Massachusetts Supreme Judicial Court Reconsiders Opinion in Light of *American Express Co. v. Italian Colors Restaurant*

by Jeffrey Kirk*

I. Introduction

On June 12, 2013, the Supreme Judicial Court of Massachusetts issued its second opinion in *Feeney v. Dell Inc.*[1] *(Feeney II),* reassessing its 2009 holding in *Feeney v. Dell Inc.*[2] (*Feeney I*) that an arbitration agreement prohibiting class actions against Dell rendered consumers' claims against the computer manufacturer nonremediable, making the agreement invalid under state law.[3] While the *Feeney I* remand was still pending, the U.S. Supreme Court held in *AT&T Mobility LLC v. Concepcion*[4] (*Concepcion*) that collective-arbitration waivers in consumer contracts generally fall under the auspices of the Federal Arbitration Act ("FAA" or "the Act"), and that the Act supersedes most claims made against such waivers under state law.[5] In *Feeney II*, the Massachusetts court nevertheless found new footing for its original decision by distinguishing its facts from those in *Concepcion*, and ultimately concluded that it would be contrary to Congress's original intent in enacting the FAA to permit arbitration clauses that effectively deny consumers redress against wrongs committed under laws designed to protect them.[6] After its June ruling, however, the court was compelled to revisit the case for a third time (in *Feeney III*[7]) following the U.S. Supreme Court's holding in *American Exp. Co. v. Italian Colors Restaurant*,[8] where it reached well beyond its logic in *Concepcion* to conclude that the FAA does not permit state courts to invalidate class-arbitration waivers on grounds of individual arbitrations being either cost-prohibitive or likely to result in minimal levels of redress, regardless of Congressional intent. On August 1, 2013, the Massachusetts court consequently reversed and remanded *Feeney II*.[9]

II. The Case

Dell and its related subsidiaries and partners sold a variety of computer products to consumers and businesses, including optional hardware service contracts. The two plaintiffs, John A. Feeney and Dedham Health and Athletic Complex, were both Dell customers.[10] Dell collected sales tax on its optional service contracts, and while the facts of the matter remain in dispute, the plaintiffs claimed these taxes were collected in violation of Massachusetts law, because no such tax was actually required by the Commonwealth's taxing authorities.[11]

The terms of both plaintiffs' purchase agreements with Dell mandated that any financial claims against the company not only go through the arbitration process, but also that each be arbitrated on an individual basis, effectively prohibiting them from participating in any class action – either by arbitration or litigation – against Dell.[12] In 2003, the plaintiffs sued Dell on the basis that the contractual terms were unconscionable and in violation of the Massachusetts Consumer Protection Act, which provides for class actions. In response, Dell moved to stay the proceedings and

Although *Italian Colors* provides another hurdle for state courts, it is likely that they will continue to devise new paths around the holding.

compel arbitration pursuant to the contractual terms and conditions as well as the FAA; a Superior Court judge granted Dell's motion. After the plaintiffs' subsequent appeals failed, they each filed arbitration claims "under protest," and their requests for class certification were denied by the National Arbitration Forum on the basis of class actions being prohibited by the plain language of their Dell contracts.

In 2008, the plaintiffs moved the Superior Court to vacate the arbitration decision, and also to revisit its earlier decision allowing Dell's motion to compel arbitration.[13] While their lower-court action once again failed, the Massachusetts Supreme Judicial Court granted their application for direct appellate review, and in the subsequent *Feeney I* holding, the court reversed the mandatory arbitration order and invalidated the arbitration clause on the basis that a class-action prohibition "contravenes Massachusetts public policy."[14] While the case was on remand, the U.S. Supreme Court issued its decision in *Concepcion*. The Court's opinion negated much of the *Feeney I* decision's legal underpinnings by requiring that arbitration agreements be enforced as written, even if they directly exclude class actions.[15]

Confronted with the *Concepcion* hurdle, the *Feeney II* court still concluded that Dell's class-action prohibition could nevertheless be defeated because, unlike the *Concepcion* case, the *Feeney* appellants had no viable means of obtaining adequate relief through individual arbitration.[16] In *Concepcion*, the arbitration clause in the plaintiffs' contract with AT&T stated that the company, in the event that an arbitrator granted a customer an award greater than AT&T's final written settlement offer, would be required to pay the customer a minimum recovery of $7,500 plus twice the customer's total attorney fees. The Court further noted that this amount would almost certainly be more than the plaintiffs could recover in a class action.[17] In contrast, the *Feeney* contracts had no such stipulation, resulting in the plaintiffs' potential recovery amounts being limited to the $13.65 and $215.55 in sales taxes they had respectively paid under their Dell service contracts.[18]

