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# Consumer Class Action Litigation: Navigating the Evolving Landscape

Leveraging Circuit and Supreme Court Developments in Certification, Causation, Class Waivers

THURSDAY, OCTOBER 27, 2011

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*Leveraging Circuit and Supreme Court Developments in Certification, Causation, Class Waivers and More*

# Consumer Class Action Litigation: Navigating the Evolving Landscape

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# Class Waivers in Arbitration Agreements: *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011)

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# AT&T Mobility LLC v. Concepcion

- Consumers purchased AT&T service (then Cingular) and received a free telephone but paid sales tax on the retail value of the phone. 131 S. Ct. 1740, 1744.
- Entered into wireless service contract that provided for arbitration of all disputes but only in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." *Id.*

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# AT&T Mobility LLC v. Concepcion

- Filed putative class action alleging, among other things, false advertising and fraud regarding the sales tax. *Id.*
- AT&T moved to compel individual arbitration under the terms of the wireless contract. *Id.* at 1744-1745.
- Plaintiffs argued the class waiver provision was unconscionable under *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 (2005).

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# AT&T Mobility LLC v. Concepcion

- *Discover Bank* test strikes class action waivers (a) in adhesion contracts (b) when damages are predictably small and (c) the consumer alleges a scheme to cheat consumers. *Id.*
- District court described positive aspects of the arbitration agreement at issue, but felt bound by *Discover Bank.* It held that the arbitration agreement was unconscionable and unenforceable because of class waiver. *Id.*
- Ninth Circuit affirmed, finding the arbitration agreement unconscionable under *Discover Bank* and holding that *Discover Bank* was not preempted by the Federal Arbitration Act ("FAA"). *Id.*

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# AT&T Mobility LLC v. Concepcion

- Supreme Court reverses in a 5-4 decision, holding that the FAA preempts California's *Discover Bank* rule. *Id.* at 1753.
- Majority recounts the history and purposes of the FAA:
  - Enacted in response to judicial hostility against arbitration. *Id.* at 1745;
  - Allows parties to choose "efficient, streamlined procedures tailored to the type of dispute." *Id.* at 1749; and
  - Ensures that private agreements are enforced according to their terms. *Id.* at 1748.
- "Contrary to the dissent's view, our cases place it beyond dispute that the FAA was designed to promote arbitration." *Id.* at 1749.

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# AT&T Mobility LLC v. Concepcion

- Section 2's savings clause allows arbitration agreements to be invalidated by "generally applicable contract defenses," *Id.* at 1746, but not rules that "stand as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 1748.
- "California's *Discover Bank* rule . . . interferes with arbitration. Although the rule does not *require* classwide arbitration, it allows any party to a consumer contract to demand it *ex post.*" *Id.* at 1750.

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# AT&T Mobility LLC v. Concepcion

- Limitation to adhesion contracts meaningless because most consumer contracts are adhesion contracts. *Id.*
- Also finds meaningless *Discover Bank's* limitation to cases involving small damages and schemes to cheat consumers. *Id.*
- "The former requirement, however, is toothless and malleable (the Ninth Circuit has held that damages of $4,000 are sufficiently small . . .), and the latter has no limiting effect, as all that is required is an allegation." *Id.*

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# AT&T Mobility LLC v. Concepcion

- "There is little incentive for lawyers to arbitrate on behalf of individuals when they may do so for a class and reap far higher fees in the process." *Id.*
- "And faced with inevitable class arbitration, companies would have less incentive to continue resolving potentially duplicative claims on an individual basis." *Id.*

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# AT&T Mobility LLC v. Concepcion

- Discusses the incompatibility of the class action tool and 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." *Id.* at 1751;
  - requires procedural formality for class notice and other class-specific issues. *Id.*;
  - increases risks to defendants because of the lack of multilayered review. *Id.*
- "Because it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' . . . California's *Discover Bank* rule is preempted by the FAA." *Id.* 1753.

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# Post-*Concepcion* Decisions

- *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205 (11th Cir. Aug. 11, 2011):
  - Putative class action under Florida law.
  - AT&T moved to compel arbitration; plaintiffs argued class waiver was against Florida public policy.
  - 11th Circuit held that *Concepcion* controlled and that if Florida law would invalidate the agreements a "contrary to public policy" it would be preempted.

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# Post-*Concepcion* Decisions

- *Litman v. Cellco Partnership*, — F.3d —, 2011 WL 3689015 (3d Cir. Aug. 24, 2011):
  - Putative class action under New Jersey law.
  - Verizon moved to compel; plaintiffs argued that N.J. Supreme Court had found class waivers unconscionable in litigation or arbitration.
  - Third Circuit held that *Concepcion* controlled: "We understand the holding of *Concepcion* to be both broad and clear: a state law that seeks to impose class arbitration despite a contractual agreement for individualized arbitration is inconsistent with, and therefore preempted by, the FAA."

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# Post-*Concepcion* Decisions

- *Green v. Supershuttle Int'l, Inc.*, 653 F.3d 766 (8th Cir. Sept. 6, 2011):
  - Shuttle drivers filed putative class action under Minnesota's Fair Labor Standards Act.
  - Company moved to compel arbitration pursuant to franchise agreements with drivers.
  - Eighth Circuit held that *Concepcion* defeated the drivers' state-law-based challenge to the enforceability of the arbitration agreement.

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# *Plaintiffs' Perspective on Recent Consumer Class Action Decisions Applying Concepcion or Wal-Mart*

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A Milberg LLP CLE Program Presentation for
Strafford Consumer Class Action Litigation

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# Today's Agenda

- Arguments/Limitations of Concepcion
- Pro-Plaintiff Concepcion Decisions
- Pro-Plaintiff Wal-Mart Decision: *In re: Zurn Plex Plumbing Litigation*



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# Arguments/Limitations of Concepcion

- Public Justice – http://www.publicjustice.net/Resources/How-Courts-Can-and-Should-Limit-ATT-v-Concepcion.aspx
- Home, Resources, Explore Resources (far right side)
- Also, "Consumer Arbitration Agreements: Enforceability and Other Issues"



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## Concepcion does not require enforcement of a class action ban where the evidence shows that the plaintiffs could not effectively vindicate their statutory rights in individual arbitration.

