



AT&T Mobility v. Concepcion: The death knell for class actions?

*Has the consumer class-action
suit been eliminated and
replaced with individual
arbitration?*

**BY JONATHAN GERTLER AND
CHRISTIAN SCHREIBER**

AT&T Mobility v. Concepcion,¹ the United States Supreme Court's most recent pro-Chamber of Commerce decision, has been hailed by big business as the death knell for employment and consumer class actions. Despite an enduring history of representative actions, Corporate America has rung this bell before – does *Concepcion* finally warrant the obituary?

What just happened?

The consensus on both sides of the bar is that big business has won a huge battle in a long, long war where many big battles remain.

In *Concepcion*, the Supreme Court, in a divided opinion, upheld AT&T Mobility's right to compel the plaintiffs and all

members of the large group of consumers which comprised the class, to proceed in individual arbitrations if they wish to pursue a claim. The Court overruled the district court and the Ninth Circuit Court of Appeal, which had both held that AT&T Mobility's arbitration clause was unconscionable under California law.

Justice Scalia, writing for the 5-4 majority, wrote that state contract law cannot "stand as an obstacle to the accomplishment" of the objectives of the Federal Arbitration Act (FAA). In so holding, the Court held that the unconscionability standard articulated by the California Supreme Court – the so-called "*Discover Bank*" rule² – was preempted by the FAA.

Commentators quickly stepped in to proclaim that *Concepcion* would spell the end of certain class actions. But this view is based on an overbroad interpretation of

the holding that concludes that *Concepcion* will allow corporations to shield all unlawful conduct from redress through a class action whenever there is an underlying written contract of any kind which includes a binding arbitration clause.

Because virtually all employment relationships and most consumer transactions either already are or easily could be governed by a contract with an arbitration clause, only discrete areas would remain for class litigation...If such a broad reading of *Concepcion* proves correct.

What is in fact true is that the parameters of *Concepcion* are only partially clear at this writing, and will almost certainly take many years to clarify. In the interim, tens of millions of individual instances of unlawful corporate conduct, which cost employees and consumers billions of dollars every year, will go unchallenged and



unremedied because of the Supreme Court's decision. That is true even assuming that eventually – whether within a few years or only after many – there will be a “fix” in the form of federal legislation such as the Arbitration Fairness Act (AFA). The AFA, already introduced in the Senate, would prohibit the use of mandatory binding arbitration clauses in most of the types of contracts affected by the *Concepcion* decision. In fact, corporate misconduct will become more endemic and egregious without the deterrent effect of class actions.

It is just as true that the Supreme Court's conservative majority has issued lead and concurring opinions which instantly change the landscape for consumer and employment class actions. It is also clear that a very large number of pending cases will be affected, in various ways: new filings of employment and many types of consumer class actions are likely to drop precipitously; numerous related challenges have begun and will continue to sprout in the trial courts and appellate courts, all heading for resolution in the state supreme courts, federal Circuit Courts, and perhaps eventually for some issues, back in the United States Supreme Court.

Concepcion is a watershed decision. It is also just the latest in a series of devastating blows to various civil rights that this Supreme Court majority will apparently leave as its legacy. Few serious observers of the Court will question, in the wake of *Concepcion*, that the closely-watched *Wal-Mart Stores, Inc. v. Dukes*³ case provides a vehicle for the hyper-corporatist Roberts Court to eviscerate many of the class actions that might otherwise survive *Concepcion*.

One must view *Concepcion* in this greater context both to appreciate where the decision leaves us, and in order to engage in informed ways about what lies ahead.

How did we get here?

Written records dating back to 1125 reflect procedures by which a few villagers could act as representatives for an entire

English village in order to file a single complaint in court. It is remarkable; 900 years ago, a time when life was starkly less complicated, long before society became so interconnected, long before there was an endless variety of products and services available to “consumers,” there were disputes that presented facts common to a sufficient many that justice demanded representative or collective action. And so it was allowed.

Likewise, early American courts (most often those sitting in equity) continued using forms of representative action. The procedural tool has in fact had an uninterrupted presence in our jurisprudential history. In 1937 the United States Supreme Court adopted Rules of Civil Procedure, including Rule 23, which provides for class actions. Throughout the last 60 years, as consumer transactions evolved and grew more complex, so did the ways in which a typical consumer or employee could be made vulnerable – by being underpaid, overcharged, deceived, discriminated against, or otherwise wronged. As consumer processes became more efficient and automated for large-scale transactions, these same efficiencies created common problems derived from common sources. Not coincidentally, class actions evolved to meet these needs.

