SAN DIEGO DEFENSE LAWYERS

THE UPDATE

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Howell v. Hamiltion Meats & Provisions, Inc.: Supreme Court Limits Recovery of Damages for Past Medical Expense

By Alan E. Greenberg

On August 18, 2011 the California Supreme Court rendered its long-awaited decision in the closely-watched decision in *Howell v. Hamilton Meats & Provisions, Inc.* matter. In a 6-1 opinion authored by Justice Kathryn Werdegar, the Court summarized the issue presented and the Court's rationale as follows:

> "When a tortiously injured person receives medical care for his or her injuries the provider of that care often accepts as full payment, pursuant to a preexisting contract with the injured person's health insurer, an amount less than that stated in the provider's bill. In that circumstance, may the injured person recover from the tortfeasor, as economic damages for past medical expenses, the undiscounted sum stated in the provider's bill but never paid by or on behalf of the injured person? We hold no such recovery is allowed, for the simple reason that the injured plaintiff did not suffer an economic loss in that amount. (See Civ. Code §§ 3281 [damages are awarded to compensate for detriment suffered]. 3282 [detriment is a loss or harm to person or property].)"

The Court emphasized in its opinion that it was not abrogating but simply correctly applying the collateral source rule, which precludes deduction of compensation the plaintiff has received from sources independent of the tortfeaor, from the damages the plaintiff "would otherwise collect from the tortfeasor." *Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal. 3d 1, 6. The Court noted that the rule ensures that the plaintiff in *Howell* would recover in damages the amount her insurer paid for her medical care. In the Court's view, however, the rule had no bearing on amounts that were included in a provider's bill but for which the plaintiff never incurred liability because the provider, by prior agreement, accepted a lesser amount as full payment. The Court stated:

> "Such sums are not damages the plaintiff would otherwise have collected from the defendant. They are neither paid to the providers on the plaintiff's behalf nor paid to the plaintiff in indemnity of his or her expenses. Because they do not represent an economic loss for the plaintiff, they are not recoverable in the first instance. The collateral source rule precludes certain deductions against otherwise recoverable damages, but does not expand the scope of economic damages to include expenses the plaintiff never incurred."

The *Howell* case involved Rebecca Howell, a San Diego woman who was injured when a truck driven by an employee of Hamilton Meats made an illegal U-turn and hit her car in Encinitas, California. She subsequently underwent numerous surgeries, accruing medical bills totaling nearly $190,000. Her health insurance company settled with the hospital for payment of $59,691. The jury awarded that amount as damages for past medical expenses. The judgment was appealed and reversed by the appellate court, which found Howell was entitled to the entire $190,000.

History of the Legal Issue

The California history of the substantive question at issue- whether recovery of medical damages is limited to the amounts providers actually are paid or extends to the amount of their undiscounted bills- begins with *Hanif v. Housing Authority* (1988) 200 Cal. App. 3d 635. The injured plaintiff in *Hanif* was a Medi-Cal recipient, and the amounts Medi-Cal paid for his medical care were, according to his evidence, substantially lower that the "reasonable value" of his treatment (apparently the same as the hospital bill). Although there was no evidence the plaintiff was liable for the difference, the court in a bench trial awarded the plaintiff the larger, "reasonable value" amount. The appellate court held the trial court had over compensated the plaintiff for his past medical expenses: recovery should have been

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Trial Type: Arbitration

Trial Length: 2 days

Verdict/Ruling: Award in favor of Petitioners in the amount of $44,901.80, representing the earnest money deposit, pre-judgment interest, arbitration fees, costs, and $23,375.00 in attorney fees.

Bottom line

Case Title: McFann v. House of Automation

Case Number: Case #: 37-2007-00068272-CU-PL-CTL; Appellate Case #: D056601

Judge:

Presiding Judge: Hon. Patricia Benke; **Assistant Justices**: Hon. Judith Haller and Hon. James McIntyre

Plaintiff's Counsel: Thomas Tosdal, Esq. TOSDAL, SMITH STEINER & WAX

Appellate Specialist: Jon R. Williams, Esq. BOUDREAU WILLIAMS LLP

Defendant's Counsel: Dinah McKean, Steve Kerins, WALSH MCKEAN FURCOLO LLP

Type of Incident/Causes of Action: Personal injury, industrial gate collapse Plaintiff Appeal from Defense Verdict

Verdict/Ruling: Verdict affirmed in full (non-published opinion).