- The U.S. Supreme Court has consistently held that statutory claims can be arbitrated, but only so long as the arbitration clause permits the parties to effectively vindicate their statutory rights. Concepcion did not overrule that precedent. Indeed, the Court noted that the plaintiffs' claims in Concepcion were "most **un**likely to go **un**resolved," and there was no factual record showing otherwise. [Emphasis added on the double negative]

- The problem, according to the Court, was that California's Discover Bank rule was so "toothless and malleable" that it would nonetheless invalidate AT&T Mobility's class action ban—even though the plaintiffs could vindicate their rights in individual arbitration. That reasoning does not apply where the plaintiffs have developed an evidentiary record establishing that a class action ban would, as a factual matter, prevent consumers from having a meaningful chance to pursue their particular legal claims. See, e.g., Scott v. Cingular Wireless, 161 P.3d 1000 (Wash. 2006).



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# Concepcion does not require enforcement of a class action ban that would conflict with federal law.

- Because Concepcion involved the preemption of state law, it does not affect cases involving purely federal law.
- Two federal courts of appeal have struck down class action bans in cases where the evidence showed that the class action bans would undermine the enforcement of the federal antitrust laws, for example, and there is a strong argument those decisions are not undermined by Concepcion. See In re American Express Merchants Litig., 634, F.3d 187 (2d Cir. 2011) (an agreement which in practice acts as a waiver of future liability under the federal antitrust statues is void as a matter of public policy); Kristian v. Comcast, 446 F.3d 25 (1st Cir. 2006) (the term "essentially shielded [the defendant] from private consumer antitrust enforcement liability, even in cases where it has violated the law.").



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# Some federal statutes expressly prohibit arbitration of claims arising under the statute.

- 15 USCA § 1639c(e)(1) (barring arbitration clauses in residential mortgage loans).
- 18 U.S.C. § 1514A(e) (pre-dispute contracts requiring arbitration of whistleblower claims under the Sarbanes-Oxley Act not enforceable).
- 10 U.S.C. §§ 987(e)(3), 987(f)(4) (voiding arbitration clauses in payday loan contracts with members of the military or their families).
- 15 U.S.C. § 1226 (automobile manufacturers prohibited from imposing pre-dispute arbitration clauses in their franchise agreements with dealers).



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# Other statutes may arguably provide an unwaivable right to bring a class action.

- See, e.g., 29 U.S.C. § 216(b) (Fair Labor Standards Act provides that "[a]n action . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and [on] behalf of himself and other employees similarly situated").
- 29 U.S.C. § 157 (National Labor Relations Act provides employees the right "to engage in . . . concerted activities for the purposes of . . . mutual aid and protection").
- Credit Repair Organizations Act - "Thus, we hold the plain language of the CROA prohibits enforcement of the arbitration agreement." Greenwood v. CompuCredit Corp., 615 F.3d 1204, 1211 (9th Cir. 2010). This case is on appeal to the U.S. Supreme Court. Argument occurred earlier this month.



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## Concepcion does not change the law prohibiting a corporation from imposing a class action ban on consumers or employees after litigation has commenced.

- Attempting to add an arbitration clause and class action ban to consumer or employment contracts while a class action is already pending is an improper communication with the class, and any contract term imposed in this way should be unenforceable.

- See, e.g., In re Currency Conversion Fee Antitrust Litig., 361 F. Supp. 2d 237 (S.D.N.Y. 2005) (refusing to enforce class action bans mailed by creditor to members of putative class).

- Long v. Fidelity Water Sys., Inc., 2000 WL 989914, at *3 (N.D. Cal. 2000) (declining to enforce arbitration clause added to credit card contracts nearly one year after class action was filed, because defendants "gave no notice to [the plaintiff] that if he opted for the arbitration provision, he could not participate in the pending class action").



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## (continued)

- Carnegie v. H&R Block, Inc., 687 N.Y.S.2d 528, 532 (N.Y. Sup. Ct. 1999) (refusing to enforce arbitration clause added to defendant's loan agreement that prohibited class-wide relief as to existing claims, because those who signed the agreement "were completely unaware of this litigation and that by signing the [loan agreement] form, they were waiving their right to participate in this class action").

- Bilbrey v. Cingular Wireless, LLC, 164 P.3d 131, 134 (Okla. 2007) (arbitration clause unconscionable where it was imposed on class members after class action complaint had been filed).

- H&R Block, Inc. v. Haese, 82 S.W.3d 331, 333, 336 (Tex. App. 2002) (class action ban incorporated into lender's standard agreement after class action was filed "constituted an unauthorized, impermissible, knowing and intentional communication with members of the plaintiff class" that "was calculated to reduce class participation and to obstruct the trial court in the discharge of its duty to protect the absent class").



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## Concepcion does not require enforcement of arbitration clauses specifying only the National Arbitration Forum.

- A large number of arbitration clauses specifically name the National Arbitration Forum ("NAF") as the sole arbitrator. But the NAF was forced to abandon consumer arbitrations by a law enforcement action.
- While corporations routinely ask courts to re-write the arbitration clauses to select another arbitration company, several courts have thrown out NAF-only arbitration clauses on grounds that the language of a contract demonstrated that the defendant's selection of NAF was an integral term of the clause. See, e.g., Ranzy v. Tijerna, 393 Fed. Appx. 174 (5th Cir. Aug. 25, 2010); Carideo v. Dell, Inc., 2009 WL 3485933 (W.D. Wash. Oct. 26, 2009) (same); Carr v. Gateway, 944 N.E.2d 327 (Ill. 2011) (same); Stewart v. GGNSC-Canonsburg, L.P., 9 A.3d 215 (Pa. Super. Ct. 2010) (same).



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## Concepcion does not apply to claims against certain creditors.

- Four major credit card companies are currently constrained from requiring arbitration, notwithstanding Concepcion, by the terms of a settlement approved last year.