Class actions have been hailed by jurists as a powerful instrument for justice. As countless courts have recognized, class actions are frequently the only mechanism for enforcing a broad array of civil rights laws that are violated by an endemic minority of businesses. This is because public enforcement (through, for example, a state attorney general) can only hope to reach a fraction of the violators. Private enforcement of the laws is the only meaningful manner to achieve deterrence and remediation. The class action is therefore critical to justice in modern society, and increasingly so in the age of technology.

But as class actions proliferated, they became a target.

Class actions were not the primary concern of corporate America and the Chamber of Commerce until the latter

part of the last century. Rather, most of the attacks on the civil justice system reflected business concerns with large personal injury verdicts. Businesses targeted plaintiffs alleging medical malpractice, automobile and pharmaceutical negligence, and products liability. The Chamber attempted to limit their exposure and liability through legislation; by curtailing Seventh Amendment rights through arbitration in medical cases; by putting damages limits on non-economic recoveries; by limiting lawyers' fees, by pushing for the re-writing of the Restatement of Torts; and by turning the public against the civil justice system through a heavily-funded campaign of misinformation.

As the plaintiffs' personal injury bar took the Chamber's best shots, class actions proliferated throughout the 1980s and 1990s, eventually becoming a major bloc of litigation. The complexity of these cases ultimately warranted special complex litigation judges in many of the larger California superior courts – judges with the expertise and skill to handle cases worth millions of dollars, involving thousands of class members.

Whether the nature of the transaction involved insurance, lending, business services, retail products, construction, technology or any other aspect of our lives in which commercial enterprises affect us – and the list is virtually endless – class actions were capturing corporations in the act of cheating their workers and their customers. The actual impact of this litigation on American business can be argued. But what is beyond dispute is that along the spectrum of challenges to large and small business alike, the class action was perceived as an increasing risk to the profitability of the business.

The Chamber ultimately turned its public relations weapons on the class action bar. When it did so, however, the Chamber could use road-tested slogans that had already been focus-grouped and honed. Insurance companies, pharma, major manufacturers and tobacco were already organized, ready to support the campaign to frighten the public with



exaggerations about the deleterious effects of litigation on the nation's economic health.

While there may be many, many good companies which try to play by the rules, thousands either do not try, or don't try in any competent or concerted manner. And because the economy is so large, and the problem of corporate compliance so endemic, the collective liability of commercial entities as a result of class litigation grew over the years to billions of dollars.

In 2005, during the Bush administration, the "Class Action Fairness Act" was passed by Congress. Although there was nothing fair about this piece of legislation, it did accomplish what the conservatives desired; class actions were pushed into the federal court system, which corporations regarded as a friendlier forum than the many progressive state courts delivering "irrational" verdicts. In offending states, the Chamber viewed both class certification procedures and liability rules as too favorable to consumers and employees seeking to remedy an assortment of corporate misdeeds.

In what might be regarded the low point of progressive politics in the last 50 years, the United States Supreme Court handed George W. Bush the keys to the Court following the 2000 presidential election. The election changed the course of American jurisprudence more than any other single Presidential election; W ultimately appointed two of the most radically-conservative, anti-consumer and anti-employee justices in history, Justices Roberts and Alito. Had Al Gore made those two appointments, there would be a moderate to moderate progressive balance on the Court today. We can fairly speculate there would be no *Citizens United*, no *Concepcion*, no *Stolt-Nielson*, and no dark cloud hanging over the civil rights of all of the people in this nation.

The appointment of Justices Alito and Roberts has given the Supreme Court an extremist right wing majority. Justice Anthony Kennedy, a solid Chamber of Commerce vote and unquestioned conservative, is the "moderate" in the majority.

Although the conservatives have their own idiosyncrasies, in very critical ways they favor businesses over people. This was known at the time of their nominations and confirmations; the only question was what havoc would they wreak? We have all the evidence we need.

Arbitration as the end game

As the focus shifted from so-called "tort reform" to a more specific assault on the economic rights of employees and consumers, businesses rolled out new "solutions" to address the problems associated with class action litigation.

The anti-class action campaign was less nuanced than those previously waged by tort reformers. Some impact could be achieved by elevating standards, as was done in securities cases; or by laws or initiatives which limited the reach of consumer standards, such as Proposition 64, which diluted the power of the Unfair Competition Law, Business & Professions Code section 17200 *et seq.* These were tried-and-true baby steps. However, the most potentially deadly vehicle for limiting the power of class actions and even individual actions based in economic wrongs was the arbitration clause. The reason is that pre-dispute, mandatory, binding arbitration provisions, if upheld, accomplished many things at once, all devastating to plaintiffs.

