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To Summarily Adjudicate or Not Adjudicate: The Recent Amendments to Section 437c

By Heather Rosing and Bryan Vess

Preface

Heather Rosing is a certified legal malpractice specialist and shareholder with Klinedinst PC, where she serves as the Chairperson of the Professional Liability Department.

Bryan Vess is a San Diego attorney who helps people, businesses and government entities with business disputes. Mr. Vess operates his own firm, BRYAN C. VESS APC.

Ms. Rosing and Mr. Vess co-wrote this article in order to give two different perspectives on the changes to the summary judgment statute—Ms. Rosing giving a defense counsel's view and Mr. Vess a plaintiffs' counsel's view.

Overview of Changes

California's statutory summary judgment and adjudication provisions are found in Code of Civil Procedure section 437c. The statute was amended by the State Legislature effective January 1, 2012. The changes are significant.

Prior to the amendment, a party could move for summary adjudication of (1) one or more causes of action, (2) affirmative defenses, (3) claims for damages, or (4) issues of duty. In reality, this mainly translated into summary adjudication motions on certain causes of action, on punitive damages, or on straightforward affirmative defenses such as the statute of limitations.

The purpose of allowing such motions under the statute is to expedite litigation and eliminate needless trials. *PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 590. However, despite the stated purpose of the statute, parties interested in having the court determine major issues that, if resolved, would not dispose of an entire cause of action or an entire affirmative defense, could not look at 437c for a mechanism for judicial resolution of the issue. Before the recent amendment, the only option to adjudicate issues was through a motion *in limine*.

Now, with the adoption of these changes to Section 437c, parties can move for summary adjudication of a legal issue or claim for damages[1] even if that issue does not completely dispose of a cause of action, an affirmative defense, or an issue of duty, according to specified procedures. The amendments establish the following procedure:

(2) This motion may be brought only upon the stipulation of the parties whose claims or defenses are put at issue by the motion and a prior determination and order by the court that the motion will further the interests of judicial economy, by reducing the time to be consumed in trial, or significantly increase the ability of the parties to resolve the case by settlement.

(3) Before a motion may be filed pursuant to this subdivision, the parties shall submit to the court a joint stipulation clearly setting forth the issue or issues to be adjudicated, with a declaration from each stipulating party demonstrating that a ruling on the motion will further the interests of judicial economy by reducing the time to be consumed in trial or significantly increasing the probability of settlement. Within 15 days of the court's receipt of the stipulation and declarations, unless the court has good cause for extending the time in which to make the determination, the court shall notify the submitting parties as to whether the motion may be filed. If the court elects not to allow the filing of the motion, the stipulating parties may request, and upon that request the court shall conduct, an informal conference with the stipulating parties to permit further evaluation of the proposed stipulation; but no further papers may be filed by the parties in support of the proposed motion.

(4) Any motion for summary adjudication brought under this subdivision shall contain the following language, or its substantial equivalent, in the notice of motion:

"This motion is made pursuant to subdivision (s) of Section 437c of the

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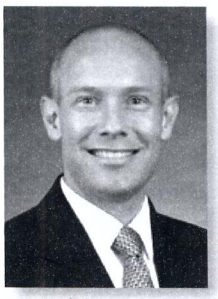
The U.S. Supreme Court Reaffirms The Enforceability of Arbitration Agreements

By Shannon Z. Petersen



In *CompuCredit Corp. v. Greenwood*, ---S.Ct.---, 2012 WL 43514 (U.S. Jan. 10, 2012), the Supreme Court has again enforced an arbitration clause and class action waiver in a consumer contract. In doing so, the Court solidified the holding of its recent landmark decision of *AT&T Mobility v. Concepcion*, 563 U.S. ___, 131 S.Ct. 1740 (2011) that under the Federal Arbitration Act (the "FAA") arbitration agreements must be enforced according to their terms. Indeed, *CompuCredit* demonstrates a growing consensus on this point. While the Court decided *Concepcion* by a 5-4 majority, 8 out of 9 justices formed the majority in *CompuCredit*, with only Justice Ginsberg dissenting. Justice Scalia wrote the majority opinions in both cases.

