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## THE FALLOUT FROM *AT&T MOBILITY V. CONCEPCION*: PARAMETERS ESTABLISHED BY THE INTERPRETATIONS OF LOWER COURTS

Terry F. Moritz\*

### I. INTRODUCTION

Last year, the United States Supreme Court rattled the arbitration world with its decision in *AT&T Mobility v. Concepcion*.<sup>1</sup> The Court's decision in *Concepcion* overturned the widely accepted *Discover Bank* rule<sup>2</sup> that had been handed down by the California Supreme Court in *Discover Bank v. Superior Court*.<sup>3</sup> *Discover Bank* had established a fairly rigid rule that class arbitration waivers were unconscionable and could not be enforced, thus permitting class actions even where the parties had agreed to only individual arbitrations.<sup>4</sup> In overturning *Discover Bank*, however, the Court held that the Federal Arbitration Act (FAA) preempted the *Discover Bank* rule and that the terms of an arbitration agreement could not be declared unconscionable simply because they contained a class action waiver.<sup>5</sup> Instead, the FAA dictates that arbitration agreements – even those in adhesive contracts – must be read at face value and strictly interpreted.<sup>6</sup>

In reaching its decision in *Concepcion*, the Court focused on § 2 of the FAA, acknowledging that this provision, often referred to as the “Savings Clause,” “permits arbitration agreements to be declared ‘unenforceable’ upon such grounds as exist at law or in equity for the revocation of any contract” but that arbitration agreements can only be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability – not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.<sup>7</sup> Ruling that § 2 of the FAA preempts California's *Discover Bank* rule, the Court noted that:

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<sup>1</sup> *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1744 (2011).

<sup>2</sup> *Id.* at 1753.

<sup>3</sup> *See generally* *Discover Bank v. Superior Court*, 113 P.3d 1100, 1103 (Cal. 2008).

<sup>4</sup> *Id.* at 1108.

<sup>5</sup> *AT&T Mobility*, 131 S. Ct. at 1753.

<sup>6</sup> *Id.* at 1752.

<sup>7</sup> *Id.* at 1746 (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U. S. 681, 687 (1996)).

Class-wide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often dominant procedural aspects of certification, such as the protection of absent parties. The conclusion follows that class arbitration, to the extent it is manufactured by Discover Bank rather than consensual, is inconsistent with the FAA.<sup>8</sup>

The Court also concluded that “[a]rbitration is poorly suited to the higher stakes of class litigation,” and struck down the *Discover Bank* rule as hostile to the use of individual arbitration to resolve consumer disputes.<sup>9</sup> Although the Court noted the ways in which arbitration is “poorly suited to the higher stakes of class litigation” – ineffectiveness of judicial review of certification issues, informality of proceedings, inexperience of arbitrators, class certification issues, and increased risks to defendants – the Court’s decision, nonetheless, seems to rest on a strict application of § 2 of the FAA, rather than any policy arguments in favor of or against classwide arbitration.<sup>10</sup>

Although the Court’s logic in the *Concepcion* decision is frequently criticized, within the context of the Court’s arbitration jurisprudence, it is sound. In the 2009-2010 Term, the Court in *Stolt-Nielsen S.A. v. AnimalFeeds International*<sup>11</sup> held that a party could not be compelled to engage in class-arbitration “unless there is a contractual basis for concluding that the party agreed to do so”.<sup>12</sup> In any arbitration agreement that contains a class action waiver it seems beyond contest to fairly conclude that the parties have not agreed to class arbitration. The argument made by those critical of the *Concepcion* decision is that because *Discover Bank* reaches all waivers of class action, whether in the arbitration forum or in a court setting, the Court misapplied the Savings Clause in § 2 of the FAA. This argument misses the point. It is only in an arbitration setting where the agreement of the parties to arbitrate is an essential precondition. Put another way, no one gets to elect whether the law will bind them, but they can elect to submit a matter to an arbitration. Thus, to the extent the *Discover Bank* rule results in judicially compelled class arbitration contrary to the agreement of the parties, the rule is specifically targeted at arbitration only.