First, and foremost, they deprive the victim of the right to a jury trial, in open court, by a jury of peers, with a right to appellate review. These basic rights, supposedly guaranteed by the Seventh Amendment of the Constitution, are critical to a fair and effective civil justice system. A secret proceeding, with no record, with arbitrators who rely on the corporate defendant for repeat business, with limited discovery, and with no review, is not a level playing field.

Beyond that, arbitration created the potential to avoid billions in liability, if only there was a way to introduce them into transactions where no contract previously existed. Contracts of adhesion grew commonplace, from cell phone services to

software downloads, and then all pretense was shed – the contracts simply began to include class-action bans within the arbitration clauses. Hourly employees, patients, borrowers, and consumers of even small commercial goods suddenly had one thing in common: they became putative "co-parties" in nonnegotiable contracts of adhesion.

Corporations could effectively insulate themselves from most of their actual liability by blocking class actions. It was an elegant solution...*if* the clauses were upheld.

Where do we stand after *Concepcion*?

Though the full impact of the *Concepcion* decision on employment and consumer class actions will not be known for years, we do know some things.

First, we can expect a contraction in the number of class actions filed because its deterrent effect will be profound. In some instances, the court where the case would have to be filed because of forum selection and jurisdictional rules will have already demonstrated a broad approach to interpreting *Concepcion* so as to compel arbitrations. In other instances, the costs and risks of engaging in an extensive and very uncertain arbitration battle before having an opportunity to litigate the merits will render the litigation an untenable business proposition, however passionate the underlying employee or consumer protection beliefs of the lawyer may be.

As an example, if a large corporation underpays 2,500 California employees \$100 per week over a four-year period, its liability will exceed \$50 million. But if that company's arbitration clause can be enforced, each employee must pursue their individual claim in arbitration – say, \$20,000 each – a prospect that will end thousands of cases before they begin.

Why? The reasons are familiar to class action lawyers, beyond good-faith dispute and recognized by the California Supreme Court in many decisions (see, e.g., *Gentry*⁴ and *Sav-On Drugs*⁵). Lawyers will generally have little interest in



prosecuting cases worth \$20,000 or less in an arbitration forum that generally lacks the integrity and safeguards of a public trial by jury with the right to appeal. Additionally, most workers who are being cheated generally do not have any idea that there has been a violation of their rights. Moreover, the vast majority of *current* employees will not risk retaliation, including termination, in order to vindicate their rights. Finally, the unpredictability of arbitration – where precedent means so little and incentives are misaligned to ensure repeat business – results in decisions that “split the baby” for political, rather than legal, reasons.

Where the wrong involves consumers, the situation is even worse. Let’s say, for example, 200,000 low-income borrowers are subjected to improperly-calculated interest or penalties on a loan resulting in an average overcharge of \$10 each month. The amount at stake, perhaps a few hundred dollars for an average class member, seems small. But for persons of modest means, it is a significant amount of money. And, in terms of the rule of law and consumer rights, the corporation has essentially converted \$50 million of its customers’ hard-earned wages or savings into its own profits. It is just wrong.

Nevertheless, few, if any, of those consumers are going to have their rights vindicated. The corporation will not be forced to stop its unlawful practice. Neither an attorney nor a consumer would take the time and effort to arbitrate such a small claim – assuming, of course, the consumer is even aware of the overcharge. In this respect, plaintiffs and plaintiffs’ lawyers are most likely to act as proverbial rational economic actors.

Thus, corporations have perfected a means of completely avoiding liability to their employees and customers, whom they harm economically through unlawful actions.

•**Pending Cases:** In hundreds of pending class actions, plaintiff classes will now face motions to compel arbitration of the class representatives’ claims on an individual basis, with no possibility of class arbitration.

Many of those motions were filed within hours of the Court’s decision, and some have already been granted.⁶ In some cases hundreds or thousands of hours of attorney time invested in prosecuting valid claims will be lost, tens or hundreds of thousands of dollars in case costs will be lost, and the aggrieved workers or consumers will be left with no remedy. We can also expect most post-*Concepcion* motions to compel arbitration that are denied to litter the dockets in state and federal trial and appellate courts.

