VALIDITY OF CLASS ACTION WAIVERS IN THE ANTITRUST CONTEXT POST-*CONCEPCION*

The Supreme Court's April 2011 decision in *AT&T Mobility v. Concepcion* is having a still uncertain effect on the ability of companies to enforce waivers of class-wide arbitration procedures for federal antitrust claims by way of agreements contained in customer adhesion contracts. In *Concepcion*, the Supreme Court held that the Federal Arbitration Act ("FAA") preempted certain state law claims and consequently it enforced waivers of rights to class-wide arbitration procedures. Since *Concepcion*, several recent federal district court cases have relied upon *Concepcion* to uphold class action arbitration waivers in the context of federal antitrust claims. However, just last week the Second Circuit ruled that a class-wide arbitration waiver for a federal antitrust claim remained impermissible after *Concepcion*, because the plaintiffs had presented adequate evidence showing that costs (particularly expert witness fees) would prohibit them from vindicating their rights under federal antitrust law if compelled to arbitrate individually.

Concepcion. In April 2011, the Supreme Court upheld a class action arbitration waiver, ruling 5-4 that the FAA preempted California's "*Discover Bank* Rule." That rule had disallowed as "unconscionable" class arbitration waivers in the context of certain consumer arbitration agreements.[1] In doing so, the Court concluded that "class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA."[2] The Court characterized arbitration generally as "poorly suited to the higher stakes of class litigation."[3] In response to the dissent's concerns that aggrieved parties would be unlikely individually to arbitrate low dollar value claims, the Court highlighted the generosity of the arbitration agreement at issue, which provided that customers would receive a minimum of $7,500 and twice their attorneys' fees if they were granted an award in arbitration greater than the last settlement amount offered by AT&T.[4]

Application of *Concepcion* to Federal Antitrust Claims. Prior to the Supreme Court's ruling in *Concepcion*, the First, Second, and Fourth Circuits issued decisions addressing the tension between the FAA and the federal antitrust statutes in the area of class action arbitration waivers.[5] Those courts focused on whether claimants would be able to vindicate their statutory rights under the federal antitrust laws if compelled to proceed individually in arbitration due to a class action

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1 *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

2 *Id.* at 1751.

3 *Id.* at 1752.

4 *Id.* at 1753.

5 *See Kristian v. Comcast*, 446 F.3d 25 (1st Cir. 2006); *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); *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274 (4th Cir. 2007).

arbitration waiver. The Fourth Circuit held that an arbitration agreement prohibiting joinder of both defendants and plaintiffs was permissible in a price fixing case because the claimants had not proved that separately arbitrating their claims would entail prohibitively high costs.[6] In so holding, the Fourth Circuit cited prior Supreme Court precedent indicating that arbitral tribunals were appropriate venues for antitrust claims if a claimant were allowed to "vindicate his or her statutory cause of action in the arbitral forum," even when the claim involved a statute "designed to further important social policies."[7]

In contrast, also prior to *Concepcion*, the First and Second Circuits held certain class action waivers to be impermissible as applied to antitrust claims. The First Circuit in 2006 recognized that a waiver of class action arbitration was not in direct conflict with the antitrust statutes, which do not mention class actions, but still held a class action waiver to be invalid primarily because the cost of bringing individual arbitration actions would be so prohibitive as to deprive the claimants of their federal statutory rights.[8]

Prior to *Concepcion*, the Second Circuit held a class action waiver in the antitrust context to be unenforceable for reasons similar to those discussed by the First Circuit in its 2006 opinion.[9] The Second Circuit issued this decision, remanding the case to the District Court for the Southern District of New York, shortly before the Supreme Court's decision in *Concepcion.* After the Supreme Court handed down its *Concepcion* decision, the Second Circuit asked for additional briefing on how *Concepcion* affected the case.[10] The plaintiffs argued that the class action waiver should remain invalid because the case involved the vindication of federal statutory rights, not the state preemption doctrine at issue in *Concepcion*, which was based on a broad common law rule that interfered with the goals of the FAA. In arguing for validity of the class action arbitration waiver, the defendants pointed to the Supreme Court's strong language in *Concepcion* disfavoring class arbitration, including its statement that class arbitration "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA," as well as the Court's disapproval of the prohibitive costs rationale used by the Second Circuit in finding the class action waiver unenforceable.