In the year since *Concepcion* was decided, lower courts throughout the country have had ample opportunity to interpret the scope of the *Concepcion* decision.<sup>13</sup> In fact, several hundred

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<sup>8</sup> *Id.* at 1750-51.

<sup>9</sup> *Id.* at 1752.

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

<sup>11</sup> *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010).

<sup>12</sup> *Id.* at 1775.

<sup>13</sup> Not only have myriad lower courts interpreted *Concepcion* in a variety of contexts, but the U.S. Supreme Court also recently issued an opinion in *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012), in which it relied on its adherence to the “liberal federal policy favoring arbitration agreements” set forth in *Concepcion* to hold that the statutory phrase “[y]ou have a right to sue a credit repair organization” in the Credit Repair Organizations Act (CROA) did not bar arbitration of disputes brought under the CROA. *Id.* at 673. The Court specifically stated, “We think it clear, however, that this mere ‘contemplation’ of suit in any competent court does not *guarantee* suit in all competent courts, disabling the parties from adopting a reasonable forum selection clause...Had Congress meant to prohibit these very common [arbitration] provisions in the CROA, it would have done so in a manner less obtuse than what respondents suggest...Because the CROA is silent on whether claims under the Act can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms.” *Id.* at 671-73.

cases have cited to *Concepcion* in some capacity. Some courts have placed limitations on the scope of *Concepcion* by either holding that the specific arbitration agreement at issue was unenforceable for reasons aside from the inclusion of a class arbitration waiver, or by differentiating *Concepcion* for its application of state or federal statutory law, rather than common law or court-made law. On the other end of the spectrum, some courts have expanded on the *Concepcion* decision to strike down state laws that resembled the *Discover Bank* rule. Throughout the decisions, two conflicting policy arguments seem to come into play: (1) the inappropriateness of arbitration as a means of resolving class claims, on the one hand, and (2) the vindication of rights doctrine (*i.e.* the possibility that many small-dollar claims will go unresolved due to the costs associated with pursuing individual claims), on the other. Yet, despite the many practical implications of the Court’s decision in *Concepcion*, lower courts seem to base their reasoning on an application of the FAA and contract construction principles.<sup>14</sup>

## II. THE BROAD RANGE OF LOWER COURTS’ DECISIONS

### A. Cases That Limit the Scope of *Concepcion* by Ultimately Finding the Arbitration Agreement at Issue to be Unenforceable on Other Grounds

Several courts continue to apply an unconscionability standard to arbitration agreements, with some courts skirting the holding of *Concepcion* by ultimately finding a particular arbitration agreement to be unenforceable for reasons aside from the inclusion of a class arbitration waiver.<sup>15</sup> In *Kanbar v. O’Melveny*, for example, the Northern District of California stated that “arbitration agreements are still subject to unconscionability analysis... [and] the doctrine of unconscionability can override the terms of an arbitration agreement and the parties’ expectations in connection therewith.”<sup>16</sup> The *Kanbar* court ultimately held that the arbitration agreement was both procedurally and substantively unconscionable based on its “take it or leave it” condition of employment, its strict notice requirements, and overly burdensome confidentiality provisions.<sup>17</sup>

Other courts focus on the fact that *Concepcion* did not disrupt a court’s ability to declare an arbitration agreement unenforceable for reasons other than public policy or unconscionability, such as fraud, duress, or lack of mutual assent. Due to confusing and inconsistent provisions in the arbitration agreement, the court in *NAACP of Camden County East v. Foulke Management Corp.* ultimately held that the arbitration agreement was unenforceable due to lack of mutual assent.<sup>18</sup> Likewise, in *Sanchez v. Valencia Holding Co., LLC*, a California Court of Appeal for the Second District declared an arbitration agreement to be procedurally and substantively

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<sup>14</sup> Only dissenting opinions seem to pay more than mere lip service to the policy argument that arbitration is poorly suited for class litigation. See *e.g.*, *Jock v. Sterling Jewelers, Inc.*, 646 F.3d 113, 131-32 (2d Cir. 2011) (Winter, J., dissenting).