- On July 26, 2010, a federal court in New York approved a settlement in Ross, et al. v. Bank of America, N.A, No. 05-cv-7116, MDL No. 1409 (S.D.N.Y.), which precludes the settling defendants from enforcing their arbitration clauses and class action bans against cardholders. Pursuant to the settlement, **Bank of America, Capital One, Chase, and HSBC** have agreed (1) to remove any arbitration clauses and class action bans from U.S. cardholder contracts; (2) not to restore or otherwise insert any arbitration clause or class action ban into its U.S. cardholder contracts within three and one half (3.5) years following May 1, 2010; and (3) not to seek to enforce their current or former arbitration clauses or class action bans against any members of the settlement class.

- Information about the settlement is available at http://arbitration.ccfsettlement.com/.



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## Concepcion may not apply to cases in state court.

- The Concepcion case originated in federal court. Justice Thomas—who provided the crucial fifth vote for the Concepcion majority—has consistently maintained that the FAA does not apply to cases in state court. E.g., Preston v. Ferrer, 552 U.S. 346 (2008) (Thomas, J. dissenting); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006) (Thomas, J. dissenting).
- Had the issue in Concepcion reached the U.S. Supreme Court from a state court, there presumably would not have been five votes for preemption.
- At least one federal court has already recognized this implicit limit to Concepcion's preemption holding. Arellano v. T-Mobile USA, Inc., 2011 WL 1842712 (N.D. Cal. May 16, 2011) (repeatedly noting that Concepcion's preemption holding is the rule "at least for actions in federal court").



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## Concepcion will not interfere with state laws that limit class action bans or arbitration clauses in insurance cases.

- A large number of federal and state appellate courts have held that the FAA does not apply to state laws that ban or limit the use of arbitration clauses by insurance companies.
- About 20 states have barred insurance companies from using mandatory arbitration clauses, and nothing in Concepcion will interfere with those state laws.
- E.g., Standard Security Life Ins. Co of NY v. West, 267 F.3d 821, 823 (8th Cir. 2001); United Ins. Co. of Am. v. Office of Ins. Regulation, 985 So. 2d 665, 668-669 (Fla. Dist. Ct. App. 1st Dist. 2008); Love v. Money Tree, Inc., 614 S.E.2d 47, 50 (Ga. 2005).



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## Concepcion does not entitle a defendant to compel arbitration if it has already waived its right to arbitrate.

- It is black-letter law that even where a valid arbitration agreement exists, a party may waive its right to avail itself of the right to arbitrate. See, e.g., *Lewallen* v. Green Tree Serv., L.L.C., 487 F.3d 1085, 1090 (8th Cir. 2007).
- Courts look at a variety of factors, for example: how many months or years the parties have engaged in litigation prior to the party moving to compel arbitration; whether significant motion practice and/or discovery has taken place; whether the party sought a judicial ruling on the merits; and whether the party invoked its arbitration clause only after receiving an unwelcome ruling from a court.
- Only where a party can demonstrate that there was a change in the governing law that was so significant that it would have been futile to seek arbitration any earlier will a court find that a change in the law excuses waiver of the right to arbitrate.



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## Concepcion should not apply to cases where state law does not require nonconsensual class arbitration.

- Justice Scalia's majority opinion in Concepcion devotes several paragraphs to explaining why "class arbitration, to the extent it is manufactured by Discover Bank rather than consensual, is inconsistent with the FAA." 131 S. Ct. at 1750–52. The Court was clearly concerned that courts applying the Discover Bank rule could order parties to arbitrate on a class-wide basis against their will. It stands to reason, then, that where state law does not present that conflict, it should not be preempted by the FAA under Concepcion.

- A state supreme court could clarify, for example, that under its state law, if a class action ban is invalidated (for instance, because it would prevent the plaintiffs from effectively vindicating their statutory rights), the drafter of the contract is given a choice between arbitration and litigation in court.



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## Concepcion does not impact cases in which no contract—or no arbitration clause—is involved.

- It might sound obvious, but Concepcion will not affect class actions where the parties are not bound by a contractual agreement.
- For example, when a defective product is sold over-the-counter at a pharmacy, there generally is just a receipt but no arbitration clause or written contract.
- Groceries are another example.



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## Concepcion does not limit the impact of federal legislation and/or regulations barring companies from imposing arbitration clauses.

- The new Bureau of Consumer Financial Protection, created in 2010 by the Dodd-Frank Wall Street Reform and Consumer Protection Act, has the authority to ban or regulate arbitration clauses in consumer financial products and services contracts.
- The Bureau will soon be conducting a study to determine whether prohibiting or limiting arbitration clauses would be in the public interest and protect of consumers.
- The Arbitration Fairness Act of 2011, sponsored by Senator Al Franken, would ban all predispute mandatory arbitration clauses in consumer and employment contracts.



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# Concepcion

- Discussion of Pro-Plaintiff Decisions



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## Newton v. Clearwire, 2:11-CV-00783-WBS-DAD, E.D. Cal. September 22, 2011

- Magistrate judge ruled that the Concepcion decision did not bar the plaintiff from invalidating class-action waivers under an unconscionability claim during discovery. The ruling allowed (limited) discovery over the objections of the defendant.

- "Plaintiff argues that her challenge to the validity of arbitration clause at issue on the grounds of unconscionability survives the Supreme Court's decision in Concepcion. Specifically, plaintiff argues that under California law, a contract term is unconscionable if it is the product of "oppression" or "surprise" due to unequal bargaining power of the parties and produces "overly harsh" or "one-sided results" and that her pre-arbitration discovery requests have been narrowly tailored to seek only information related to results produced by the arbitration clause in question. Plaintiff's suggestion is that if discovery reveals that those results are fairly characterized as overly harsh or one-sided, she will be able to defeat defendant's motion to compel arbitration on the grounds that this arbitration clause is unconscionable.

- The court is persuaded by this aspect of plaintiff's argument."



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# Newton v. Clearwire (continued)

- "In Concepcion, the Supreme Court addressed whether the FAA preempted the public-policy based rule announced in Discover Bank. See 131 S. Ct. at 1746. The Supreme Court held the Discover Bank rule was preempted because "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." 131 S. Ct. at 1748.