In a February 1, 2012 opinion, the Second Circuit found that *Concepcion* did not affect its initial reasoning because *Concepcion* addressed FAA preemption of state law, not the tension between the FAA and a federal statutory right.[11] Relying heavily on pre-*Concepcion* Supreme Court precedent recognizing that "the class action device is the only economically rational alternative when a large group of individuals or entities has suffered an alleged wrong, but the damages due to any single individual or entity are too small to justify bringing an individual action," the Second Circuit found that plaintiffs had established as a matter of law that the costs of individually arbitrating the claims at issue would prohibit them from vindicating their statutory

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6 *In re Cotton Yarn Antitrust Litig.*, 505 F.3d at 293.

7 *Id.* at 282-283 (quoting *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000)).

8 *Kristian v. Comcast,* 446 F.3d at 54, 61.

9 *In re American Express Merchants' Litig.*, 634 F.3d at 198-199.

10 Order at 1, *In re American Express Merchants' Litig.*, No. 06.1781-cv (2d Cir. May 9, 2011).

11 Opinion at 14, *In re American Express Merchants' Litig.*, No. 06.1781-cv (2d Cir. Feb. 1, 2012).

rights under federal antitrust law.[12] Finding that the agreements at issue did not provide for class arbitration, the Second Circuit remanded for class proceedings in the district court.[13]

Prior to the Second Circuit's recent decision, several federal district courts enforced class action arbitration waivers in the context of antitrust litigation initiated while the AT&T and T-Mobile merger was pending. Several customers of AT&T attempted to initiate individual arbitrations with the goal of enjoining the merger. AT&T sought to enjoin those arbitrations on the ground that they were foreclosed by customer agreement provisions in which those customers waived "class or representative proceeding[s]" and agreed that an arbitrator could only award relief in favor of an individual party. In district court proceedings in Massachusetts, California, New York, Pennsylvania, Maryland, and Florida, customers sought to compel these arbitrations and AT&T sought to enjoin them.[14] Each of the district courts presented with the issue in those states did not allow the arbitrations to proceed, finding that the demands, although individual in form, were representative in nature, particularly because thousands of substantially identical demands had been filed by a single law firm and the relief sought was not individual to any particular claimant. Many of the courts cited *Concepcion* in support of this conclusion.[15]

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The *American Express* case addressed in the Second Circuit's opinion has already been to the Supreme Court once and it seems likely that review of the most recent opinion will be sought. Issues likely to be raised include the need to reconcile Supreme Court precedents affirming the importance of class actions to the enforcement of the federal antitrust laws with the reluctance to compel class resolution evident in the majority opinion in *Concepcion* and reflected in the district court opinions concerning the AT&T/T-Mobile cases. In the meantime, courts will likely remain averse to provisions in arbitration agreements that, rather than establish dispute resolution procedures, directly deprive customers of a substantive right expressly provided for by federal antitrust statutes, such as treble damages.[16] Companies that choose to adopt mandatory arbitration clauses should consider including an appropriate "savings clause" that states that remedies expressly provided for by applicable law cannot be waived.[17]

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12 *Id.* at 16, 21-22.

13 *Id.* at 25.

14 *See AT&T Mobility LLC v. Princi*, No. 11-11448, 2011 WL 6012945 (D. Mass. Dec. 2, 2011); *AT&T Mobility LLC v. Bernardi*, No. 11-03992, 2011 WL 5079549 (N.D. Cal. Oct. 26, 2011); *AT&T Mobility LLC v. Gonnello*, No. 11-5636, 2011 WL 4716617 (S.D.N.Y. Oct. 7, 2011); *AT&T Mobility LLC v. Smith*, No. 11-5157, 2011 WL 5924460 (E.D. Pa. Oct. 7, 2011); *AT&T Mobility LLC v. Fisher*, No. 11-2245, 2011 WL 5169349 (D. Md. Oct. 28, 2011); *AT&T Mobility LLC v. Bushman*, No. 11-80922, 2011 WL 5924666 (S.D. Fla. Sept. 23, 2011).

15 *See also In re Apple & AT&TM Antitrust Litigation*, No. 07-05152, 2011 WL 6018401 (N.D. Cal. Dec. 1, 2011) (relying on *Concepcion* in antitrust matter to grant motion to compel arbitration and decertify class).

16 *See Kristian v. Comcast*, 446 F.3d at 47-48; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635-638 (approving use of arbitral forum for resolution of antitrust matter if such a forum provides for appropriate vindication of statutory rights under antitrust laws and discussing the importance of treble damages as among those statutory rights).

17 *Id.*

If you have any questions about this memorandum or require assistance with any matter related to antitrust, please contact Theodore C. Whitehouse (202-303-1118, twhitehouse@willkie.com), Ruth Van Veldhuizen (202-303-1279, rvanveldhuizen@willkie.com), or the Willkie attorney with whom you regularly work.

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