Bloomberg BNA

The United States
Law Week

Case Alert & Legal News™

The U.S. Supreme Court's Landmark Decision In *AT&T Mobility v. Concepcion*: One Year Later

BY ROBERT M. BUCHANAN JR.

The U.S. Supreme Court issued a landmark decision about one year ago, on April 27, 2011, in *AT&T Mobility LLC v. Concepcion*.[1] The high court endorsed AT&T's arbitration program, which prevents class actions by addressing each consumer's claim individually. Arbitration programs from many other companies have since been scrutinized in putative consumer class actions.

How has the Supreme Court's decision in *Concepcion* influenced how courts are ruling in these cases? We surveyed the results in federal courts. To date, 45 consumer class actions were dismissed in favor of arbitration, while 14 were kept in court. These results represent a major change for companies that regularly face consumer complaints. They also translate to an important opportunity for companies to develop effective arbitration programs. After *Concepcion* there are much better odds that a robust arbitration program will prevent costly consumer class actions.

U.S. Supreme Court Sets Critical Precedent

Class action lawyers are poised to file expensive lawsuits whenever anything appears to go wrong. AT&T (formerly Cingular) has millions of customers for mobile phone services, and so it faces a large volume of consumer claims. In *AT&T Mobility v. Concepcion*, the U.S. Supreme Court explained the AT&T program for managing them one by one. A customer may send in a simple claim form. AT&T must then make a speedy response.

(1) If the customer is not satisfied with the offer from AT&T, the customer may go to arbitration. The dispute will proceed on an individual basis only, not as a class action.

(2) AT&T will pay the expense of the arbitrator.

(3) If the arbitrator awards more than AT&T offered in settlement, then the customer will receive an automatic $10,000, plus double attorneys fees. Even if the customer loses, the customer will not pay AT&T's fees.

Justice Scalia framed the *Concepcion* case as a clash of two policies. On the one hand, the policy of the California courts favored class actions. On the other hand, the policy of the Federal Arbitration Act favored arbitration.

As Justice Scalia wrote, this program sets up effective incentives for AT&T to treat customers fairly:

> [T]he Concepcions were better off under their arbitration agreement with AT&T than they would have been as participants in a class action, which could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars.

Evidently AT&T determined that it is cost-effective to provide the $10,000 incentive. Why? Because the money paid out by AT&T will go directly to customers who have claims, which may increase customer satisfaction. The payments will not fund the business model of class action lawyers, and the arbitrations will not lead to runaway verdicts.

[1] 2011 BL 110648, 79 U.S.L.W. 4279 (U.S. 2011).

Robert M. Buchanan Jr. is the leader of the Antitrust Practice at Choate, Hall & Stewart LLP, Boston. He can be reached at rbuchanan@choate.com.

 ISSN 0148-8139

The Supreme Court held that the dispute in *Concepcion* must go to arbitration, and shall not proceed as a class action. Prior to that holding, the state courts in California had maintained the opposite rule: they had ruled that consumers must have the right to proceed with a class action, and shall not be forced into arbitration. Justice Antonin Scalia framed the *Concepcion* case as a clash of two policies. On the one hand, the policy of the California courts favored class actions. On the other hand, the policy of the Federal Arbitration Act favored arbitration. By a vote of 5–4, the U.S. Supreme Court held that the federal arbitration statute preempts the state court class action rule.

The Results: One Year Later

There have been 76 decisions in the federal courts from the date of the *Concepcion* decision through March 26, 2012, in which the federal courts reviewed an arbitration clause in a putative consumer class action. The results stand as follows:

■ In 45 cases, the court enforced the arbitration clause and barred a consumer class action.

■ In 14 cases, the court rejected the arbitration clause and kept a class action in court.

■ In four cases, the plaintiffs' lawyers sought to bring their class claims inside the arbitration proceeding.

■ In 13 cases, the court did not decide between an arbitration and a class action. In some cases, the court sent this question to be decided by the arbitrator. In a few, the court ordered initial discovery or set an evidentiary hearing.

The majority of federal courts have followed the lead of *Concepcion*. Assuming that a customer's claim may have merit, these courts ask whether the claim may be redressed in a viable arbitration program. If so, then a class action is barred, most courts have held.

A minority of the courts, however, have evaded or distinguished the *Concepcion* holding. They have raised skeptical questions along the following lines:

■ ***Is the Arbitration Clause Binding on Both Sides?*** The U.S. District Court for the District of Maryland rejected an arbitration clause on the ground that it was not binding on both sides. The clause at issue provided that any dispute brought by the customer must be sent to arbitration. The clause did not expressly state, however, what would happen if the company were to initiate a dispute. Because the clause was not mutual, the court held it was not binding under Maryland law. The U.S. Court of Appeals for the Fifth Circuit reached a similar result in an employment case (not included in our count) where an arbitration clause was stated in a handbook for employees, which the company could amend unilaterally. In both cases the arbitration clause was rejected, and the class action was kept in court.

Some companies provide that the customer may opt out of arbitration by giving notice within a fixed period of time (such as 30 days) after purchasing the product. Where the customer has the opportunity to opt out, but does not opt out, some courts have cited this fact as indicating consent to the arbitration clause. Thus including an opt-out provision may help a company demonstrate that it is correct to require arbitration.