- In so holding, however, the Supreme Court specifically reaffirmed that the FAA "permits agreements to arbitrate to be invalidated by '**generally applicable contract defenses, such as fraud, duress, or unconscionability**,' [although] not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." Id. at 1746 (quoting Doctor's Associates, Inc., 517 U.S. at 687)."



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# Newton v. Clearwire (continued)

- "Here, plaintiff conflates the concepts of unconscionability and exculpation in arguing that her discovery requests are crafted to elicit information relevant to whether the arbitration clause at issue produces overly harsh or one-sided results, thereby operating to exculpate defendant of all liability. As noted above, in Discover Bank, the California Supreme Court had held that a class action waiver was unconscionable as a violation of public policy when it operated to exempt a party "from responsibility for [its] own fraud, or willful injury to the person or property of another." 36 Cal.4th at 161-63 (quoting Cal. Civ. Code § 1668). However, the Supreme Court explicitly rejected the Discover Bank rule which was based upon § 1668, finding it to be preempted by the FAA. Accordingly, defendant's argument that the decision in Concepcion forecloses the claim that the arbitration clause at issue here is unlawful because it functions to exculpate defendant of all liability, is well founded.
- **However**, the Supreme Court in Concepcion did not foreclose a claim that an arbitration clause is unconscionable on all other grounds recognized under state law." Note 3.



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# Kolev v. Euromotors West/The Auto Gallery, --- F.3d --- 2011 WL 4359905 (9th Cir. Sept. 20, 2011)

- Justia.com Opinion Summary: Plaintiff brought suit against the Dealership and Porsche when the pre-owned car that she purchased from the Dealership developed serious mechanical problems during the warranty period and the Dealership refused to honor her warranty claims. Plaintiff alleged breach of implied and express warranties under the Magnuson-Moss Warranty Act (MMWA), 15 U.S.C. 2301 et seq., and breach of contract and unconscionability under California law.
- The district court granted the Dealership's petition to compel arbitration pursuant to the mandatory arbitration provision in the sales contract that plaintiff signed when she bought the car and stayed the action against Porsche.
- Plaintiff's principal argument on appeal was that the MMWA barred the provision mandating pre-dispute binding arbitration of her warranty claims against the Dealership. Although the text of the MMWA did not specifically address the validity of pre-dispute mandatory binding arbitration, Congress expressly delegated rulemaking authority under the statue to the Federal Trade Commission (FTC).
- The FTC construed the MMWA as barring pre-dispute mandatory binding arbitration provisions covering written warranty agreements and issued a rule prohibiting judicial enforcement of such provisions with respect to consumer claims brought under the MMWA. Because it was required to defer to the reasonable construction of a statute by the agency that Congress had authorized to interpret it, the court held that the MMWA precluded enforcement of pre-dispute agreements such as Porsche's that required mandatory binding arbitration of consumer warranty claims. The court declined to address plaintiff's remaining claims. Accordingly, the court reversed and remanded for further proceedings.



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## Kolev v. Euromotors West/The Auto Gallery (continued)

- Apparent circuit split with Fifth and Eleventh Circuits. *See* Walton v. Rose Mobile Homes, LLC, 298 F.3d 470, 478 (5th Cir. 2002); Davis v. Southern Energy Homes, Inc., 305 F.3d 1268, 1280 (11th Cir. 2002).

- The majority noted that Eleventh and Fifth Circuits have held that the FTC's construction of the MMWA is unreasonable in light of the Supreme Court's repeated holdings that Congress created a liberal federal policy favoring arbitration when it enacted the FAA in 1924, more than 50 years before Congress enacted the MMWA in 1975. Slip op. at 17801-17802 (citing cases).

- The Ninth Circuit majority rejected these holdings because: (1) it viewed the prior statute, the FAA, as "less specific" than the later MMWA, (2) it found the FTC's interpretation "reasonable," and (3) the MMWA differs in certain respects from other statutes that the Supreme Court has found to be trumped by the FAA. Slip op. at 17804.

- http://www.consumerclassactionsmasstorts.com/2011/10/articles/preemption/ninth-circuit-holds-that-binding-arbitration-is-unavailable-in-warranty-contracts-to-which-the-mmwa-applies/



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# Chen-Oster v. Goldman, Sachs & Co., 2011 WL 2671813 (S.D.N.Y. July 07, 2011)

- Applying the federal common law of arbitrability in rejecting the argument that Concepcion required enforcement of class arbitration waiver in a gender discrimination pattern and practice case.
- Holding that enforcement of the arbitration clause at issue would interfere with the enforcement of a federal substantive right.
- "In this case the plaintiff would be foreclosed from bringing her pattern or practice claim not only by the practicality of economic pressures limiting the value of her claim compared with the cost of prosecuting it, but also by the actuality of federal case law interpreting Title VII. To the extent that she has a substantive right under Title VII to bring a pattern or practice claim rather than an individual disparate impact claim, she would be precluded from enforcing that right by the arbitration clause in her employment contract."



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# Brown v. Ralphs Grocery Company, 197 Cal.App.4th 489, 128 Cal.Rptr.3d 854, (Cal. App. 2 Dist., July 12, 2011)

- Representative actions for state labor code violations under California's Private Attorney General Act (PAGA) were not preempted by the FAA.
- Concepcion did not address preemption in cases involving PAGA's statutory procedure.
- The procedure did not involve many of the attributes of class action procedure that the Supreme Court had held were inconsistent with the purposes of arbitration.



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## Kanbar v. O'Melveny & Myers, --- F.Supp.2d ----, 2011 WL 2940690 (N.D. Cal. July 21, 2011)

- The judge rejected O'Melveny's arguments that Concepcion precluded a class challenge to its arbitration agreement, however, concluding that the Supreme Court's ruling didn't trump a finding that the agreement was unconscionable.
- "[A]rbitration agreements are still subject to unconscionability analysis" in the wake of Concepcion . . . . "The doctrine of unconscionability can override the terms of an arbitration agreement and the parties' expectations in connection with them."
- Nonetheless, the Court granted motion by O'Melveny & Myers to compel arbitration with a former employee for harassment because she had initially invoked the arbitration clause, waiving her right to sue.



