



Did Premerger  
Notification Just Get  
Easier? It Depends  
on Your Perspective  
Page 5

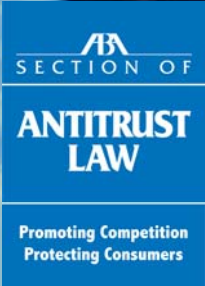


Profit Sharing  
Agreements and the  
Non-Statutory Labor  
Exemption in *State  
of California v.  
Safeway*  
Page 10



How to Ask  
Congress for a  
Favor  
Page 15

# The Antitrust Counselor



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## Reevaluating Individual Arbitration of Antitrust Claims After *AT&T Mobility v. Concepcion*

By Joel M. Cohen and Rosanna G. Lipscomb

The Supreme Court rendered two decisions in 2011 that may impact the ability of plaintiffs and their counsel to assert claims—including antitrust claims—on behalf of a class. The case that received the most attention, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), clarified and sharpened the application of traditional Rule 23 standards. While *Wal-Mart* may impact class certification decisions in antitrust cases under Rule 23, the Court's decision in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), has the potential to impact whether certain kinds of antitrust cases may no longer be heard by the federal courts altogether.<sup>1</sup>

*Concepcion* confirmed the enforceability of arbitration provisions in standard-form consumer contracts that require individual arbitration of all disputes, precluding both class action litigation and class action arbitration. *Concepcion* suggests a potentially significant role for arbitration provisions—in lieu of traditional Rule 23 concepts—to determine the size, scope, and location of disputes that might otherwise have been brought as class actions in federal court.

*Concepcion* has led at least one court—the Second Circuit—to request briefing on whether it should reconsider a prior decision nullifying an arbitration provision in an antitrust class action. Other courts will likely be asked to consider the issue in similar cases. These matters should be watched closely by companies that include arbitration provisions in their customer agreements or who may seek to include them in the wake of *Concepcion*.

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<sup>1</sup> A third class action-related decision, *Erica P. John Fund, Inc. v. Halliburton Co.*, No. 09-1403, slip op (June 6, 2011), involved questions regarding the certification of a class in the context of a securities fraud action.

<sup>1</sup> Visit our committee's website at <http://apps.americanbar.org/dch/committee.cfm?com=AT304000>

It is worth noting, however, that individual antitrust arbitrations can, in certain circumstances, create risks and complications. Recent attempts by plaintiff lawyers to initiate multiple arbitration-based challenges to the proposed AT&T/T-Mobile transaction illustrate this point.<sup>2</sup>

## Background

In *Concepcion*, the plaintiffs alleged that their cell phone service provider, AT&T, engaged in false advertising and fraud by charging sales tax on phones that were advertised as free. The plaintiffs' claims were later consolidated in a putative class action.

AT&T moved to compel arbitration of the claims because the plaintiffs' contracts with AT&T mandated arbitration of all disputes and further required that claims be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding."<sup>3</sup> The district court<sup>4</sup> and the Ninth Circuit Court of Appeals,<sup>5</sup> denied AT&T's motion and held that the class action waiver provision in AT&T's arbitration clause was "unconscionable," and therefore unenforceable, under the California Supreme Court's decision in *Discover Bank v. Sup. Court*, 36 Cal. 4th 148 (2005). *Discover Bank* held that class action waiver provisions are unconscionable when "[the] 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 . . . ."<sup>6</sup>

The Supreme Court reversed. The Court held that the California state law rule was preempted by the Federal Arbitration Act.<sup>7</sup> In so holding, the Court noted that the "principal purpose" of the FAA is to "ensur[e] that private arbitration agreements are enforced according to their terms" and emphasized that "[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute."<sup>8</sup>

The Court also held that requiring class arbitration where the parties have not agreed to it "interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."<sup>9</sup> Moreover, from the Court's perspective "class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."<sup>10</sup> At the same time, class arbitration "greatly increases risks to defendants" because the "absence of multilayered review makes it more likely that errors will go uncorrected."<sup>11</sup>

In responding to the dissent's assertion "that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system," the Court explained that, even if it is desirable for unrelated reasons, "States cannot require a procedure that is inconsistent with the FAA . . . ."<sup>12</sup> Finally, the majority noted that where a litigant fares better in individual arbitration than they would as a member of a class in court, the "[arbitration] scheme [is likely] sufficient to provide incentive for the individual prosecution of meritorious claims."<sup>13</sup>

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<sup>2</sup> *Law Firm Strikes Back at AT&T Over Merger*, Reuters (July 27, 2011), <http://www.reuters.com/article/2011/07/27/us-att-merger-arbitration-idUSTRE76Q7F320110727>.

<sup>3</sup> *Concepcion*, 131 S.Ct. at 1743 (internal quotations and citation omitted).

<sup>4</sup> *Laster v. T-Mobile USA, Inc.*, 2008 U.S. Dist. LEXIS 103712 (S.D. Cal., Aug. 11, 2008).

<sup>5</sup> *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009).

<sup>6</sup> 36 Cal. 4th at 162-63.

<sup>7</sup> *Concepcion*, 131 S. Ct. at 1743.

<sup>8</sup> *Id.* at 1749.

<sup>9</sup> *Id.* at 1748.

<sup>10</sup> *Id.* at 1751.

<sup>11</sup> *Id.* at 1752.

