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Class Action Waiver And the Effective Vindication Doctrine At the Antitrust/ Arbitration Crossroads

BY ELLEN MERIWETHER

THE SUPREME COURT HAS SHOWN growing attention to arbitration issues and enforcement of arbitration agreements over the last thirty years, with rulings in at least a dozen cases arising under the Federal Arbitration Act (FAA).[1] Beginning with *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,[2] in which the Court announced that the FAA reflected a "liberal federal policy favoring arbitration," these decisions have slowly but surely narrowed the scope for arguments against enforcement of arbitration agreements.

Often these issues arise with respect to claims under state statutes and common law, to which the FAA may apply. But for claims arising under federal statutes, one feature of this trend has been the effective vindication doctrine, under which the Supreme Court has articulated a requirement that effectuating the FAA policy in favor of arbitration does not come at the expense of important policies embodied in other federal statutes, including federal antitrust laws.

The discussion below traces important developments in how federal courts have used this doctrine to balance interests under the FAA with those under other federal statutes, and focuses on the collision of those interests through the enforcement of arbitration agreements that preclude class actions in federal antitrust cases.

Brief History of the Effective Vindication Doctrine

In a series of decisions from the mid-1980s through the early 1990s, the Supreme Court held that statutory claims, including federal statutory claims arising under the Sherman Act, were subject to arbitration.[3] The underlying philosophy of those decisions, as expressed in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, was 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." As the Supreme Court explained, "[S]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."[4]

In later decisions, such as *Green Tree Financial Corp.-Alabama v. Randolph*, the Supreme Court reinforced the principle that arbitration of federal statutory claims is appropriate where the plaintiffs' statutory rights can be effectively vindicated through arbitration: "[E]ven claims arising under a statute designed to further important social policies may be arbitrated . . . so long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum . . . .").[5] Courts of appeals have recognized the doctrine as well,[6] including cases involving Sherman Act claims, in which the courts held that effective vindication of such claims requires access to class procedures because without them there would be no incentive for private enforcement, which is inconsistent with the congressional scheme.[7]

In two recent decisions, the Supreme Court addressed arbitration agreements specifically as they have an impact on access to class action proceedings. In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,[8] the Court held that class-wide arbitration so changes the nature of an arbitration proceeding that, absent an express provision otherwise, "a party may not be compelled under the FAA to submit to class arbitration."[9] In *AT&T Mobility LLC v. Concepcion*,[10] the Court ruled that state public policy interests in providing consumers with access to class action procedures so as to facilitate the litigation of small dollar claims must yield to contrary federal policy favoring bilateral arbitration as embodied in the FAA.[11]

Concepcion appears for now at least to have largely (if not completely) foreclosed arguments that public policy interests under state law in allowing access to class action procedures are a sufficient basis to avoid what would otherwise be an enforceable arbitration agreement to which the FAA applies. *Concepcion* was decided on preemption grounds, however, and the Supreme Court had no occasion in that case to decide whether access to class proceedings was necessary for the effective vindication of a federal statutory right.

Given the Supreme Court's growing attention to arbitration questions, the Court may accept the opportunity to address this issue in review of the decision in *In re American Express Merchants' Litigation*,[12] which the Second Circuit issued following remand by the Supreme Court for reconsideration in light of *Stolt-Nielsen*. The Second Circuit ruled that the mandatory class action waiver clause at issue in the case is unenforceable because "plaintiffs were able to demon-

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strate that the practical effect of enforcement would be to preclude their ability to bring federal antitrust claims."[13] The Second Circuit further concluded that neither *Stolt-Nielsen* nor *Concepcion* required it to change its earlier conclusions on this subject, as neither of those cases discussed or rejected the effective vindication doctrine described in *Mitsubishi* and *Green Tree*.[14]

Having granted certiorari once, the Supreme Court may take the case up again and decide whether the effective vindication doctrine remains valid after *Concepcion*, and if so, whether a factual demonstration that access to class action proceedings is necessary to protect congressional intent in promoting private enforcement of the antitrust laws will be accepted as a basis to refuse enforcement of bilateral arbitration agreements.

Basis for the Holding in *Concepcion*

A brief recap of the issue presented in *Concepcion* and the grounds for the Supreme Court's ruling in the case will aid in understanding what impact, if any, the decision may have on the effective vindication doctrine.