<sup>15</sup> See, *e.g.*, *Kanbar v. O’Melveny & Myers*, No. C-11-0892 EMC, 2011 WL 2940690, at \*1 (N.D. Cal. July 21, 2011); *NAACP of Camden County E. v. Foulke Mgmt. Corp.*, 421 N.J. Super. 404 (App. Div. 2011); *Chavez v. Bank of Am.*, No. C 10-653 JCS, 2011 WL 4712204, at \*1 (N.D. Cal. Oct. 7, 2011); *Sanchez v. Valencia Holding Co.*, No. B228027, 2011 WL 5027488, at \*1 (Cal. Ct. App. Oct. 24, 2011); *Newton v. Clearwire Corp.*, No. 2:11-CV-00783-WBS-DAD, 2011 WL 4458971, at \*1 (E.D. Cal. Sept 23, 2011).

<sup>16</sup> *Kanbar*, 2011 WL 2940690, at \*6.

<sup>17</sup> *Id.* at \*7.

<sup>18</sup> *NAACP of Camden County E.*, 421 N.J. Super. at 438.

unconscionable based on the cumulative effect of clauses regarding arbitration appeal procedures, the imposition of certain filing fees, and the exclusion of repossession issues from arbitration.<sup>19</sup>

Some courts choose to “pencil-out” an unconscionable provision, but uphold the remainder of the arbitration agreement. For instance, in *Chavez v. Bank of America*, the Northern District of California expunged substantively unconscionable forum selection clause from an otherwise enforceable arbitration agreement.<sup>20</sup>

Other courts continue to apply existing jurisdictional standards of unconscionability, provided that they do not disfavor arbitration *per se*. In *Bernal v. Burnett*, Judge Martinez for the United States District Court for the District of Colorado, tested an arbitration agreement with a class arbitration waiver under Colorado’s unconscionability test, which is set forth in *Davis v. MLG Corp.*:

Because Colorado’s test for unconscionability on a contract provision does not explicitly disfavor arbitration (class or otherwise), the degree to which *Concepcion* changes the legal landscape in Colorado is unclear. There does not appear to be any reason why the *Davis* factors are not still good law. Thus, the court will consider the facts of this case under the structure, keeping in mind the Supreme Court’s statements and observations in *Concepcion*.<sup>21</sup>

## **B. The Application of *Concepcion* to Federal or State Statutory Laws in Contrast to Common Law or Court-Made Law**

Some lower courts have differentiated the implications and scope of *Concepcion* based on the application of a federal or state *statutory* law rather than an application of common law or court-made law.<sup>22</sup> For example, *Chen-Oster v. Goldman, Sachs & Co.* involved allegations of gender discrimination against female employees in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and New York City Human Rights Law, N.Y.C. Admin Code § 8-107 *et seq.*<sup>23</sup> A federal court in the Southern District of New York initially denied the defendant’s motion to stay the action and compel arbitration based on an arbitration agreement ancillary to an employment contract. The defendant filed a motion for reconsideration following the Court’s ruling in *Concepcion*.<sup>24</sup> The court again denied the motion, holding that *Concepcion* did not clearly reach rights secured under Title VII. The court specifically stated:

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<sup>19</sup> *Sanchez*, 2011 WL 5027488, at \*10.

<sup>20</sup> *Chavez*, 2011 WL 4712204, at \*11.

<sup>21</sup> *Bernal v. Burnett*, 793 F. Supp. 2d 1280, 1287 (2011) (citing *Davis v. MLG Corp.*, 712 P.2d 985 (Colo. 1986)).

<sup>22</sup> *See, e.g.*, *Chen-Oster v. Goldman, Sachs & Co.*, No. 10 Civ. 6950(LBS)(JCF), 2011 WL 2671813, at \*1 (S.D.N.Y. July 7, 2011); *Brown v. Ralphs Grocery Co.*, 197 Cal. App. 4th 489 (2011).

<sup>23</sup> *Chen-Oster*, 2011 WL 2671813, at \*1.