Bottom line

Title of Case: J. Robert O'Connor v. Glassman, M.D.

Case No.: 37-2010-00085422

Judge: Honorable Judith Hayes

Type of Action: Alleged Medical Malpractice in the Diagnosis and Treatment of an Arterial Clot following Cardiac Stenting

Type of Trial: Jury

Trial Length: 6 days

Attorneys for Plaintiff: John Girardi and David Bigelow of Girardi and Keese

Attorneys for Defense: Clark Hudson and Ben Howard of Neil Dymott Frank McFall & Trexler

Injuries: Blocked Popiteal Artery requiring bypass surgery instead of an percutaneous intervention, residual numbness.

Settlement Demands: None.

Settlement Offer: Waiver of costs.

Plaintiff asked the Jury For: Special Damages totaling $30,000 to $85,000; For Non-Economic Damages no specific amount was requested - other than "It should be Substantial".

Verdict: Defense 12-0

Bottom line

Title of Case: Hein v. Kahn, M.D.

Case No.: 37-2009-0010147

Judge: Honorable John Meyer

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Plaintiff and Defense Perspective on: Class Action Waivers After The U.S. Supreme Court Decision In *AT&T v. Concepcion*[1]

By Shannon Petersen, Esq. and Alan Mansfield, Esq.

On April 27, 2011, the U.S. Supreme Court held, in AT&T v. *Concepcion*, that the Federal Arbitration Act "preempts California's rule classifying most collective arbitration waivers in consumer contracts as unconscionable."[2] The Court referred to this rule as the "*Discover Bank* rule," after *Discover Bank v. Superior Court*. [3]

In *Concepcion*, the Ninth Circuit Court of Appeals affirmed a trial court's finding, based on *Discover Bank*, that a class action waiver in a form arbitration agreement was unconscionable because 1) the contract was a contract of adhesion, 2) the damages at issue were small (averaging $30 per class member), and 3) the plaintiff alleged a scheme to cheat consumers out of small sums of money.

The U.S. Supreme Court reversed. Writing for a 5-4 majority (Justice Thomas wrote a concurrence), Justice Scalia concluded state laws that undermine the enforceability of class action waivers in consumer arbitration agreements improperly obstruct the FAA. The following is a defense and plaintiff perspective on the impact of *Concepcion*.

Discover Bank Is Dead: A View From The Defense

Concepcion fundamentally alters the law in California and elsewhere. In addition to *Discover Bank*, the Court's decision also necessarily overturns a host of California cases limiting the enforceability of class action waivers and restricting arbitration agreements on public policy grounds. While the Court's decision applies only to arbitration agreements written under the FAA, it is only a matter of time before form contracts across the country are re-written to provide for arbitration under the FAA and thus benefit from this decision.

According to the Court, the "overarching purpose" of the FAA "is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."[4] This purpose trumps any state law designed to protect class action rights. The Court was unpersuaded by the rationale of *Discover Bank* that enforcing class action waivers in cases involving small sums of money will essentially kill such claims. As the dissent argued: "The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."[5] The majority was untroubled: "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."[6]

As Justice Thomas explained in his concurring opinion, "Contract defenses unrelated to the making of an agreement—such as public policy—could not be the basis for declining to enforce an arbitration clause."[7]

Under *Concepcion*, many other seminal California cases refusing to enforce arbitration clauses now share *Discover Bank*'s death, including *Gentry v. Superior Court*;[8] *Cruz v. Pacific Health Systems, Inc.*;[9] *Broughton v. Cigna Healthplans;*[10] *and Fisher v. DCH Temecula Imports LLC*,[11] among others.