The FAA declares that arbitration agreements are valid and enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."[15] This saving clause permits agreements to arbitrate to be invalidated by "'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."[16] Thus, arguments of unconscionability based on the characteristics of an arbitration proceeding itself (e.g., an argument that the Federal Rules of Evidence do not apply) are not a valid basis to avoid the arbitration agreement because such arguments "stand as an obstacle to the accomplishment of the FAA's objectives."[17]

The question presented in *Concepcion* was whether the *Discover Bank*[18] rule recognized under California law—holding that class action waivers in most consumer adhesion contracts are unconscionable and therefore unenforceable—was in the nature of a "generally applicable contract defense," or whether the rule, as applied, specifically disfavors arbitration and thus must yield to contrary congressional intent as embodied in the FAA.

Under the *Discover Bank* rule:

> [W]hen [a class action] waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party "from responsibility for [its] own fraud, or willful injury to the person or property of another." Under these circumstances, such waivers are unconscionable under California law and should not be enforced.[19]

Prior to *Stolt-Nielsen*, at least, application of the rule did not require the arbitration agreement to be voided but instead allowed a party to the agreement to demand classwide arbitration.[20]

The plaintiffs in *Concepcion* argued that the *Discover Bank* rule was not preempted by the FAA because the rule was simply a refinement of general unconscionability analysis under California law and embodied a policy against exculpation that applies generally to contracts under California law. Based on this view, the plaintiffs argued that "*Discover Bank* placed arbitration agreements with class action waivers on the *exact same footing* as contracts that bar class action litigation outside the context of arbitration."[21]

Using a Supremacy Clause analysis, the Court held that the *Discover Bank* rule stands as an obstacle to the accomplishment of the FAA's objective, to "ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."[22] The Court further reasoned that "requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[23]

The Court rejected the argument that the rule served California's announced policy of encouraging the prosecution of "small-dollar claims that might otherwise slip through the legal system," on the basis that "states cannot require a procedure that is inconsistent with the FAA even if it is desirable for unrelated reasons."[24] In other words, no matter how legitimate a state public policy interest may be, that interest must yield to conflicting federal policy embodied in the FAA.[25]

The Court proceeded to state an additional, though seemingly unnecessary, basis for its conclusion, noting in response to claims by the dissent that, given the particular claim and arbitration provision involved, it was "most unlikely" that the plaintiffs' claim would go unresolved in the absence of collective adjudication.[26] The arbitration provision provided that AT&T would pay claimants a minimum of $7500 and twice their attorney's fees if they obtained an award greater than AT&T's last settlement offer, and the district court had concluded that the plaintiffs in *Concepcion* were better off under the arbitration agreement than they would have been as participants in a class action.[27] Given the Court's statement that federal policy interests under the FAA preempt any state public policy interest in encouraging the adjudication of small-dollar consumer claims, it does not appear that the Court would have reached a different result if the plaintiffs had shown that it would only be economical to adjudicate their claims in a class action proceeding.[28]

Basis for the Effective Vindication Doctrine

As described briefly above, the Supreme Court has premised its rulings that arbitration of federal statutory claims is appropriate on the condition, either expressly or in dicta, that effective vindication of the statutory right was available in arbitration. For example, in *Mitsubishi Motors Corp.* the Court stated that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbi-

tral forum, the statute will continue to serve both its remedial and deterrent function."[29] In *Green Tree* the Court stated that "the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum" and left open the prospect that a bar to classwide arbitration may not be enforced if the litigant "bears the burden of showing the likelihood of incurring such costs."[30]

Courts of appeals have followed similar logic in applying the effective vindication doctrine, focusing on cost and other practical considerations that affect whether arbitration is an effective means to vindicate rights under federal law.[31] In some antitrust cases, courts have relied on the doctrine to invalidate class action waivers.[32]

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Thus, notwithstanding the Supreme Court's ruling on preemption grounds in *Concepcion*—that federal policy under the FAA favoring arbitration takes precedence over a state law policy that access to class action procedures is necessary to ensure the effective vindication of a state law claim—the effective vindication doctrine may require a different balancing of potentially conflicting interests for claims under federal law, to which principles of preemption do not apply.[34]

The Second Circuit's ruling in *Amex III* presents this issue squarely.

