, three historical factors make it doubtful that Congress would have issued a clear statement in the NLRA to bar application of the FAA to class action waivers in employment arbitration agreements. First, when the NLRA became law in 1935, class actions for damages did not exist.⁵⁶ Second, as Professor Richard Bales has noted, "[a]rbitration of employment disputes in the nonunion sector was virtually unheard of as recently as [the early 1990s]."⁵⁷ Third, the legislative history of the FAA suggests that few believed it would apply to employment-related disputes.⁵⁸ Given these factors, no court should expect a clear statement in the NLRA on the inapplicability of the FAA.

Because it would be anachronistic to demand a clear statement in the NLRA barring application of the FAA to class action waivers, Judge Rogers should have proceeded to consider the NLRA in light of its underlying purposes, as *McMahon* allows. In the case of the

⁵⁴ Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 227 (1987).

⁵⁵ See *CompuCredit*, 132 S. Ct. at 669 (citing *McMahon* with approval).

⁵⁶ 1 WILLIAM B. RUBENSTEIN ET AL., *NEWBERG ON CLASS ACTIONS* § 1.13, at 36 (5th ed. 2011) ("It was not until the promulgation of original Rule 23 and the first Federal Rules of Civil Procedure in 1938 that law and equity merged, and class suits for damages in the United States first became available . . .").

⁵⁷ RICHARD A. BALES, *COMPULSORY ARBITRATION* 1 (1997). With respect to organized labor, arbitration began in the garment industry in the 1910s and 1920s as a way to address grievances, but was "slow to spread to other industries" until the advent of the War Labor Board during World War II. Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 1010 (1999).

⁵⁸ See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 42 (1991) (Stevens, J., dissenting) ("When the FAA was passed in 1925, I doubt that any legislator who voted for it expected it to apply . . . to the arbitration of disputes arising out of the employment relationship."). Section 1 of the FAA excludes from the FAA's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1 (2006), and it was not until 2001 that the Supreme Court, by a 5–4 vote, limited the exclusion to transportation workers in a decision largely ignoring the FAA's legislative history. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001) ("[W]e need not assess the legislative history of the exclusion provision.").

NLRA, Congress likely evinced an intent to override the FAA due to “an inherent conflict between arbitration and the statute’s underlying purposes.”⁵⁹ The NLRA, as interpreted by the NLRB in *D.R. Horton*, protects the nonwaivable right of employees to pursue classwide claims against their employers.⁶⁰ The NLRB’s interpretation may well be correct as a matter of statutory construction; indeed, the courts of appeals have understood section 7 of the NLRA to include the right to engage in group litigation,⁶¹ and the Supreme Court has held that employers violate section 8(a)(1) when they require employees to waive their section 7 rights through individual contracts.⁶² But even if the NLRB’s interpretation is not compelled by the statute, Congress has “placed in [the NLRB’s] hands”⁶³ the authority “to adapt the [NLRA] to changing patterns of industrial life.”⁶⁴ As the Supreme Court has affirmed, the NLRB’s construction of ambiguous statutory language in the NLRA is entitled to *Chevron* deference.⁶⁵ Moreover, in applying the *McMahon* test, the Court has looked to an authorized agency’s construction of the statute in question. In *McMahon* itself, the Court considered whether congressional intent to override the FAA was deducible from the text, history, or purposes of the Securities Exchange Act of 1934,⁶⁶ and as part of that inquiry it was necessary to determine whether mandatory arbitration agreements prevented individuals from vindicating statutory rights under the Act.⁶⁷ The Court found that arbitration adequately protected such rights, relying principally on the fact that the Securities and Exchange Commission (SEC) had “[i]n the exercise of its regulatory authority . . . specifically approved the arbitration procedures”⁶⁸ — a move the dissent characterized as undue “deference” to the agency.⁶⁹

⁵⁹ *McMahon*, 482 U.S. at 227.

⁶⁰ *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184, 2012 WL 36274, at *1 (Jan. 3, 2012).