•**Viable Post-*Concepcion* Cases:** Some cases are simply unaffected because they do not involve an underlying contract, and hence there simply is no arbitration provision at issue. For instance, supermarket transactions may involve the purchase of products that contain false or misleading labeling. Deceptive business practice claims in that circumstance would be unaffected.

There is also a window of time during which some corporations will be slow to adopt arbitration clauses that either prohibit or are silent on the subject of class actions, (silence being tantamount to a prohibition, under the U.S. Supreme Court ruling in the precursor case to *Concepcion*, *Stolt-Nielson*⁷).

In the information age, corporations are very well informed on the issues, and they are actively responding by incorporating arbitration agreements wherever possible in their business relationships. One can anticipate that the use of arbitration clauses will become virtually universal where they can, as a practical reality, be used.

There will also be new areas where arbitration clauses are incorporated where they haven’t been before, such as in employment agreements with low level employees, whose simple, modest and sometimes informal terms of employment were previously felt not to warrant having a written agreement. Where there are large enough assemblages of any similarly situated employees within a company, one can anticipate that there will be an arbitration agreement added to the agreement.

One can speculate that, if there are not already attempts to insert arbitration

agreements into run-of-the-mill cash register transactions where credit or debit cards are used, there will be soon. Perhaps there will be arbitration agreements with automobile purchases and leases, and with medical prescriptions. Time will tell, but the trajectory is clear.

One central issue to be resolved is whether *Concepcion*’s application should be limited to the narrow set of facts presented there, where there was no evidentiary record made by plaintiffs demonstrating that individual arbitration was not an *adequate* method for pursuing a claim.

It also isn’t clear that the arbitration provision will survive a strong evidentiary showing that arbitration does not provide an effective means for the individual to vindicate her non-waivable statutory rights.

There is also an argument to be made that Justice Thomas’s view that the Federal Arbitration Act does not apply in state court, although not all of the minority bloc of justices agrees with this concept.

There are also miscellaneous instances where *Concepcion* won’t apply, as with a series of cases in which large corporations have agreed as part of litigation not to seek to enforce their arbitration clauses for several years, or in insurance contracts in those states where arbitration clauses are prohibited in insurance agreements. The federal McCarren-Ferguson Act specifically regulates insurance and doesn’t preclude states from barring arbitration agreements. There are about 20 states that validly do so.

Where do we go from here?

It seems likely that state Supreme Courts like California’s, which have supported class actions by striking down class-action prohibitions in arbitration clauses, will read *Concepcion* narrowly.

But even in friendly jurisdictions, there will be more burdens on the plaintiff, there will be more appeals, and the litigation will be more expensive, and riskier. But it is likely that in California and many jurisdictions, through an uneven and highly iterative process, a



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patchwork quilt will emerge of viable attacks on some arbitration provisions.

Beyond fighting for the narrowest possible application of *Concepcion*, some non-judicial action is possible. Given the current make-up of the House of Representatives, the Arbitration Fairness Act seems unlikely to pass anytime soon. However, under the recent federal financial reform legislation, the Executive Branch now has agency authority to ban arbitration agreements in certain consumer financial contracts, and it remains to be seen whether the Obama administration does so after its initial evaluation is completed, as early as later this year.

Some trial lawyer organizations are exploring the possibility of a state-level system in which class actions may be pursued using private class action attorneys to fund and litigate the cases. The viability of this type of scheme is untested.

Until there is a legislative resolution and/or resolution of the many issues created by the *Concepcion* decision, class action litigation in the face of an underlying arbitration agreement will remain a difficult one for plaintiffs' class-action lawyers – and the millions of victimized employees and consumers we represent.

Chavez & Gertler is a class-action litigation firm in Mill Valley that handles complex consumer and employment class actions.

Jonathan Gertler is a founding partner of the firm and current president of the San Francisco Trial Lawyers Association, which named him Trial Lawyer of the Year in 2006. Christian Schreiber is a class-action litigation associate at the firm. Visit their Web site: www.chavezgertler.com



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Endnotes

- ¹ *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740
- ² *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148.
- ³ Argued March 29, 2011.
- ⁴ *Gentry v. Superior Court* (2007) 42 Cal.4th 443.
- ⁵ *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319.
- ⁶ "Accordingly, despite public policy arguments thought to be persuasive in California, *Concepcion* has trumped these considerations, at least for cases in federal court." *Arellano v. T-Mobile USA, Inc.*, C 10-05663 WHA, 2011 WL 1842712 (N.D. Cal. May 16, 2011).
- ⁷ *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* (2010) 130 S.Ct. 1758.