Background of *American Express Merchants' Litigation*

The plaintiffs in *In re American Express Merchants' Litigation*, on behalf of a putative class of merchants accepting the American Express card, sued American Express under the Sherman Act for injury arising from the defendant's "honor all cards" rule. The card acceptance agreement governing the basic contractual relationship between American Express and member merchants required disputes between the parties to be resolved via arbitration, with an express waiver of any rights to arbitration on a classwide basis. The district court found that the arbitration provision covered the claims at issue and that the class action waiver was enforceable.[35]

In *Amex I*, the Second Circuit held that the class action waiver was not enforceable, based in part on detailed testimony from an antitrust economist who outlined the costs involved in conducting the economic antitrust study required to demonstrate liability. Based on this testimony, the court found that "the only economically feasible means for enforcing the statutory rights is via a class action."[36] Relying on the Supreme Court's decisions in *Mitsubishi Motors*[37] and *Green Tree*,[38] the Second Circuit ruled that "the class action waiver and the card acceptance agreement cannot be enforced in this case because to do so would grant Amex de facto immunity from antitrust liability by removing the plaintiffs' only reasonably feasible means of recovery."[39]

The Supreme Court granted certiorari but then remanded the case for reconsideration in light of the intervening decision in *Stolt-Nielsen*. In *Amex II*, the Second Circuit essentially reiterated its earlier holding, finding it undisturbed by *Stolt-Nielsen*.[40] Less than two months later, the Supreme Court issued its decision in *Concepcion*, prompting the Second Circuit to issue yet another decision in *Amex III*.[41]

In *Amex III*, the Second Circuit characterized the question as "whether a class action arbitration waiver clause is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to vindicate their statutory rights."[42] The court noted that, while *Concepcion* plainly offers a path to analyzing whether a state contract law is preempted by the FAA, its prior decisions in the case rested on a "vindication of statutory rights analysis, which is part of the federal substantive law of arbitrability," arising from cases such as *Mitsubishi* and *Green Tree*.[43] The court concluded that this analysis continued to apply, finding no indication in *Stolt-Nielsen* or *Concepcion* that the Supreme Court intended to overturn those decisions.[44]

The Second Circuit proceeded to analyze evidence submitted by the plaintiffs, that the cost of necessary expert analysis would range from $300,000 to $1 million, while individual treble damage recovery for even the largest merchant plaintiff would not exceed $40,000. The court ruled that the plaintiffs had met the burden of proof under *Green Tree* to show "that the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws," and that "the only economical means for plaintiffs enforcing their statutory rights is via a class action."[45]

The court observed that "eradicating the private enforcement component from our antitrust law scheme cannot be what Congress intended when it included strong private enforcement mechanisms and incentives in the antitrust statutes," and declined to enforce the arbitration agreement where doing so "flatly ensures that no small merchant may

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challenge [defendant's] tying arrangements under the federal antitrust laws."[46]

Effective Vindication Doctrine in Other Post-*Concepcion* Courts of Appeals Decisions

Other courts of appeals have not yet squarely addressed whether the effective vindication doctrine continues to apply to federal claims following *Concepcion*.[47] In *Kilgore v. Key Bank National Association*,[48] the Ninth Circuit implied in dictum that the effective vindication doctrine continues to apply to federal claims following *Concepcion*, but the court had no occasion to directly address the issue because the case involved only state law claims and state public policy concerns.[49] In *In re Checking Account Overdraft Litigation*,[50] although an unidentified federal claim was involved, the court analyzed enforcement of a class action waiver under *Concepcion* and Georgia common law unconscionability principles, and did not address (nor did the parties appear to present), whether the effective vindication doctrine applies to the federal claim. Similarly, in *Quilloin v. Tenet Health System Philadelphia, Inc.*,[51] the Third Circuit assessed the arbitrability of plaintiffs' claims under the federal Fair Labor Standards Act in light of *Concepcion* and state law unconscionability principles (finding the class action waiver provisions were not unconscionable). In *Coneff v. AT&T*,[52] the Ninth Circuit considered the exact same arbitration clause at issue in *Concepcion*. Although one federal claim (among many state law claims) was at issue and the plaintiff expressly raised the effective vindication doctrine, the court decided the case on preemption grounds, holding that state public policy concerns, however worthwhile, could not, consistent with *Concepcion*, undermine the FAA.[53]

Conclusion

The Supreme Court has arrived at yet another crossroads at the intersection of arbitration and antitrust law. The Second Circuit's decision in *Amex III* affords the Court an opportunity to balance federal interests favoring enforcement of arbitration agreements under the FAA against federal interests favoring private remedies under federal antitrust law, focused in this instance on whether to enforce a class action waiver provision in merchant agreements with American Express that may effectively preclude the merchants from pursuing private remedies.