CompuCredit, however, does not merely repeat *Concepcion*. The Court in *Concepcion* held that the FAA preempts state law refusing to enforce arbitration terms (such as class action waivers) that some argue favor corporate defendants over consumers. The Court in *CompuCredit* expands this by holding that the FAA also trumps federal law implying a statutory right to a civil action in a court of law. Unless some other federal law expressly prohibits arbitration, the FAA requires that arbitration agreements be enforced. As for state law, the FAA preempts any implied or express statutory right to a judicial action.

The class action plaintiffs in *CompuCredit* obtained credit cards through a form application containing an arbitration provision enforceable under the FAA. The plaintiffs sued in federal court in California claiming CompuCredit violated the federal Credit Report Organization Act (the "CROA"), 15 U.S.C. § 1679 *et seq.* by allegedly misrepresenting the credit limits and by claiming that credit cards could be used to rebuild poor credit. CompuCredit moved to compel arbitration and enforce a class action waiver.

The plaintiffs opposed the motion, arguing that the CROA granted them a statutory right to a judicial action. Specifically, the plaintiffs relied on a provision of the CROA stating that consumers: "have a right to sue a credit repair organization that violates" its provisions and that this right cannot be waived. The U.S. District Court of the Northern District of California agreed with the plaintiffs and denied the motion to compel arbitration, holding that "Congress intended claims under the CROA to be non-arbitrable." *CompuCredit*, ---S. Ct.---, 2012 WL 43514 at *2-*3. The Ninth Circuit affirmed, holding that CROA's "right to sue" provision "clearly involves the right to bring an action in a court of law." *Id.*

The U.S. Supreme Court disagreed, and reversed the decision of the Ninth Circuit. The Court began by repeating from *Concepcion* and other precedent that the FAA "establishes a liberal policy favoring arbitration agreements." *Id.* at *3. "It requires courts to enforce agreements to arbitrate according to their terms." *Id.*

The Court then went on to add that this "is the case even when the claims at issue are federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command." *Id.* According to the Supreme Court, the CROA's "right to sue" provision does not override the FAA. Instead, it means only that consumers "have the legal right, enforceable in court, to recover damages from credit report organizations that violate CROA." *Id.* at *5. The parties "remain free to specify" how this legal right can be pursued, including by arbitration. *Id.* at *4. "Because the CROA is silent on whether claims under the Act can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms." *Id.* at *6.

This decision reaches well beyond the CROA. Prior to *Concepcion*, the plaintiffs' class action bar argued that class action waivers are unenforceable as unconscionable under state

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Meet Your New Board Member

Deborah Dixon

I am a fifth year associate at Wingert Grebing Brubaker & Juskie. My practice focuses on litigation, including professional liability defense, employment and business litigation and defending national businesses in an array of claims. I believe my training and background at Wingert Grebing fosters my desire to promote and exemplify integrity and professionalism in our community.

I enjoy maintaining leadership roles within our community and am currently the Co-Chair of the Golf Committee for Lawyers Club, as well as an active member of the Fund for Justice within Lawyers Club. I continue to work with law students as an adjunct professor in the trial skills department at California Western School of Law.

Steven T. Sigler

Stephen Sigler joined Neil Dymott in 1996 and became a shareholder in 2003. Mr. Sigler specializes in civil litigation with an emphasis in professional liability. Mr. Sigler is a member of the California State Bar and is admitted to practice in the U.S. District Court, Southern District of California and the U.S. Court of Appeals for the Ninth Circuit.

Mr. Sigler received his law degree from the University of Kansas where he was also awarded the David H. Fischer Advocacy Award.

Past community involvement has included the San Diego Chapter of the University of Kansas Alumni Association and as a member and chairman of the San Diego Medical Professional Liaison Committee. Mr. Sigler has also provided Pro Bono assistance in matters involving conservator actions and immigration asylum claims. He has spoken to multiple groups and associations on a variety of HIPAA and healthcare legal issues.