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## In re: Checking Account Overdraft Litigation, -- F. Supp.2d --, 2011 WL 4454913 (S.D. Fla. Sept. 01, 2011)

- Arbitration agreements with class action waivers unenforceable on substantive unconscionability grounds despite Concepcion.
- The defendant banks, in this alleged excessive overdraft fee class action suit, renewed their motions to compel arbitration after the Eleventh Circuit remanded the matter for consideration in light of the Concepcion ruling.
- The district court had earlier held the class action waivers contained in the banks arbitration agreements with consumers to be unconscionable under various states' laws.



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## In re: Checking Account Overdraft Litigation (continued)

- "The Parties now before the Court have each argued for an extreme interpretation of Concepcion. Plaintiffs ask the Court to find that Concepcion has changed nothing, and that the class action waivers in the arbitration agreements may still be the basis for finding them unconscionable. Defendants, on the other hand, argue that Concepcion has changed everything, and that unconscionability is no longer a defense to the enforceability of an arbitration agreement.

- In a sense, both views are correct. Concepcion has changed everything, in that class action waivers have historically been a major factor in the unconscionability analysis under state law, and now, they can no longer be considered.

- And yet, Concepcion has changed nothing in that **a thorough, case-by-case analysis of the applicable state law doctrine of unconscionability, applied to the specific terms of an arbitration agreement, is still required**. In sum, Concepcion has not relieved courts from their obligation to scrutinize arbitration agreements for enforceability on a case-by-case basis where one party resists arbitration; rather, Concepcion provides guidance as to what courts may consider when fulfilling that obligation." Order on remand issued September 1, 2011 at 9-10.



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## *Jock v. Sterling Jewelers*, 646 F.3d 113 (2d Cir. July 1, 2011)

- 2-1 panel decision that distinguishes Stolt-Nielsen on a number of grounds – e.g., there was no "concession" that the arbitrator had not applied the intent of the parties -- and overturns a district judge (Rakoff) who had overturned an arbitrator's decision.

- "We hold that the district court, rather than examining whether the arbitrator had exceeded her authority under the precedent of this circuit, improperly substituted its own interpretation of the parties' arbitration agreement for that of the arbitrator's to conclude that the arbitrator had reached an incorrect determination that the parties' arbitration agreement did not prohibit class arbitration. We, therefore, reverse the judgment of the district court vacating the arbitration award and remand with instructions to confirm the award."



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# *Jock v. Sterling Jewelers* (continued) -- Judge Winter's Dissent

- My colleagues attempt to distinguish Stolt-Nielsen on several grounds.
- First, they note the stipulation in Stolt-Nielsen that the arbitration agreement there was "silent" as to class arbitration. Maj. Op. at 11-12, 18.
- Second, they rely on Stolt-Nielsen's recognition of the possibility of implied agreements to class arbitration. Maj. Op. at 13-14, 18.
- Third, they make reference to the arbitrator's reliance on Ohio law in this case. Maj. Op. at 19, 21-23.
- Fourth, they rely on provisions of the various arbitration agreements at issue here empowering arbitrators to award generally available types of legal and equitable relief. Maj. Op. at 23-24.
- Fifth, and finally, they invoke the limited scope of judicial review of arbitration agreements. Maj. Op. at 19-21.



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# Arbitrations to Stop AT&T Merger with T-Mobile

- July 22, 2011 -- AT&T Customers File Arbitration Cases Seeking to Block $39 Billion T-Mobile Merger.
- 236-page arbitration demand alleged that the proposed deal would harm competition in violation of the Clayton Antitrust Act.
- “If we bring 100 cases and we lose 99 of them we are going to win,” Bursor told AllThingsD. “We just need one arbitrator to say, ‘Wait a minute, this merger is going to hurt competition.’” http://allthingsd.com/20110722/att-customers-file-arbitration-cases-seeking-to-block-t-mobile-merger/



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# AT&T Sues to Stop Arbitrations

- August 15, 2011
  http://www.pcmag.com/article2/0,2817,2391145,00.asp
- AT&T Wireless filed eight lawsuits in federal courts seeking an injunction over the "abusive actions," or arbitration claims, of customers who had joined together in a class-action case against the carrier.
- Quick recap: in July, law firm Bursor & Fisher filed a lawsuit on behalf of AT&T customers who were against the proposed acquisition, citing concerns about eventual fee hikes. So far, the firm has solicited more than 1,000 names; you can read more about Bursor & Fisher's efforts at FightTheMerger.com.
- In one of the lawsuits AT&T filed in a district court in Massachusetts, AT&T said it is seeking to stop customer Michael Princi from pursuing his arbitration case with Bursor & Fisher.



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## (Continued)

- The complaint reads, "Defendant is among the 1,000 (and counting) ATTM [AT&T Mobility] customers whom the law firm of Bursor & Fisher P.A. ('Bursor') has solicited and now claims to have recruited as part of a scheme to pressure ATTM into settling meritless claims.“
- "Bursor and Faruqi's [another attorney assisting Bursor & Fisher's lawsuit] scheme plainly violates the arbitration agreement between ATTM and defendant. Among other limitations on the scope of arbitration, the agreement expressly precludes 'any form of representative or class proceeding' and permits claims for injunctive relief 'only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim.'“
- In other words, the promised $10,000 for winning an arbitration case doesn't apply to customers in a collective complaint.



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## (Continued)

- In a Monday statement, an AT&T spokesperson said, "The bottom line here is an arbitrator has no authority to block the merger or affect the merger process in any way."
- "The claims are completely without merit. We have filed suit in order to stop this abusive action," AT&T said.
- But Scott Bursor, a partner at Bursor & Fisher, said the American Arbitration Association (AAA) overruled AT&T's objections and has moved forward with the arbitration process; now the federal courts must agree with the AAA's decision. The AAA declined to comment.
- "AT&T's filing of these lawsuits appears to be an act of desperation, since AT&T now realizes it faces a substantial likelihood that one or more of these arbitration [cases] will indeed stop the takeover from happening," Bursor said. "But AT&T's legal arguments are frivolous. We expect the courts will reject AT&T's arguments and dismiss these cases very quickly. AT&T's desperate lawsuits will not interfere with the ongoing arbitration proceedings."