The signposts ahead mark divergent paths, one guided by the preemption standard applied to state law claims in *Concepcion*, and the other by the effective vindication doctrine established for federal claims in *Mitsubishi*, *Green Tree*, and other decisions. Although the decision in *Concepcion* appears to have balanced competing interests decidedly in favor of the FAA policy for enforcement of arbitration agreements where the counterbalance is policies under state law, the scale may well tip in the other direction where the counterbalance is the effective vindication of private treble damages remedies under federal antitrust law, as the Second Circuit concluded in *Amex III*.

Whether the Supreme Court ultimately is presented with and accepts the invitation to consider this issue in *Amex III*, parties and counsel who find themselves at this crossroads will continue to debate whether the Supreme Court's growing solicitude for enforcement of arbitration agreements may jeopardize the ability of consumers and businesses to vindicate private remedies under federal antitrust law. ■

[1] *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 29 (1983) (affirmed ruling that contract dispute was arbitrable under FAA and terms of contract, even though appeal was only from entry of stay of federal action to compel arbitration, because court had briefs and evidentiary submissions from parties on merits of arbitrability); Southland Corp. v. Keating, 465 U.S. 1, 10 (1984) (under Supremacy Clause, FAA preempted California statute on franchise investments that required judicial consideration and barred arbitration of claims under statute); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 640 (1985) (antitrust dispute was subject to arbitration under FAA); Perry v. Thomas, 482 U.S. 483, 491–92 (1987) (under Supremacy Clause, FAA preempted provision of California labor statue stating that wage collection actions may be maintained in court without regard to private arbitration agreements); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 241 (1987) (because customers could effectively vindicate civil RICO claims for treble damages against broker in arbitration, pre-dispute agreement with broker to arbitrate was enforceable under FAA as to RICO claim); Volt Info. Sci., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 477–78 (1989) (provision in California civil procedure code allowing stay of arbitration in accordance with terms of arbitration agreement, did not undermine goals and policies of FAA); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991) (federal age discrimination claim was subject to compulsory arbitration pursuant to arbitration agreement in securities registration application); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 281–82 (1995) (use of "evidencing" and "involving" in FAA provision on enforcement of written arbitration agreements did not restrict scope of FAA so as to allow state to apply its anti-arbitration law or policy); Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 64 (1995) (enforcing securities brokerage contract that permitted arbitration panel to award punitive damages to customers, even though contract was governed by New York law, which pro-

hibited arbitrators from awarding punitive damages); Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 91–92 (2000) (arbitration agreement that did not mention arbitration costs and fees was not per se unenforceable on theory that it failed to affirmatively protect parties from potentially steep arbitration costs); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119 (2001) (employment contracts of transportation workers were exempted from FAA); EEOC v. Waffle House, Inc., 534 U.S. 279, 294–96 (2002) (agreement between employer and employee to arbitrate employment-related disputes did not bar EEOC from pursuing victim-specific relief in court under federal statute on behalf of employee, where employee did not engaged in conduct, such as seeking arbitration of claims or entering into settlement negotiations with employer, that might limit relief EEOC could obtain in court); Preston v. Ferrer, 552 U.S. 346, 359 (2008) (when parties agreed to arbitrate all questions arising under contract, FAA superseded state laws lodging primary jurisdiction in another judicial or administrative forum); AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011) (FAA preempted California common law rule on unconscionability of class arbitration waivers in consumer contracts); CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 673 (2012) (because federal Credit Repair Organization Act was silent on whether claims under Act may be arbitrated, FAA required enforcement of arbitration agreement in credit card application according to its terms).

[2] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

[3] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) (holding Sherman Act claims amenable to arbitration); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 232 (1987) (RICO claims are subject to arbitration). The Supreme Court held in *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 673 (2012), that federal statutory claims arising under the Credit Repair Organizations Act are subject to arbitration.

[4] 473 U.S. at 628, 637.

[5] 531 U.S. 79, 90 (2000). *See also* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28, 35 (1991) (holding an age discrimination claim is subject to compulsory arbitration pursuant to arbitration agreement in securities registration application reasoning, under *Mitsubishi*, that claims under those statutes are appropriate for arbitration "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum").

[6] *See, e.g.*, Blair v. Scott Specialty Gases, 283 F.3d 595, 605 (3d Cir. 2002) ("Supreme Court has made clear that arbitration is only appropriate 'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum' allowing the statute to serve its purposes." (quoting *Gilmer*, 500 U.S. at 28)). *See also infra* note 30.