■ ***Will the Customer Face a Fair Process?*** A minority of courts have ruled that a company's arbitration program is unfair to the individual customer. For example, the federal court in San Francisco scrutinized an arbitration clause by American Debt Services Inc.[2] The named plaintiff had credit card debts. America Debt Services signed her up to a contract for settling with her creditors. According to the plaintiff's allegations, she provided $4,000 to the company, but American Debt Services never made any contact with her creditors. The plaintiff filed a class action for violation of California consumer protection laws. American Debt Services sought to compel arbitration. The company's dispute resolution clauses provided that:

> (i) the plaintiff could not recover more than the amount she had paid to the company;
>
> (ii) the plaintiff would be required to pay the company's attorney fees if the company prevailed;
>
> (iii) the arbitration would take place in Tulsa, Okla. (which was far away from the plaintiff's home in California); and
>
> (iv) the company had the unilateral right to select the arbitrator.

These four provisions, the court stated, contradicted rights established by the federal Credit Repair Organizations Act and the California Consumers Legal Remedies Act. The court struck down the company's arbitration clause, ruling that the plaintiffs' lawyers may proceed with a class action.

The ruling against American Debt Services Inc. may be an outlier, because the court may have sympathized with the plaintiff, but the ruling illustrates a general point. Where a company's industry is regulated by a particular set of statutes, the company's arbitration clause should make room for the customer to recover the full range of remedies provided by the statutes.

Expensive Antitrust Theories And Other Federal Claims

A panel of the U.S. Court of Appeals for the Second Circuit made a point of evading *Concepcion* in an antitrust decision early this year.

The decision, dated Feb. 1, 2012,[3] addressed a case brought by supermarkets and other merchants against American Express. According to their allegations, American Express required the merchants to accept its charge cards (which did not represent desirable business) along with its debit cards (which did represent desirable business). The plaintiffs challenged this requirement as a violation of the rule of reason under the Sherman Act. In order to establish a rule of reason claim, a plaintiff must demonstrate that the challenged practice unreasonably restrains competition in the relevant market. This requires market analysis by an expert economist. An economist attested that it would cost as much as one million dollars to conduct the needed study. If the class action were barred, the merchants ar-

[2] *Newton v. American Debt Services Inc.*, No. C-11-3228 (N.D. Calif. Feb. 22, 2012).

[3] *In re American Express Merchants' Litigation*, 667 F.3d 204, 2012 BL 27969, 80 U.S.L.W. 1031 (2d Cir. 2012).

  LW ISSN 0148-8139

gued, it would be too expensive for any one litigant to enforce the antirust laws against American Express.

The Second Circuit panel accepted the plaintiffs' anti-arbitration argument. It framed the issue as follows:

> [W]hether a class-action arbitration waiver clause is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to vindicate their federal statutory rights.

The federal antitrust laws represent an important public policy commitment by Congress, the panel declared, which has not been overruled by the Federal Arbitration Act. The panel held that the expensive antitrust claim against American Express may proceed in a class action.

The ruling of the *American Express* panel appears to be a deliberate attempt to get around *Concepcion*. It is hard to imagine that the current Supreme Court would uphold the panel's decision. Indeed a March 16, 2012,[4] decision by the U.S. Court of Appeals for the Ninth Circuit expressly disagreed with the *American Express* decision. Not surprisingly, American Express has petitioned to have the panel's decision reviewed by the full Second Circuit.

Relying on a different set of reasons in employment cases (which are not included in our count), some of the other federal courts have held that *Concepcion* does not require arbitration of claims brought by employees. Some of these courts have indicated that the Fair Labor Standards Act bars employers from enforcing a rule against collective action lawsuits.

Problems Could Arise From Future Statutes

A case that came before the Supreme Court of Canada, named *Seidel v. TELUS Communications Inc.*, presents a preview of questions that may arise later in the United States. The Supreme Court of Canada issued its ruling on March 18, 2011, just one month before *Concepcion* was decided by the U.S. Supreme Court. Like *Concepcion*, the case involved a contract for mobile phone services. The consumer protection statute in the province of British Columbia provides that consumers have the right to sue in court. The statute further provides that the courts will not enforce any agreement to waive these rights. A claim brought under this statute cannot be diverted to arbitration, the Supreme Court of Canada held. It declared:

> The choice to restrict or not restrict arbitration clauses in consumer contracts is a matter for the legislature.

The current U.S. Congress has been asked to overturn the *Concepcion* ruling. A bill titled ''The Arbitration Fairness Act of 2011'' (S. 987) would provide that an arbitration claim is not binding for any consumer dispute or for any employee dispute. Whether or not this bill moves forward, similar questions may arise in the future.

Conclusion

The *Concepcion* decision presents an important opportunity for companies that regularly face consumer claims. While the majority of federal courts have followed the Supreme Court's lead in *Concepcion*, there are still some uncertainties.

Should companies devote resources to a consumer arbitration program? *Concepcion* provides a valuable new tool, which needs to be used carefully. The courts continue to scrutinize whether an arbitration program provides fair and realistic incentives for the individual customer to bring a claim. Companies that want to develop an arbitration program should step back and look at it from the customer's point of view. If the company's program puts money in the hands of customers who have legitimate claims, that will help keep money out of class actions.

[4] *Coneff v. AT&T Corp.*, 2012 BL 61851, 80 U.S.L.W. 1252 (9th Cir. Mar. 16, 2012).