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# Consumer Class Action Litigation: Navigating The Evolving Landscape

**October 27, 2011**

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# Consumer Class Action Litigation: Navigating The Evolving Landscape

I. **Rethinking Commonality And Other Rule 23 Issues:**
*Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011)

II. **The Anti-Injunction Act In Class Actions:**
*Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011)

III. **Noteworthy Recent Decisions In Class Actions**

# Wal-Mart Stores, Inc. v. Dukes et al.

131 S. Ct. 2541 (2011)

# Wal-Mart Stores, Inc. v. Dukes et al.

- Putative class of 1.5 million female current and former employees of the nation's largest retailer alleged that the company discriminated against them on the basis of sex by denying them equal pay or promotions, in violation of Title VII.

- Specifically, the plaintiffs alleged that Wal-Mart's policy of affording discretion over pay and promotions to local managers results in an unlawful disparate impact on female employees. 131 S. Ct. at 2548.

- The plaintiffs sought injunctive and declarative relief, as well as punitive damages and back pay. *Id*. at 2548.

# Wal-Mart Stores, Inc. v. Dukes et al.

- The Northern District of California certified this nationwide class under FRCP 23(b)(2). 222 F.R.D. 137, 187-88 (N.D. Cal. 2004).

- A divided *en banc* Court of Appeals for the Ninth Circuit affirmed the District Court's class certification, holding that 23(b)(2) certification was permissible here because the claim for back pay is not predominant over the other claims. 603 F.3d 571, 618-20 (9th Cir. 2010).

- The Ninth Circuit trimmed the class by remanding the punitive claim to determine whether it might cause the monetary claims to predominate. *Id*. at 621. Further, the Ninth Circuit excluded from the class those members who were no longer Wal-Mart employees at the time the complaint was filed. *Id*. at 623.

# Wal-Mart Stores, Inc. v. Dukes et al.

- Supreme Court majority opinion focused on the commonality requirement of FRCP 23(a)(2). 131 S. Ct. at 2550-51. This prerequisite demands more than just mere common questions; rather, the class proceeding must have the capacity to raise "common answers" apt to drive the resolution of the litigation. *Id*. at 2551.

- In this case, the Court held that "it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*." *Id*. at 2553.

# Wal-Mart Stores, Inc. v. Dukes et al.

- To adequately determine whether the class meets the commonality prerequisite, courts must look beyond the pleadings. This "rigorous analysis" may sometimes overlap with the merits of plaintiff's underlying claim. *Id*. at 2551.
- The Court in its analysis scrutinized the class experts.
  - it rejected plaintiffs' attempt to establish this theory through its expert sociologist, because this expert could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking. *Id*. at 2553-54.
  - similarly, plaintiffs' statistical evidence failed to establish the required commonality. *Id*. at 2555.
  - in *dictum*, Justice Scalia expressed doubt about the district court's conclusion that *Daubert* does not apply at the certification stage. *Id*. at 2554.

# Wal-Mart Stores, Inc. v. Dukes et al.

- Class was also improperly certified under FRCP 23(b)(2). At least where (as here) monetary relief is not incidental to the injunctive or declarative relief sought, a class may not be certified under 23(b)(2). *Id*. at 2557.

- Rule 23(b)(2) does not authorize class certification when each class member would be entitled to an individualized award of monetary damages. *Id*.

- Individualized monetary claims must receive the procedural protections of FRCP 23(b)(3): Predominance of common questions, superiority of the class proceeding, mandatory notice, and the right to opt out. *Id*. at 2558.

# The Anti-Injunction Act in Class Actions

## Smith et al. v. Bayer Corp.

131 S. Ct. 2368 (2011)

# Smith et al. v. Bayer Corp.

- Bayer removed West Virginia state court action in which plaintiff alleged that a pharmaceutical product violated West Virginia consumer protection laws. The case was then moved to an MDL in the District of Minnesota. That court denied plaintiffs' motion for class certification because the individual question of proof of actual loss predominates. 218 F.R.D. 197, 216 (D. Minn. 2003).

- A second case arising out of the same product involving identical claims was brought by a different plaintiff in another West Virginia state court. Bayer could not remove this case, as it predated CAFA. Plaintiff moved the West Virginia state court for class certification under West Virginia's Rule 23.

# Smith et al. v. Bayer Corp.

- Bayer moved the District Court of Minnesota to issue an injunction to protect its judgment denying class certification. The district court agreed and enjoined the state court in West Virginia from ruling on plaintiff's motion for class certification. *Id*. at 2374.

- The Eighth Circuit affirmed the injunction as a proper application of the re-litigation exception to the Anti-Injunction Act. 593 F.3d 716, 724 (2010).

- Supreme Court reversed, emphasizing that this rare exception should not be invoked unless there is no doubt about its applicability. 131 S. Ct. at 2375.

# Smith et al. v. Bayer Corp.

- The exception applies only when concepts of res judicata or collateral estoppel clearly bar re-litigation. *Id*. at 2375-76.

- In the Baycol cases, the Supreme Court held that the re-litigation exception did not apply for two reasons. *Id*.

# Smith et al. v. Bayer Corp.

- First, the issues in the two cases are not identical.
  - Even though both courts would have interpreted the identical text of Rule 23, the analysis would have differed.
  - The West Virginia state court would have applied W. Va. Rule 23 as interpreted by the West Virginia Supreme Court, while the District of Minnesota applied the Eighth Circuit's analysis of FRCP 23.
  - More specifically, West Virginia employs an "all things considered" balancing-analysis of the 23(b)(3) predominance question. Conversely, the District Court of Minnesota applied a strict test barring class treatment when proof of each plaintiff's injury is necessary.

*Id*. at 2376-79.