[7] Kristian v. Comcast Corp., 446 F.3d 25, 59 (1st Cir. 2006) (without access to some class mechanism, a consumer plaintiff will not sue at all, a result inconsistent with a congressional scheme providing for private enforcement); *In re* American Express Merchants' Litig., 554 F.3d 300, 310 (2d Cir. 2009) (*Amex I*) (plaintiffs adequately demonstrated that the class action waiver provision should not be enforced because enforcement would effectively preclude any action seeking to vindicate the statutory rights).

[8] 130 S. Ct. 1758 (2010).

[9] *Id.* at 1774–76.

[10] 131 S. Ct. 1740 (2011).

[11] *Id.* at 1753.

[12] 667 F.3d 204 (2d Cir. 2012) (*Amex III*), *pet. for reh'g en banc denied*, *In re* Am. Express Merchants' Litig., No. 06-1871-cv (2d Cir. May 29, 2012). The case has been before the Second Circuit on two prior occasions: in *Amex I* in 2009 and, following *Stoltz-Neilson*, in *In re American Express Merchants' Litigation*, 634 F.3d 187 (2d Cir. 2011) (*Amex II*).

[13] *Amex III*, 667 F.3d at 214.

[14] *Id.* at 216–17.

[15] 9 U.S.C. § 2.

[16] *Concepcion*, 131 S. Ct. at 1746 (quoting Doctor's Assocs. v. Casarotto, 517 U.S. 681, 687 (1996)).

[17] *Id.* at 1748.

[18] Discover Bank v. Super. Ct., 36 Cal. 4th 148 (2005).

[19] *Id.* at 162 (quoting Cal. Civ. Code § 68).

[20] *Concepcion*, 131 S. Ct. at 1750.

[21] *Id.* at 1745.

[22] *Id.* at 1748.

[23] *Id.*

[24] *Id.* at 1753.

[25] *See, e.g.*, Kilgore v. Key Bank Nat'l Ass'n, 2012 WL 718334 (9th Cir. Mar. 7, 2012) (the fact that "state legislatures will find their purposes frustrated" by application of the FAA to a particular state statutory claim "cannot justify departing from the appropriate preemption analysis as set forth by the Supreme Court in *Concepcion*").

[26] *Concepcion*, 131 S. Ct. at 1753.

[27] *Id.*

[28] *See, e.g.*, Cruz v. Cingular Wireless, LLC, 648 F.3d 1205, 1214 (11th Cir. 2011) (finding irrelevant in light of *Concepcion*, plaintiffs' proffer of evidence from three consumer attorneys who testified that they would not take the claims at issue on an individual basis).

[29] 473 U.S. 614, at 637.

[30] 531 U.S. 79, at 90, 92. *See also* EEOC v. Waffle House, Inc., 534 U.S. 279, 295 n.10 (2002) (statutory claims may be arbitrated because party does not forgo substantive rights afforded by statute); Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 540 (1995) (observing that if an arbitration provision operated to prospectively waive a party's right to pursue statutory remedies, the Supreme Court would have little hesitation condemning it); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (statutory claims may be arbitrated where the parties are afforded their substantive rights under the federal statute).

[31] *See, e.g.*, Kristian v. Comcast Corp., 446 F.3d 25, 54 (1st Cir. 2006) ("We have said that the legitimacy of the arbitral forum rests on 'the presumption that arbitration provides a fair and adequate mechanism for enforcing statutory rights.'"); Musnick v. King Motor Co. of Fort Lauderdale, 325 F.3d 1255, 1259 (11th Cir. 2003) ("The party seeking to avoid arbitration under such an agreement has the burden of establishing that enforcement of the agreement would 'preclude' him from 'effectively vindicating [his] federal statutory right in the arbitral forum.' . . . Absent such a showing, the agreement may be enforced."); McCaskill v. SCI Management Corp., 298 F.3d 677, 680 (7th Cir. 2002) (arbitration agreement that prohibited an award of attorneys' fees to plaintiff on Title VII claim was unenforceable); Blair v. Scott Specialty Gases, 283 F.3d 595, 605, 610 (3d Cir. 2002) (remanding case to allow claimant an opportunity to demonstrate that arbitration would be prohibitively expensive and would deny her a forum to vindicate her statutory rights); Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 895 (9th Cir. 2002) ("Courts have since interpreted *Gilmer* to require basic procedural and remedial protections so that claimants can effectively pursue their statutory rights.").