In *Gentry*, the California Supreme Court held that in most cases an arbitration clause cannot be used to waive a statutory right. In *Fisher*, the court relied on *Gentry* and held that there is an unwaivable statutory right to a class action under the Consumers Legal Remedies Act (the CLRA). Both decisions are grounded in state public policy favoring class actions rights over a parties' agreement. Both are now out the window in light of *Concepcion*.

Similarly, in *Broughton* and *Cruz*, the California Supreme Court held that claims for a public injunction under the CLRA and the Unfair Competition Law (the UCL) are not subject to arbitration. The Court in *Concepcion* rejected this approach as well. "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."[12] Indeed, so far, federal district courts applying *Concepcion* have held that the FAA "preempts California's preclusion of public injunctive relief claims from arbitration ...."[13]

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Concepcion *continued from page 8*

Plaintiffs will try to work around *Concepcion*, but they have little room to maneuver. Though the FAA does not preempt "generally applicable contract defenses," such as fraud, duress, or unconscionability, a plaintiff can no longer argue that the class action waiver itself is unconscionable. Plaintiffs will continue to argue procedural unconscionability, but the Supreme Court did not think much of this argument either, holding that "the times in which consumer contracts were anything other than adhesive are long past."[14] Non-negotiable form contracts remain enforceable. For plaintiffs' class action counsel, the sky is indeed falling.

The Sky Is Not Falling: A Plaintiff's Perspective

Public interest groups, business associations and plaintiffs' attorneys have either rejoiced or lamented, depending on their point of view, regarding how *Concepcion* either protects businesses from predatory lawsuits or makes it impossible for consumers to obtain redress from predatory practices. While *Concepcion* holds it is a violation of the FAA to find an arbitration clause with a class action waiver provision in certain types of arbitration clauses per se unconscionable, as the dissent observed, the California Supreme Court had already held as much in *Discover Bank*: "[c]lass action and arbitration waivers are not, in the abstract, exculpatory clauses .... We do not hold that all class action waivers are necessarily unconscionable."[15] Thus, the U.S. Supreme Court may have only overruled that which the California Supreme Court did not say.

The *Concepcion* ruling is also limited in that it focused primarily on attacking class action arbitrations under the FAA, not class action waivers generally. The Court conceded if such a clause had other unconscionable elements or defenses that did not apply only to arbitration, such a clause could be stricken without offending the FAA under its savings clause, which "permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability."[16] *Concepcion* leaves open whether a class action waiver provision in a non-interstate commerce case, or when combined with other unconscionable elements or defenses that are not solely arbitration-related, could still be invalidated, or whether a claim for violation of a federal statute can be preempted by another federal law, since by definition preemption applies to restrict state claims, not federal claims.[17]

The Court also recognized that, "Of course States remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class action-waiver provisions in adhesive arbitration agreements to be highlighted."[18] While this may be an avenue of pursuit in some cases, defendants will counter that this only applies to laws created by legislation, and not judges, and that any such law cannot interfere with arbitration. Defendants will also argue that this footnote must be reconciled with the Court's own precedent in *Doctor's Associates, Inc. v. Casarotto*,[19] holding that the FAA preempted a Montana statute requiring all contracts containing arbitration provisions to provide notice of such on the first page in underlined and capitalized letters.

The U. S. Supreme Court also did not address a number of other key issues, such that significant questions over *Concepcion*'s scope remain. For example, despite the defense's claim to the contrary, *Concepcion* does not alter the rule of *Broughton* or *Cruz* that claims for injunctions under the CLRA or UCL cannot be arbitrated. The decision is not based on unconscionability, but rather because of the need for judicial oversight over a public injunction. In fact, the majority in *Concepcion* cited the same lack of judicial oversight over a class action as one of the reasons for its holding, indicating such reasoning is consistent, rather than in conflict, with those California Supreme Court decisions. Nor did the Court address the holdings of *Gentry*, *Fischer*, *Gutierrez*, and other California cases that an unwaivable statutory right to proceed as a class action exists under certain California statutes. Indeed, the U.S. Supreme Court specifically denied a *certiorari* request in *Gentry* back in 2008. As one California Court of Appeal has recently held (in sidestepping the question of *Gentry*'s continued viability), in *Concepcion* the Court "did not specifically address whether California state law applicable to waivers of statutory representative actions . . . was preempted by the FAA."[20] As further noted in the concurring and dissenting opinion, "With the reasoning of *Discover Bank* having been rejected as being in conflict with the FAA, the same fate may be in store for *Gentry*. Nonetheless . . . *Gentry* remains the binding law of this state which we must follow."[21] The U.S. Supreme Court may address this issue in the next term.[22]

