IN THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

Case No. 09-10612-~~H~~ CC

JAMES PENDERGAST
Individually and on behalf
of all others similarly situated,

Appellant,

v.

SPRINT NEXTEL CORPORATION,
SPRINT SOLUTIONS, INC., and
SPRINT SPECTRUM, L.P.,

Appellees.
_____/

APPELLANT'S MOTION TO REMAND FOR FURTHER PROCEEEDINGS OR TO ALLOW SUPPLEMENTAL BRIEFING

Appellant, James Pendergast, in light of the Florida Supreme Court's decision to decline jurisdiction in this case as a result of *AT&T Mobility, LLC v. Concepcion,* 131 S.Ct. 1740 (2011), moves this Court to remand this case to the District Court for further proceedings or to allow supplemental briefing on the issue of the Plaintiff's ability to vindicate his statutory rights, and as grounds therefor would state as follows:

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1. This Court certified four questions to the Florida Supreme Court in early 2010. Oral argument took place in February, 2011. Subsequently, the U.S. Supreme Court decided *AT&T Mobility, LLC v. Concepcion,* 131 S.Ct. 1740 (2011). As a result of that decision, Sprint moved this Court to withdraw the certified questions. This Court declined to do so, but suggested that the Florida Supreme Court was free to decline to answer the certified questions.

2. On June 17, 2012, the Florida Supreme Court granted Sprint's motion to decline jurisdiction and return the case to this Court.

3. We have no doubt that Sprint will now be asking for a summary affirmance of the District Court's opinion based on *Concepcion,* and based on language in this Court's order suggesting that Concepcion had at least partially resolved some of the certified questions. However, that order was issued on June 17, 2011, approximately one month before this Court's opinion in *Cruz v. Cingular Wireless, LLC,* 648 F.3d 1205(11th Cir. 2011).

4. In *Cruz,* this Court acknowledged that it did not reach the open questions 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. *See e.g., Mitsubishi Motors Corp. v. Solar,* 473 U.S. 614 (1985)" and whether "the

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Mitsubishi vindication principle applies to state as well as federal statutory causes of action. See *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 79, 81–83 (D.C.Cir.2005) (Roberts, J.)." *Cruz* at 1215. This Court declined to address these questions because the arbitration clause at issue in *Cruz* was the very same arbitration clause that was approved by the U.S. Supreme Court in *Concepcion.*

5. As to the first question above – whether, after Concepcion, "an arbitration agreement may [still] be invalidated on public policy grounds where it effectively prevents the claimant from vindicating her statutory cause of action," we don't believe this is actually an open question. First, the United States Supreme Court does not reverse itself by implication, so *Mitsubishi Motors* and its progeny remain good law.[1]

6. Second, AT&T itself acknowledged that it was not seeking to overturn *Mitsubishi Motors* and its progeny:

> Under our interpretation, courts could invalidate arbitration agreements that select procedures that are so egregiously unfair as to

[1] See *Agostini v. Felton* (1997) 521 U.S. 203, 237 (lower courts may not "conclude our more recent cases have, by implication, overruled an earlier precedent" and must "leav[e] to this Court the prerogative of overruling its own decisions"); see also *Shalala v. Ill. Council on Long Term Care* (2000) 529 U.S. 1, 18 ("This Court does not normally overturn, or so dramatically limit, earlier authority sub silentio.").

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> run afoul of generally applicable state-law unconscionability doctrine. *And courts also could invalidate agreements requiring bilateral arbitration upon finding that a customer is unable to vindicate her rights on an individual basis.*

(AT&T's Reply Brief, at 1)(emphasis supplied)[2]