Shortly after the Massachusetts court's decision in *Feeney II,* however, the U.S. Supreme Court created yet another hurdle with its decision in *American Exp. Co. v. Italian Colors Restaurant. Italian Colors* effectively abrogated the Massachusetts court's *Feeney II's* rationale by holding that an arbitration class action waiver is enforceable, even if the consequence is to deny the consumer an effective remedy. Based on *Italian Colors*, the Massachusetts court granted Dell's petition for rehearing.[19] In *Feeney III*, the court concluded its earlier holding was no longer viable in light of the Supreme Court's explicit holding that the matter of individual arbitration expenses being cost-prohibitive did not, in itself, eliminate the *right to pursue* such a remedy, whether under state or federal law.[20]

III. Existing Law/Legal Background

The FAA has been a tenet of American jurisprudence for nearly 90 years, with dozens of Supreme Court cases on the subject. The Court has made it clear that the Act is broadly applicable under both federal and state laws, and that there is a strong national policy favoring arbitration. Some courts nevertheless continue to attempt to circumvent the enforcement of arbitration clauses,, finding ways to avoid arbitration and allow the parties to use a class action and judicial recourse. The Supreme Court's decision in *Concepcion*, invalidating California's attempt to declare prohibitions on class actions unconscionable, failed to provide substantive elucidation on the matter of class-action arbitration, and spurred appellate- and state-level courts into devising myriad means of allowing class actions to proceed.

Feeney II is only one of many such rulings, and they will likely continue unless and until the Supreme Court elects to narrow the parameters of both *Concepcion* and *Italian Colors* vis-à-vis prohibitions on class-action waivers in consumer adhesion contracts. Although *Italian Colors* provides another hurdle for state courts, it is likely that they will continue to devise new paths around the holding; indeed, in *Feeney III* the Massachusetts court stated that "the plaintiffs raise[d] several alternative grounds for denying the defendants' renewed motion," and that the court "decide[d] … only that the class waiver may not be invalidated on the ground that it effectively denies the plaintiffs a remedy. We take no view on the other issues."[21] This statement appears to be an implicit invitation for an appeal on alternate grounds not abrogated by *Italian Colors.*

A number of courts have interpreted *Concepcion* in light of its explicit statement that certain arbitration agreements can still be invalidated by "generally applicable contract defenses" such as fraud, duress, and unconscionability,[22] and *Italian Colors* contains no language contrary to this view. For example, in *Noohi v. Toll Bros., Inc.*, the Fourth Circuit held that an arbitration agreement was unenforceable under Maryland law owing to a lack of consideration, and that the FAA – even after taking *Concepcion* into account – did not preempt the state-law requirement that arbitration provisions be supported by consideration discrete from the underlying contract.[23] In *Gandee v. LDL Freedom Enterprises, Inc.*, the Washington Supreme Court held that multiple provisions in a debt adjustment contract were substantively unconscionable, and that nothing in the *Concepcion* holding preempted this conclusion.[24] Similarly, in *Samaniego v. Empire Today LLC*, California's Second Court of Appeal held that a contractual provision mandating arbitration of claims asserting labor-law violations was both procedurally and substantively unconscionable, and that the FAA did not preempt the state's existing unconscionability doctrine regarding such claims.[25]

Other state courts have fully skirted *Concepcion* by asserting that it is inapplicable to cases at hand. In *Brown v. Ralphs Grocery Co.*, for example, California's Second Court of Appeal held that the FAA governs only private arbitrations, and thus the appellant's "public" action under the state's Private Attorney General Act – which allows actions to recover civil penalties for violations of California's labor code – was permissible because the Act creates a statutory right for penalties "that otherwise would be sought by state labor law enforcement agencies," and individuals suing under it stand as "proxies" for these agencies.[26]

Concepcion has also proven challenging in cases where adhering to the Court's interpretation of the FAA would require violating another federal law. In *In re American Express Merchants' Litigation*, for example, the Second Circuit held that adherence to a mandatory arbitration clause containing a class-action waiver would entirely preclude the appellants' ability to pursue their antitrust claims under the Sherman Act.[27] Also, in *Sutherland v. Ernst & Young LLP*, the U.S. District Court for the Southern District of New York held that the plaintiff could not vindicate her rights under the Fair Labor Standards Act (FLSA) absent collective action, and that the class-action waiver in her arbitration agreement with the defendant was thus unenforceable under both the FLSA and New York law.[28] Further, the National Labor Relations Board was confronted with the matter in a case against D.R. Horton, a home building company.[29] The Board concluded

that the company's blanket restriction on employee class actions, for arbitration and litigation, violated employees' rights under the National Labor Relations Act to engage in concerted action for mutual protection.[30]

Italian Colors, however, has called the future relevance of each of these holdings into question. Under its rationale, the FAA does not permit courts or administrative agencies to invalidate class-arbitration waivers on cost-prohibition grounds *even if* such a waiver would in practice wholly preclude a plaintiff's ability to pursue claims under federal laws such as the Sherman Act and Clayton Act.[31] In effect, the Court has stated that the arbitration mandates of the FAA trump both the language and Congressional intent of extant and/or subsequent federal law, an apparent paradox that may not be resolved absent Congressional intervention.