<sup>12</sup> *Id.* at 1753.

<sup>13</sup> *Id.*

## Potential Application of *Concepcion* in Antitrust Litigation

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636–37 (1985), the Supreme Court concluded that antitrust claims arising from international transactions are suitable for arbitration. The Court expressed the view that federal statutory claims may be arbitrated if “the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum.”<sup>14</sup> The rationale of *Mitsubishi* has been extended to domestic antitrust disputes.<sup>15</sup>

Prior to *Concepcion*, several courts had considered the enforceability of arbitration provisions that prohibited class action litigation or arbitration in the context of federal antitrust claims. In *In re American Express Merchants’ Litig.*, 554 F.3d 300 (2d Cir. 2009), *vacated and remanded*, 130 S. Ct. 2401 (2010), *on remand*, 634 F.3d 187 (2d Cir. 2011), American Express moved to compel individual arbitration of plaintiffs’ Section 1 tying claims, pursuant to an arbitration agreement which contained a class action waiver.<sup>16</sup> The Second Circuit held that the class action waiver was unenforceable because it effectively would have precluded the plaintiffs in that case from vindicating their statutory rights under the Sherman Act.<sup>17</sup> The First Circuit reached a similar conclusion in *Kristian v. Comcast*, 446 F.3d 25 (1st Cir. 2006).

On the other hand, the Fourth Circuit in *In re Cotton Yarn Antitrust Litigation*, 505 F.3d 274 (4th Cir. 2007), declined to invalidate an arbitration provision which effectively prohibited multiple plaintiffs from combining their antitrust claims in a single proceeding. The court recognized that “requiring each plaintiff to proceed separately against each defendant will entail additional expense,” but concluded that this “does not necessarily mean that the party cannot effectively vindicate its statutory rights through arbitration.”<sup>18</sup> The court held that there was insufficient evidence in the record to conclude that enforcing the individual arbitration provision would prevent plaintiffs from effectively vindicating their statutory rights.

Although *Concepcion* was not an antitrust case, it raises the question of whether the analysis applied in the foregoing decisions—that is, a case-by-case assessment of whether a contractual prohibition against class-wide prosecution of claims effectively prevents plaintiffs from vindicating their statutory rights—is consistent with the Federal Arbitration Act. To the extent the issue involves a balancing of federal policies, *Concepcion* certainly adds weight to the arbitration side of the scale. Moreover, the Court expounded at length regarding the potential benefits of class action waiver provisions in promoting the core benefits of arbitration that the Federal Arbitration Act were intended to foster, and dismissed the concern that class proceedings may be “necessary to prosecute small-dollar claims that might otherwise slip through the legal system.” In the end, the Court concluded that the Act “prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of class-wide arbitration procedures.” Defendants will argue that the same result should apply when the underlying substantive claims arise under federal law.

On the other side, antitrust plaintiffs presumably will seek to distinguish *Concepcion* on the ground that it did not involve the enforcement of federal statutory rights, and argue that the reasoning of cases such as *American Express* remains valid to the extent plaintiffs can establish that they will be unable to vindicate their statutory rights through individual arbitrations.

Given the importance of the issue in the many industries in which consumer arbitration clauses are or could be in use, it is likely that other courts—and perhaps ultimately the Supreme Court—will be asked to address these questions as well.

<sup>14</sup> *Id.* at 637.

<sup>15</sup> See, e.g., *Kotam Elecs. v. JBL Consumer Prods.*, 93 F.3d 724 (11th Cir. 1996) (“Today we hold that antitrust disputes in the domestic context are arbitrable as well.”).

<sup>16</sup> The court’s initial decision in 2009 was vacated and remanded for reconsideration in light of *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010), which held that an arbitration panel could not impose a class arbitration procedure on parties that had not agreed to such a procedure in their arbitration agreement. The Second Circuit found that *Stolt-Nielsen* did not affect its conclusion that the class action waiver provisions were unenforceable.

<sup>17</sup> See *In re American Express Merchants’ Litig.*, 634 F.3d at 197-98

<sup>18</sup> *In re Cotton Yard Antitrust Litig.*, 505 F.3d at 285.

On May 9, 2011, the Second Circuit issued an order requiring the parties in *American Express* to submit letter briefs limited to the issue of how *Concepcion* applies to the case.<sup>19</sup> The parties submitted briefs in early June, and on August 1, 2011, the Second Circuit indicated that it would consider rehearing the case.<sup>20</sup> Given the importance of the issue in the many industries in which consumer arbitration clauses are or could be in use, it is likely that other courts—and perhaps ultimately the Supreme Court—will be asked to address these questions as well.

## Conclusion

*Concepcion* does not spell the end of antitrust class actions. It may, however, suggest a potential avenue for diverting certain kinds of antitrust claims for resolution in individual arbitrations. Companies that have or could have arbitration provisions in their customer agreements should keep a close watch on how *Concepcion* is interpreted and applied in antitrust matters, as the law in this area continues to evolve.



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<sup>19</sup> Order at 1, *In re American Express Merchants' Litig.*, No. 06.1871-cv (2d Cir. May 9, 2011).

<sup>20</sup> Order at 1, *In re American Express Merchants' Litig.*, No. 06.1871-cv (2d Cir. Aug. 1, 2011).

4 Visit our committee's website at <http://apps.americanbar.org/dch/committee.cfm?com=AT304000>