# Smith et al. v. Bayer Corp.

- Second, the plaintiff in the second case was not a party to the first action.
  - the term "party" does not encompass unnamed members of a putative class before certification. *Id*. at 2379.
  - the exception allowing a properly conducted class action to bind a nonparty does not apply here, because class certification was denied in the first case. Neither a proposed class action nor a rejected class action may bind nonparties.

*Id*. at 2380-82.

# Smith et al. v. Bayer Corp.

- In light of *Bayer Corp*., the Supreme Court has vacated and remanded a case from the Seventh Circuit. *Thorogood v. Sears, Roebuck & Co.*, 131 S. Ct. 306 (2011).
- In *Thorogood*, the Seventh Circuit reversed the lower court's denial of defendant's request to enjoin a California state court from certifying a class similar to the one the Seventh Circuit had previously decertified. 624 F.3d 842, 854 (7th Cir. 2010).
- The court ruled that the All Writs Act authorized an injunction against plaintiffs' counsel (which were the same as in the first case) and against the members of the class. *Id*. at 852-53.
- The Seventh Circuit acknowledged that the Supreme Court had accepted cert in *Bayer Corp*. but found it improbable that the *Thorogood* case would be affected. *Id*.

# Noteworthy Circuit Court Decisions

*Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield of Michigan*, 654 F.3d 618 (6th Cir. 2011).

- Union obtained summary judgment against Blue Cross Blue Shield after the insurer had imposed certain fees contrary to Michigan law. The district court then granted class certification.
- The Sixth Circuit reversed under the superiority requirement of FRCP 23(b)(3). Because the district court had already decided the central legal issues, a class action was not the superior method of resolution. More specifically, "it would have been more judicially efficient to enter a final judgment in the individual action so as to allow BCBSM to file an appeal. In this way, the central legal issue could have been resolved by this court, and based on that outcome, other potential class members could then decide whether to pursue an individual suit . . . ."
- The court also considered the impact of a class action on insurance costs for the elderly in Michigan as further support for the conclusion that the class action is not a superior method of resolution.

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# In re: Zurn Plex Plumbing Litigation, 644 F.3d 604 (8th Cir. July 6, 2011)

- Circuit court affirmed district court class certification order
- Discussion of limited versus full Daubert analysis
- Bifurcated versus full discovery



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# Bifurcation of discovery

- At last year's presentation, here is what a defense counsel said (below is content of the slide):
- "Bifurcation of class certification versus merits discovery should always be sought".
- Discretion of the court
- There is a general recognition that it is more efficient to bifurcate
  - Federal Judicial Center, Manual for Complex Litigation §21.14 (4th ed. 2004) ("Discovery relevant only to the merits delays the certification decision and may ultimately be unnecessary. Courts often bifurcate discovery between certification issues and those related to the merits of the allegations.")
- But separation of issues can pose a challenge
  - Manual for Complex Litigation §21.14 (4th ed. 2004) ("Courts have recognized that information about the nature of the claims on the merits and the proof that they require is important to deciding certification. Arbitrary insistence on the merits/class discovery distinction sometimes thwarts the informed judicial assessment that current class certification practice emphasizes.")
- Should try to negotiate scope of pre-certification discovery."



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Mr. Azar focuses his practice on antitrust, consumer, corporate governance, and securities fraud class actions, along with selected general business litigation matters. Mr. Azar has significant litigation experience, including first-chair trial and appellate work. His experience with corporate governance issues includes spending a year clerking for Chief Justice Veasey of the Delaware Supreme Court. Prior to joining Milberg, Mr. Azar was a senior associate with Quinn Emanuel.

Mr. Azar serves as a volunteer prosecutor through the Los Angeles Bar Association's Trial Advocacy Project, and has been named by Los Angeles Magazine as a Southern California Super Lawyers Rising Star. He serves on the pro bono panel of the Harriett Buhai Center for Family Law, and he was awarded a Distinguished Service Award in 2009 for his continuing representation of a disabled father in a complex family law matter. Mr. Azar's pro bono work has also included: prevailing at trial in a case on behalf of a learning disabled student asserting claims under the American with Disabilities Act; successfully persuading the Ninth Circuit Court of Appeals to allow a disabled prisoner's federal civil rights case to proceed, resulting in a published decision on a matter of first impression; and assisting tenants in disputes with their landlords.

Mr. Azar has extensive knowledge of dispute resolution, having served as a mediator in more than 160 cases, and he has trained and reviewed other mediators. He served for five years as the editor of the quarterly publication of the Society of Professionals in Dispute Resolution, and was honored with the association's Presidential Recognition award.

Mr. Azar is a contributing author of the forthcoming Antitrust Law Developments (7th Edition), scheduled for publication by the ABA Section of Antitrust Law in April 2011.



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# Noteworthy Recent Decisions in Class Actions

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# Noteworthy Recent Decisions

- *In re Bluetooth Headset Products Liability Litigation*, — F.3d —, 2011 WL 3632604 (9th Cir. Aug. 19, 2011):
  - Class objectors challenged fairness and reasonableness of class action settlement.
  - Settlement approved by district court provided class with $100,000 in *cy pres* awards, $800,000 for class counsel, and $12,000 for class representatives. No settlement money to class members.
  - Ninth Circuit reversed approval of settlement, finding that district court failed to (1) adequately conduct a "searching inquiry" into fairness of the negotiated distribution of funds and (2) consider the substantive reasonableness of the attorney's fee request in light of the degree of success.

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# Noteworthy Recent Decisions

- *Stearns v. Ticketmaster Corp.*, — F.3d —, 2011 WL 3659354 (9th Cir. Aug. 22, 2011):
  - Putative class action challenged "deceptive internet scheme" under California's UCL and CLRA.
  - District court denied class certification because it concluded (among other things) that individual issues regarding proof of reliance and causation would predominate.
  - Ninth Circuit reversed on that point, relying on *In re Tobacco II Cases*, 46 Cal. 4th 298, 93 Cal. Rptr. 3d 559, 207 P.3d 20 (2009). Although a class representative had to show injury in fact and causation to have standing, "relief under the UCL is available without individualized proof of deception, reliance and injury," so issues of reliance would not predominate for the class.