Nor did the Court address class action waivers outside the context of arbitration agreements. California precedent remains unaltered in such circumstances. The Court also did not address the so-called "poison pill" provision contained in many arbitration agreements—that if a class action waiver is found to be unenforceable for any reason, the entire arbitration clause is unenforceable. While arguably such provisions are not enforceable since the focus is on the separate class action waiver provision and not the arbitration provision, it remains to be seen how courts will address these issues. In addition, there is always looming the fundamental question whether the arbitration agreement was induced by fraud, whether a defendant can establish the plaintiff or group of plaintiffs actually agreed to arbitrate the claims at issue in the particular litigation in terms of the scope of the arbitration clause itself, or whether the arbitration clause at issue is contained in all the relevant contracts. In a recent decision, despite *Concepcion*, the court denied a motion to compel arbitration with respect to the claims of one of the plaintiffs on the ground that there was no evidence that plaintiff agreed to arbitrate his claim.[23]

Finally, there is the possibility *Concepcion* will be short-lived. In an ironic twist, since 2002 car dealers have been exempt from arbitration clauses altogether for claims by and against car manufacturers under the "Motor Vehicle Franchise Contract Arbitration Fairness Act."[24] The Act was necessary, according to the legislative history, because of "the disparity in bargaining power between motor vehicle dealers and manufacturers," and because motor vehicle franchise agreements "are inherently coercive and one-sided contracts of adhesion." An argument is being advanced that, if this was the justification for imposing a legislative exemption under the FAA for car dealers, the same protections should apply to all consumers. On May 17, 2011, a trio of Democratic Senators introduced a bill in Congress called the "Federal Arbitration Fairness Act" that would eliminate forced arbitration clauses in consumer and employment contracts. Twin bills were co-sponsored by 62 other Congresspersons and 12 other senators , and are presently in the House and Senate Judiciary Committees awaiting hearing. There are other arbitration exemptions as well that may apply depending on the particular circumstances , such as in the insurance, banking and residential mortgage loan contexts.

Has the sky fallen, just as pundits claimed with passage of the PSLRA,

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Type of Action: Alleged Medical Malpractice, retained foreign body following GYN surgery (Supracervical Hysterectomy).

Trial Length: 4 days

Attorney for Plaintiff: Koorosh Shahrokh

Attorney for Defense: Clark Hudson of Neil Dymott Frank McFall & Trexler

Injuries: Alleged infection due to retained foreign body, development of pelvic inflammatory disease requiring subsequent surgery to remove tubes and ovaries.

Settlement Demands: $59,999, lowered to $29,999 and then lowered to $15,000

Settlement Offer: $8,000

Plaintiff asked the Jury For: "Whatever they believed was reasonable"

Verdict: Defense (1-11 on SOC; 11-1 on causation)

Bottom line

Case Title: Emma Fernandez v. Dennis Eriksen, et al.