[32] *See Kristian*, 446 F.3d at 58–59; *Amex I*, 554 F.3d 300, 310, 320 (2d Cir. 2009).

[33] *See Green Tree*, 531 U.S. at 92 ("It may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum. But the record does not show that [plaintiff] will bear such costs if she goes to arbitration."); *In re* Cotton Yarn Antitrust Litig., 505 F.3d 274, 285 (4th Cir 2007) (rejecting as insufficient plaintiffs' demonstration that proceeding in arbitration on an individual as opposed to class basis would prevent the effective vindication of Sherman Act claims). *But see Kristian*, 446 F.3d at 54–55, 59, 64 (invalidating class action waiver where plaintiffs demonstrated through expert affidavits that, unless claims were brought as a class action, they would not have been brought at all).

[34] *See, e.g.*, Chen-Oster v. Goldman, Sachs & Co., No. 10 Civ. 6950, 2011 WL 2671813, at *3 (S.D.N.Y. July 7, 2011) (noting that case presents issue not considered by *Concepcion*, that is, "whether the FAA's objectives are also paramount when, as here, rights created by a competing federal statue are infringed by an agreement to arbitrate").

[35] *Amex I*, 554 F.3d at 309.

[36] *Id.* at 310.

[37] 473 U.S. 614 (1985).

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

[39] 554 F.3d at 320.

[40] *See Amex II*, 634 F.3d at 189.

[41] 667 F.3d 204 (2012).

[42] *Id.* at 212.

[43] *Id.* at 213 (citing *Amex I*, 554 F.3d 300, 320 (2d Cir. 2009)).

[44] *Id.* at 216–17.

[45] *Id.* at 218.

[46] *Id.* (quoting *Amex I*, 554 F. 3d at 319). American Express's petition for rehearing en banc was denied on May 29, 2012. *In re* Am. Express Merchants's Litig., No. 06-1871-cv (2nd Cir. May 29, 2012). One circuit court judge filed an opinion concurring in the result, while three judges issued separate dissenting opinions. Judge Cabranes, one of the dissenters, observed that the issue "surely deserves further appellate review," and stated "one can infer that the deniial of en banc review can only be explained as a signal that the matter can and should be resolved by the Supreme Court."

[47] The Supreme Court addressed arbitration after *Concepcion* in *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 673 (2012), ruling that federal statutory claims arising under the Credit Repair Organizations Act are subject to arbitration. It was not presented with the question of whether access to class action proceedings was necessary for the effective vindication of the claim.

[48] 673 F.3d 947 (9th Cir. 2012).

[49] *Id.* at 962; *see also* Cruz v. Cingular Wireless, LLC, 648 F.3d 1205, 1215 (11th Cir. 2011) (In case involving only state law claims, court rejected proffer of affidavits that three plaintiffs' attorneys would not take on representation of individual claimants as proof that access to class procedures was necessary to effective vindication of claims: "[W]e need 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. Even if the *Mitsubishi* vindication principle applies to state as well as federal statutory causes of action . . . and even if it could be applied to strike down a class action waiver in the appropriate circumstance, such an argument is foreclosed here, because the *Concepcion* Court examined *this very arbitration agreement* and concluded that it did not produce such a result." (citations omitted)).

[50] 672 F.3d 1224, 1229 (11th Cir. 2012).

[51] 673 F.3d 221, 232 (3d Cir. 2012) ("[E]ven if the arbitration agreement explicitly waived [plaintiffs'] right to pursue class actions, the Pennsylvania law prohibiting class action waivers is surely preempted by the FAA under *Concepcion*."). Again, as in *In re Checking Account Overdraft Litigation*, it does not appear that either party or the court raised the question of effective vindication of the federal statutory right.

[52] 673 F.3d 1155 (9th Cir. 2012).

[53] *Id.* at 1161. One district court has ruled that the effective vindication doctrine remains viable after *Concepcion*. *See* Chen-Oster v. Goldman, Sachs & Co., No. 10 Civ. 6950 (LBS) (JCF), 2011 WL 2671813, at *3–5 (S.D.N.Y. July 7, 2011) (denying motion for reconsideration, based on *Concepcion*, of order invalidating arbitration agreement because it did not allow for class proceedings and requiring individual arbitration would preclude plaintiff from enforcing "substantive right under Title VII to bring a pattern or practice claim").