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# Noteworthy Recent Decisions

- *Klier v. Elf Atochem North America, Inc.*, — F.3d —, 2011 WL 4436528 (5th Cir. Sept. 26, 2011):
  - Toxic tort class action settled for $41 million, with amount divided among three subclasses. More than $800,000 remained after distribution. Defendant suggested distributing to *cy pres* recipients. Class member objected that funds should go to class members.
  - Fifth Circuit agreed "[b]ecause the settlement funds are the property of the class, a *cy pres* distribution to a third party of unclaimed settlement funds is permissible 'only when it is not feasible to make further distributions to class members.' Where it is still logistically feasible and economically viable to make additional pro rata distributions to class members, the district court should do so, except where an additional distribution would provide a windfall to class members with liquidated-damages claims that were 100 percent satisfied by the initial distribution."



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# Noteworthy Recent Decisions

- *Krinsk v. SunTrust Banks*, — F.3d —, 2011 WL 3902998 (11th Cir. Sept. 7, 2011):
  - Borrower filed putative class action against lender for allegedly improperly suspending access to line of credit.
  - Loan agreement contained arbitration agreement and class action waiver; lender moved to dismiss case instead of moving to compel arbitration.
  - Discovery and class certification briefing proceeded before court ruled on motions to dismiss.
  - Plaintiff filed amended complaint. Lender then moved to compel arbitration. Court denied and found lender had waived right.
  - Eleventh Circuit reversed, holding that the filing of the amended complaint revived lender's right to assert arbitration defense. New complaint changed the scope of the case unexpectedly.



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# Noteworthy Circuit Court Decisions

*In re Aqua Dots Prods. Liability Litg.*, 654 F.3d 748 (7th Cir. 2011).

- Putative FRCP 23(b)(3) class action brought by parents who had purchased a toy product the manufacturer later recalled after a number of children became sick by eating the candy-resembling toy product. None of the plaintiffs' children actually got sick. Rather, the class alleged that defendants had violated the Consumer Products Safety Act and various state laws, requesting a full refund and punitive damages.

- The district court denied class certification under FRCP 23(b)(3) because the defendants' voluntary recall and refund program was superior to class litigation as a method of resolution.

# Noteworthy Circuit Court Decisions

*In re Aqua Dots Prods. Liability Litg.*, 654 F.3d 748 (7th Cir. 2011).

- The Seventh Circuit disagreed with this analysis, because the text of 23(b)(3) only addresses superior methods for "adjudicating the controversy." The defendants' recall and refund program was not a method of adjudication, and thus is not contemplated as a superior method by Rule 23(b)(3).
- Nevertheless, the Seventh Circuit affirmed the result reached below, but under Rule 23(a)(4)'s adequacy of representation prong. The interests of the class are not adequately represented by the plaintiffs' desire for class litigation when the refunds are available without incurring the costs of litigation.
- Moreover, the punitive damages claim renders the class difficult to manage under 23(b)(3)(D), as a nationwide class would depend on multiple states' laws.

# Noteworthy Circuit Court Decisions

*Madison v. Chalmette Refining, L.L.C.*, 637 F.3d 551 (5th Cir. 2011).

- The district court certified a personal injury class under FRCP 23(b)(3) arising out of alleged coke dust exposure of school children during a war reenactment conducted adjacent to defendant's refinery. *Id*. at 553.
- The Fifth Circuit reversed, because the lower court "did not meaningfully consider how Plaintiffs' claims would be tried." *Id*. at 556. The predominance analysis requires district courts to consider "how a trial on the merits would be conducted if a class were certified." *Id*. at 555.
- Absent this analysis, "it was impossible for the court to know whether the common issues would be a 'significant' portion of the individual trials, much less whether the common issues predominate." *Id*. at 557.
- The district court had relied on the existence of a multi-phase trial plan proposed by plaintiffs which reserved question of damages to an individual phase. *Id*. at 556. It had simplified the issue to whether the class had been near the refinery and whether there had been exposure. *Id*. The Fifth Circuit disagreed, finding the issues far more complex and requiring more thoughtful analysis of how a trial court be conducted. *Id*.

# Noteworthy Circuit Court Decisions

*West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169 (4th Cir. 2011).

- Defendant pharmacies removed action brought under a state consumer protection law by West Virginia Attorney General. Among other things, the action sought refunds on behalf of purchasers of generic drugs. *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 748 F. Supp. 2d 580 (S.D. W. Va. 2010).
- Defendants argued that this was a class action in disguise, and therefore warranted federal jurisdiction under CAFA. The district court and the Fourth Circuit disagreed. 646 F.3d at 179.
- This case was a classic *parens patriae* action, not a class or mass action. The court noted that "the fact that the Attorney Geneeral is acting to obtain disgorgement of ill-gotten gains, separate and apart from the interests of particular consumers in obtaining recompense validates this action as a *parens patriae* action." *Id*. at 176.

# Speaker

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**Barry Goheen** is a partner in King & Spalding's Business Litigation Practice Group. He practices in the firm's general and commercial litigation area and focuses on class actions and other multi-party litigation.

Mr. Goheen has served as lead or co-counsel in over 40 class actions in all areas of the law, including antitrust, securities fraud, consumer protection, product liability, privacy, and general commercial disputes in state and federal courts representing such clients as The Coca-Cola Company, Wal-Mart, SunTrust Banks, Bank of America, Brown & Williamson Tobacco Corporation, Jefferson-Pilot Life Insurance Company, Equifax, and Lockheed Martin Corporation.

His class action matters include:

- Participation in several phases of a multi-phase trial of a product liability class action in Miami, Florida.
- Co-counsel in the defense of nationwide class action brought against insurance company alleging unfair insurance practices.
- Lead counsel in the defense of a proposed nationwide RICO class action brought against automobile manufacturer alleging misrepresentation of horsepower in the vehicles.
- Co-counsel in the defense of nationwide antitrust class action brought by purchasers of souvenirs at NASCAR events.
- Lead or co-counsel in defense of over 30 proposed class actions brought by consumers of cigarette products, obtaining dismissal or denial of class certification in all but two cases.