Case Number: CIVVS907234

Judge: Hon. Gilbert Ochoa

Plaintiff's Counsel: Jerold Sullivan, Sullivan & Sullivan, Manhattan Beach

Defense Counsel: John T. Farmer, Farmer Case Hack & Fedor

Type of Incident/Claims: Plaintiff contended she had been travelling in the #1 lane of the freeway for several miles and was slowing for traffic ahead, when her vehicle was rear-ended by the defendant's vehicle. The defendant contended plaintiff made an abrupt lane change in front of his vehicle, then braked hard, giving him insufficient time to slow or stop to avoid the collision. Plaintiff had extensive medical treatment, including multiple MRI's, three epidurals and two "percutaneous disc decompression (PDD)" surgeries performed by Dr. Van Vu. Plaintiff's expert, neurosurgeon Jeffrey Gross, MD, testified plaintiff's medicals of approximately $120,000 were reasonable, necessary and related to the accident, and that plaintiff was a candidate for future cervical and lumbar fusions, due to the accident, at a projected cost of $350-400,000. A loss of present and future earnings from a job as a forklift operator at Home Depot, was also alleged. Defense expert, orthopedist Steven Nagleberg, MD, testified that plaintiff should have had medical treatment for a few weeks, valued at around $4,000.

Settlement Demand: CCP Sec. 998 demand for $99,999 before trial; demand of high/low of $500,000/250,000 during trial.

Settlement Offer: CCP Sec. 998 offer of $15,000 before trial.

Trial Type: Jury Trial

Trial Length: 7 days

Verdict: 9-3 defense

Concepcion *continued from page 9*

CAFA and Proposition 64? Likely no—just tell plaintiffs the height of the bar and they'll adjust to hurdle it. Nevertheless, it will likely take years for plaintiffs, defendants, and the courts to sort out the limits of *Concepcion* and its application to established California authority.

Mr. Petersen is a business litigation partner with the law firm of Sheppard, Mullin, Richter & Hampton LLP, where he specializes in class action defense.

Mr. Mansfield is the founder of the Consumer Law Group of California, where he specializes in national consumer class action and public interest litigation.

(Endnotes)

[1] A prior version of this article was published by the Association of Business Trial Lawyers San Diego in the summer 2011 edition of its quarterly report and is being re-printed in part with the permission of the ABTL.

[2] 563 U.S. ___, 131 S.Ct 1740, 1746 (Apr. 27, 2011)

[3] 36 Cal.4th 148 (2005)

[4] *Id.* at 1748.

[5] *Id.* at 1761.

[6] *Id.* at 1753.

[7] *Id.* at 1755.

[8] 42 Cal. 4th 443 (2007) (*cert. den.* 128 S. Ct. 1743, Mar. 31, 2008)

[9] 30 Cal. 4th 303, 316 (2003)

[10] 21 Cal. 4th 1066, 1082 (1999)

[11] 187 Cal. App. 4th 601 (2010)

[12] *Concepcion*,131 S.Ct. at 1747

[13] *See Arellano v. T-Mobile USA, Inc.*, 2011 WL 1842712, at *1-*2 (N.D. Cal. May 16, 2011); *Zarandi v. Alliance Data Systems Corp.*, 2011 WL 1827228, *1-*2 (C.D. Cal. May 9, 2011) (same); *In re Apple*, 2011 WL 2886407, *4 (N.D. Cal. Jul. 19, 2011) (same).

[14] *Id.* at 1750.

[15] 36 Cal.4th at 161-62

[16] *Concepcion* at 1746.

[17] *See* n. xxii, *infra*.

[18] *Id.* at 1750, n.6

[19] 517 U.S. 681 (1996)

[20] *Brown v. Ralphs Grocery Co.*, ---Cal.Rptr.3d---, 2011 WL 2685959, *7 (Cal.App. 2 Dist., July 20, 2011).

[21] *Id.* at 8 (concurring and dissenting).

[22] *Greenwood v. CompuCredit Corp.*, 615 F.3d 1204 (9th. Cir. 2010)(*cert. granted* May 2, 2011)(waiver of statutory right to bring suit that is specifically protected by statute precludes arbitration of claims, disagreeing with two other circuits).

[23] *In re Apple*, 2011 WL 2886407, *5 (N.D. Cal. Jul. 19, 2011); see also *Aho v. AmeriCredit Financial*, 2011 U.S. Dist. LEXIS 80246, *15 (S.D. Cal. Jul. 25, 2011) ("certifying a class, in part, with respect to those who do not have arbitration clauses, but excluding from the class those who do").

[24] 15 U.S.C. § 1221 *et seq.*