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law. Deprived of that argument post-*Concepcion*, they now focus on the argument that plaintiffs have unwaivable statutory rights that trump any agreement under the FAA. In California, for example, plaintiffs argue that the Consumers Legal Remedies Act (the "CLRA") grants an unwaivable statutory right to a class action in a court of law. *See Fisher v. DCH Temecula Imports*, 187 Cal.App.4th 610 (2010); *Gentry v. Superior Court*, 42 Cal.4th 443 (2007). Similarly, plaintiffs also argue that they have an unwaivable right to a public injunction in a court of law under both the CLRA and California's Unfair Competition Law (the "UCL"). *See Cruz v. Pacific Health Systems, Inc.*, 30 Cal. 4th 303, 316 (Cal. 2003); *Broughton v. Cigna Healthplans*, 21 Cal. 4th 1066, 1082 (1999).

The language of the CLRA and the UCL, however, is similar to the language of the CROA. The CLRA states that a consumer "is entitled to bring an action," including a class action, and that any waiver of this right is unenforceable. Similarly, the CLRA and the UCL state that plaintiffs have the right to seek injunctions on behalf of the public. Like the CROA, the CLRA and the UCL do not expressly preclude arbitration. Thus, according to the U.S. Supreme Court, the parties "remain free to specify" how these legal rights can be pursued. *See CompuCredit*, ---S.Ct.---, 2012 WL 43514 at *4. Because the CLRA and the UCL are silent on whether claims under them can proceed in an arbitrable forum, "the FAA requires the arbitration agreement to be enforced according to its terms." *Id.* at *6.

In any event, under *Concepcion* and other law, the FAA preempts any state-law based statutory right to a class action, a public injunction, or a judicial action. *See, e.g., Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003) (holding the FAA preempts any unwaivable statutory right to a class action under the CLRA).

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New *Hanif* Case Applying *Howell*

By: Brittany H. Bartold

On Friday, November 4, 2011, the Fifth District Court of Appeal (Fresno) decided *Sanchez v. Strickland* (F060582) __ Cal.App.4th ___, which discussed and applied two aspects of the California Supreme Court's recent decision in *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541. Interestingly, only one of the holdings is published.

The case arose out of an accident in which the decedent collided with an International truck hauling two semi-trailers. (Slip opn., p. 3.) As a result, the decedent spent four months in the hospital and later died. (*Ibid.*) At trial, the jury awarded the decedent's daughters over $1 million in past medical expenses. (*Id.* at p. 4.) The trial court granted defendants' motion reducing the jury's award of past medical expenses from the amount billed by the medical providers to the amount actually paid to the providers under Medicare and Medi-Cal. (*Id.* at p. 2.) The daughters appealed, contending that the trial court misapplied California's collateral source rule. (*Ibid.*)

In the unpublished portion of the opinion, the court unequivocally extended *Howell* to Medicare. (Slip opn., p. 2.) *Howell* held that a plaintiff may not recover as past medical expenses the difference between (1) the medical providers' full billings for the medical care and services supplied to the plaintiff and (2) the amounts the medical providers have agreed to accept from the plaintiff's private insurer as full payment. (*Ibid.*) The court in *Sanchez* concluded that Howell's holding concerning private insurance applies with equal force to Medicare. (*Ibid.*) While the two-paragraph discussion of this issue is unpublished, this holding is mentioned in the introduction section of the opinion, which is published.

In the published portion of the opinion, the court held that "[w]here a medical provider has (1) rendered medical services to a plaintiff, (2) issued a bill for those services, and (3) subsequently written off a portion of the bill gratuitously, the amount written off constitutes a benefit that may be recovered by the plaintiff under the collateral source rule." (Slip opn., p. 13.) As a result, the court held that the limitation on recovery set forth in *Howell* does not extend to amounts gratuitously written off by a medical provider. (*Id.* at p. 3.)

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