<sup>24</sup> *Id.*

*Concepcion* involved the preemption of state contract law by a federal preference for arbitration embodied in a federal statute, the FAA...This case demands consideration of a separate issue: whether the FAA's objectives are also paramount when, as here, rights created by a competing federal statute are infringed by an agreement to arbitrate...In this case, as discussed in the April 28 Order, what is at issue is not a right to proceed, procedurally, as a class, but rather the right guaranteed by Title VII, to be free from discriminatory employment practices. *Chen-Oster*, 2011 WL 1795297, at \*12. Because arbitrators will apply the same substantive law of Title VII as would be applied by a federal court, *see Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 27 (2d Cir.2000), and the substantive law of Title VII as applied by the federal courts prohibits individuals from bringing pattern or practice claims, *Chen-Oster*, 2011 WL 1795297, at \*11, \*12 n.6, this case implicates federal statutory (Congressionally-created) rights, not the 'judicially-created obstacle [ ] to the enforcement of agreements to arbitrate' that was at issue in *Concepcion*.<sup>25</sup>

In *Brown v. Ralphs Grocery Company*,<sup>26</sup> the Court of Appeals for the Second District of California considered complex allegations involving the California Private Attorney General Act of 2004 (PAGA) and California's Labor Code. The court proclaimed that "[t]he purpose of the PAGA is not to recover damages or restitution, but to create a means of 'deputizing' citizens as private attorneys general to enforce the Labor Code." Accordingly, because the claims were brought for the benefit of the general public, with the claimants acting as a proxy for the state to enforce labor laws, the applicable class waivers were unenforceable. The appellate court remanded the case to the trial court to decide whether to sever the waiver or to refuse to enforce the arbitration clause altogether.<sup>27</sup>

### C. Cases that Expand the *Concepcion* Holding

At the other end of the spectrum are those cases in which a lower court has expanded on the *Concepcion* holding to overturn rulings similar to *Discover Bank*. In *Litman v. Cellco Partnership*, the Third Circuit refused to follow the New Jersey Supreme Court's holding in *Muhammad v. County Bank of Rehoboth Beach, Delaware*,<sup>28</sup> which prohibited class waivers in consumer contracts of adhesion that involved disputes involving small amounts of damages.<sup>29</sup> In overturning *Muhammad* and enforcing the particular arbitration agreement at issue, the Third Circuit noted:

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<sup>25</sup> *Id.* at \*3.

<sup>26</sup> 128 Cal. Rptr. 3d 854, 856 (2011).

<sup>27</sup> *Id.* at 868. It is worth noting, however, that a court in the Northern District of California upheld an arbitration agreement subject to plaintiffs' Sherman Act allegations, stating that "it is well established in the Ninth Circuit that claims involving federal statutory rights, and in particular antitrust claims, are subject to arbitration." *In re Apple & AT&TM Antitrust Litigation*, 2011 WL 6018401 (N.D. Cal. Dec. 1, 2011).

<sup>28</sup> *Litman v. Cellco P'ship*, 655 F.3d 225, 231 (3d Cir. 2011).

<sup>29</sup> *Muhammad v. County Bank of Rehoboth Beach*, 912 A.2d 88, 100 (N.J. 2006).

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, irrespective of whether class arbitration ‘is desirable for unrelated reasons.’<sup>30</sup>

Similarly, in *Wolf v. Nissan Motor Acceptance Corporation*, a New Jersey federal court rather reluctantly followed the direction of *Concepcion* and found that Muhammad was no longer good law.<sup>31</sup> Accordingly, the arbitration clause that contained a class action waiver was deemed not to be unconscionable.<sup>32</sup>

The Eleventh Circuit interpreted *Concepcion* broadly in applying it to the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) and held that “[i]nsofar as Florida law would invalidate [arbitration] agreements as contrary to public policy [ ], such a state law would ‘stand[ ] as an obstacle to the accomplishment and execution’ of the FAA.”<sup>33</sup> In *Cruz v. Cingular Wireless*, the plaintiffs had argued that the remedial purpose of the FDUTPA would be hindered by enforcement of the arbitration agreement, since most claims brought under the FDUTPA would go unprosecuted unless brought as a class due to the fact that they involve small dollar amounts.<sup>34</sup> Because *Concepcion* had rejected this exact argument, the Eleventh Circuit held that “faithful adherence to *Concepcion*” required that the court enforce the arbitration agreement regardless of any public policy arguments to the contrary.<sup>35</sup>