IV. Conclusion

Even though *Feeney II* has been reversed, numerous post-*Concepcion* holdings remain standing in which courts have concluded that plaintiffs merit relief on grounds not restricted by the *Concepcion* decision, most notably the well-established contractual defense of unconscionability. *Italian Colors* does not alter any of the earlier jurisprudential calculus in this regard. Many of the class-arbitration cases in which plaintiffs have won favorable rulings have transpired in traditionally pro-consumer areas of the country such as California and Massachusetts. As of yet, there is no consensus on the extent to which either *Concepcion* or *Italian Colors* can be circumvented, rationalized, or altogether ignored. Still, *Italian Colors* has upset earlier post-*Concepcion* rulings in which class-arbitration prohibitions were invalidated on grounds of individual arbitration costs precluding vindication of federal statutory rights, as clearly indicated in *Feeney III*, and it remains to be seen how other courts will reconcile *Italian Colors* with their previous decisions once they are challenged, a happenstance that at this point appears to be inevitable.

*Jeffrey Kirk is a third-year student at the University of Houston Law Center.

---

1 *Feeney v. Dell Inc.*, 465 Mass. 470, 989 N.E.2d 439 (2013) (*Feeney II)*.
2 *Feeney v. Dell Inc.*, 454 Mass. 192, 908 N.E.2d 753 (2009) (*Feeney I)*.
3 *Feeney II,* 465 Mass. 470, 471, 989 N.E.2d 439, 440-41.
4 *AT&T Mobility LLC v. Concepcion*, 131 S.Ct 1740 (2011).
5 *Id.* at 1750-51.
6 *Feeney II,* 465 Mass. at 507, 989 N.E.2d at 464.
7 *Feeney v. Dell Inc.*, 466 Mass. 1001, 2013 WL 3929051 (Aug. 1, 2013) (*Feeney III)*.
8 *American Exp. Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304, 2308-12 (2013).
9 *Feeney III*, 466 Mass. at 1001.
10 *Feeney I,* 454 Mass. at 194-95, 908 N.E.2d at 753.
11 *Id.* at 194-96, 908 N.E.2d 753.
12 *Id.* at 195, 908 N.E.2d 753.
13 *Id.* at 198, 908 N.E.2d 753.
14 *Id.* at 199-200, 908 N.E.2d 753.
15 *Concepcion*, 131 S.Ct at 1750-51.
16 *Feeney II*, 465 Mass. at 472, 989 N.E.2d at 441.
17 *Concepcion*, 131 S.Ct at 1745.
18 *Feeney II*, 465 Mass. at 503, 989 N.E.2d at 462.
19 *Feeney III*, 466 Mass. at 1001.
20 *Id*. at 1002.
21 *Id.* at 1003.
22 *Concepcion*, 131 S.Ct at 1746.
23 *Noohi v. Toll Bros., Inc.*, 708 F.3d 599, 602 (4th Cir. 2013).
24 *Gandee v. LDL Freedom Enterprises, Inc.*, 176 Wash.2d 598, 601, 293 P.3d 1197 (2013).
25 *Samaniego v. Empire Today LLC*, 205 Cal.App.4th 1138, 1141, 140 Cal.Rptr.4d 492 (2012).
26 *Brown v. Ralphs Grocery Co.*, 197 Cal.App.4th 489, 500, 128 Cal. Rptr.3d 854 (2011) (citing *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court*, 46 Cal.4th 993, 1003, 95 Cal.Rptr.3d 605, 209 P.3d 937 (2009)).
27 *In re American Express Merchants' Litigation*, 667 F.3d 204, 206 (2d Cir. 2012).
28 *Sutherland v. Ernst & Young LLP*, 847 F.Supp.2d 528, 533 (S.D.N.Y. 2012).
29 *In re D.R. Horton, Inc.*, 357 NLRB No. 184, 192 L.R.R.M. (BNA) 1137, 2012 WL 36274 (2012).
30 *Id*., 2012 WL 36274 at *1.
31 *Italian Colors*, 133 S.Ct. at 2308-12.