⁶¹ See, e.g., *Brady v. Nat’l Football League*, 644 F.3d 661, 673 (8th Cir. 2011) (“[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is ‘concerted activity’ under § 7 of the [NLRA].”); *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976); *Leviton Mfg. Co. v. NLRB*, 486 F.2d 686, 689 (1st Cir. 1973); see also Ann C. Hodges, *Can Compulsory Arbitration Be Reconciled with Section 7 Rights?*, 38 WAKE FOREST L. REV. 173, 218 (2003) (“Concerted activity is stifled where there is no forum for collective claims.”).

⁶² See *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337–38 (1944); *Nat’l Licorice Co. v. NLRB*, 309 U.S. 350, 359–60 (1940).

⁶³ *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963).

⁶⁴ *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975).

⁶⁵ E.g., *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536 (1992).

⁶⁶ 15 U.S.C. §§ 78a–78pp (2006 & Supp. IV 2010).

⁶⁷ See *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 229–34 (1987).

⁶⁸ *Id.* at 234.

⁶⁹ *Id.* at 262 (Blackmun, J., concurring in part and dissenting in part). The Court gave no weight to the SEC’s prior rule that the Securities Exchange Act prohibited arbitration of statutory claims, finding that the prior rule was “not based on any independent analysis of [the statute]” but

Thus, in assessing whether there is an inherent conflict between the NLRA and the FAA, it is likely that courts must take as a premise that the NLRA protects the nonwaivable right of employees to bring classwide claims — either because this reading of the NLRA is correct as a matter of statutory construction, or because the NLRB’s construction is entitled to deference.⁷⁰ Either way, there is an inherent conflict between the NLRA’s class action requirement and the FAA. Writing for the Court in *Concepcion*, Justice Scalia held that “[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”⁷¹ Congress, in passing the NLRA, has therefore required the availability of a procedure that inherently conflicts with the FAA. From the *McMahon* test, it follows that Congress has evinced an intent to bar application of the FAA to class action waivers in employment arbitration agreements. Thus, if courts take as a premise that sections 7 and 8(a)(1) prohibit class action waivers, they should conclude that the FAA does not require the enforcement of such waivers.

In analyzing the congressional override issue, Judge Rogers wrote that “[*Concepcion*’s] statement of the meaning and purposes of the FAA applies equally in the context of determining which federal statute controls here.”⁷² That observation is indeed correct, but Judge Rogers has misjudged its import. When the FAA conflicts with state law requiring the availability of classwide claims, the FAA preempts state law. But when the FAA conflicts with a federal law requiring the availability of classwide claims, and that law survives *CompuCredit*’s threshold inquiry, it is likely that the FAA must yield — even if the law does not bar application of the FAA in express terms. Both results turn on the Court’s holding in *Concepcion* that classwide claims are “inconsistent” with arbitration.

reflected wholesale reliance on prior court of appeals decisions addressing the very same issue of statutory construction. *Id.* at 234 n.3 (majority opinion); *see also id.* at 262 n.21 (Blackmun, J., concurring in part and dissenting in part) (noting that the SEC only disclaimed its prior rule on submitting its amicus brief in the case). By contrast, the NLRB rested its construction of sections 7 and 8(a)(1) on its own analysis of the NLRA and disparate case law, without relying on any court of appeals case that addressed the very same issue of statutory construction. *See D.R. Horton, Inc.*, 357 N.L.R.B. No. 184, 2012 WL 36274, at *2–10 (Jan. 3, 2012).

⁷⁰ Importantly, courts need only defer to the NLRB’s interpretation of the NLRA, not to its interpretation of the FAA. District courts have held that the NLRB’s construction of the NLRA in *D.R. Horton* is entitled to deference, even when they have declined to follow the rest of *D.R. Horton*’s analysis. *See, e.g., Carey v. 24 Hour Fitness USA, Inc.*, No. H-10-3009, 2012 WL 4754726, at *2 (S.D. Tex. Oct. 4, 2012); *Tenet HealthSystem Phila., Inc. v. Rooney*, No. 12-mc-58, 2012 WL 3550496, at *4 (E.D. Pa. Aug. 17, 2012); *Delock v. Securitas Sec. Servs. USA, Inc.*, No. 4:11-CV-520-DPM, 2012 WL 3150391, at *3 (E.D. Ark. Aug. 1, 2012).

⁷¹ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011).

⁷² *Morvant*, 2012 WL 1604851, at *11.