7. Finally, numerous courts, including the Second Circuit in *In re American Exp. Merchants Litig.*, 667 F.3d 204, 212 (2d Cir. 2012) (hereinafter "*In re AmEx -III*"), have reiterated the viability of the doctrine. The Second Circuit held that *Concepcion* does not apply in circumstances where the plaintiffs are able to demonstrate, as a matter of fact, that the "practical effect of enforcement" would be to "preclude their ability to vindicate" their substantive rights. *In re AmEx -III*, at 212. See also *Sutherland v. Ernst & Young LLP*, 2012 WL 130420 (S.D.N.Y. Jan. 17, 2012); *AT&T Mobility, LLC v. Fisher,* 2011 WL 5169349 (D. Md. 2011); *Lewis v. UBS Fin. Servs. Inc.,* 818 F.Supp.2d 1161 (N.D.Cal. 2011); *Chen-Oster v. Goldman, Sachs & Co.,* 2011 WL 2671813, (S.D.N.Y. July 7, 2011); *Torrence v. Nationwide Budget Finance*, 2012 WL 335947 (N.C. Super. Ct. Jan. 25, 2012); and *Feeney v. Dell Inc.*, 2011 WL 5127806 (Mass. Super. 2011).

8. Additionally, the Second Circuit flatly rejected Sprint's earlier argument that *Concepcion* creates a bright line rule of enforceability of class action

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[2] AT&T's *Concepcion* briefs can be viewed here: http://www.appellate. net/briefs

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waivers in arbitration clauses. *In re AmEx –III.* at 212 (2d Cir. 2012) (*Concepcion* does not "require that all class-action waivers be deemed per se enforceable.")

9. On the second question, whether the vindication of rights analysis applies to state statutory causes of action, there is a split at the Circuit Court level, as a result of *Kilgore v. Key Bank Nat'l Assoc'n*, 673 F.3d 947 (9th Cir. 2012). But *Kilgore* runs afoul of U.S. Supreme Court precedent on the issue. First, none of *Mitsubishi Motors* and its progeny limit the applicability of the vindication of rights analysis to federal statutory claims. Indeed, in *Preston v. Ferrer*, 552 U.S. 346 (2008), the Supreme Court held that an agreement to arbitrate could not deprive a plaintiff of his substantive rights under a state statute: "'By 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 ... forum.' *Mitsubishi Motors Corp.*, 473 U.S., at 628, 105 S.Ct. 3346. So here, Ferrer relinquishes no substantive rights the TAA or other California law may accord him." *Preston* at 359. The First Circuit, and, as noted by this Court in *Cruz*, Chief Justice Roberts while with the D.C. Circuit, have both previously applied the vindication of rights analysis to state statutory claims. See *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006) and *Booker v. Robert Half Intl, Inc.*, 413 F.3d 77 (D.C. Cir. 2005) This Court should take this opportunity to weigh in on this important question.

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10. As a final matter, there is no doubt Plaintiff has provided this Court with a factual record on which these important questions can be answered. First, Sprint's arbitration agreement contains none of the consumer friendly elements of the AT&T clause that proved dispositive in *Concepcion* and *Cruz*. Second, the Plaintiff presented an undisputed record below demonstrating that he could not vindicate his rights in individual arbitration. We remind this Court that the District Court even reached such a conclusion, albeit in a footnote: It stated, "a consumer who suffers $20.00 in damages may have to forego his claim for lack of adequate representation, regardless of the probability of victory or relative merits to the dispute. Clearly, defendants, such as Sprint, should not be permitted to insulate themselves from meritorious consumer lawsuits, especially given the public utility nature of wireless service." Docket 60, p.6, FN8.

11. Mr. Pendergast, and the millions of wronged consumers he seeks to represent, deserve the opportunity to be heard on this very important issue. Denying them this opportunity will assuredly result in their claims going unresolved, unlike those of the Concepcions'. *Concepcion* at 1753.

WHERFORE, Appellant, James Pendergast respectfully requests this Court to enter an Order remanding this case to the District Court for or authorizing supplemental briefing on the issue of whether the vindication of rights analysis set forth in *Mitsubishi*

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Motors and its progeny applies to Mr. Pendergast's state statutory claim and if so, whether he has established through record evidence that he is unable to vindicate his rights in individual arbitration.

Respectfully submitted,

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Certificate of Service

The undersigned certifies that a copy hereof has been furnished to the persons on the attached Service List on this 26 day of **July, 2012**.

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