### III. THE CONTINUING UTILITY OF THE VINDICATION OF RIGHTS DOCTRINE IN LIGHT OF *CONCEPCION*

#### A. The American Express Trilogy

In *In re American Express Merchants’ Litigation* (“*Amex I*”), plaintiffs, a putative class of low volume merchants, initiated a Sherman Act claim alleging violations of federal antitrust laws.<sup>36</sup>

In *Amex I*, the court considered the enforcement of a mandatory arbitration clause in a merchant’s contract with American Express, which also contained a “class action waiver,” a provision that prohibited any party to the contract from pursuing anything other than individual arbitration claims.<sup>37</sup> The Second Circuit found the class action waiver unenforceable, “because enforcement of the clause would effectively preclude any action seeking to vindicate the statutory rights asserted by the plaintiffs.”<sup>38</sup> This concept that collective action in certain circumstances must be permitted because without such collective action, wrongful conduct would go

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<sup>30</sup> *Litman*, 655 F.3d at 231 (quoting *Concepcion*, 131 S. Ct. at 1753).

<sup>31</sup> *Wolf v. Nissan Motor Acceptance Corp.*, No. 10-cv-3338 (NLH)(KMW), 2011 WL 2490939, at \*6-7 (D. N.J. June 22, 2011).

<sup>32</sup> *Id.* at \*6.

<sup>33</sup> *Cruz v. Cingular Wireless*, 648 F.3d 1205, 1207 (11th Cir. 2011) (quoting *Concepcion*, 131 S. Ct. at 1753).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 1214.

<sup>36</sup> *In re Am. Express Merchs.’ Litig. (Amex I)*, 554 F.3d 300 (2d Cir. 2009).

<sup>37</sup> *Id.* at 310-11.

<sup>38</sup> *Id.* at 304.

unchallenged, is known as the “vindication of rights doctrine.” *In re American Express* is a textbook example of the doctrine and some of the issues it raises when it arises in an arbitration context.

*Amex I* made its way to the Supreme Court, where it was remanded for reconsideration in light of its decision in *Stolt-Nielsen*.<sup>39</sup> Upon reconsideration, the Second Circuit issued its decision in *In re American Express Merchants’ Litigation* (“*Amex II*”),<sup>40</sup> holding that its original analysis was unaffected by *Stolt-Nielsen*.<sup>41</sup> Accordingly, it again reversed the district court’s decision and remanded for further proceedings,<sup>42</sup> but placed a hold on its mandate in order for American Express to file a petition seeking a writ of certiorari to the Supreme Court. While the mandate was on hold, the Supreme Court issued its decision in *Concepcion*. The Second Circuit thereafter reviewed its prior decisions and concluded, in *In re American Express Merchants’ Litigation* (“*Amex III*”), that “*Concepcion* does not alter our analysis, and we again reverse the district court’s decision and remand for further proceedings.”<sup>43</sup>

The plaintiffs in *Amex I* asserted a tying arrangement imposed on them by requiring them to honor all American Express cards.<sup>44</sup> In the district court, the plaintiff had submitted an affidavit from an economist establishing the fiscal impracticality of individual antitrust claims, and the Second Circuit had found such evidence to be compelling.<sup>45</sup>

In *Amex III*, the Second Circuit acknowledged that *Concepcion* and *Stolt-Nielsen*, taken together, stand for the principle that parties cannot be forced to arbitrate disputes in a class-action arbitration unless the parties agree to class action arbitration,<sup>46</sup> but the court went on to note:

What *Stolt-Nielsen* and *Concepcion* do not do is require that all class-action waivers be deemed *per se* enforceable. That leaves open the question presented on this appeal: whether a mandatory class action 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 bring federal antitrust claims. While we cannot rely on *Concepcion* or *Stolt-Nielsen* to answer the question before us, we continue to find useful guidance in other Supreme Court decisions addressing the issue of vindicating federal statutory rights via arbitration.<sup>47</sup>

In *Amex III*, the Second Circuit noted that longstanding Supreme Court precedent recognized that the class action device is the only economical alternative when a large group of individuals or entities has suffered an alleged wrong, but the damages due to any single individual or entity are too small to justify bringing an individual action.

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<sup>39</sup> Am. Express Co.v. Italian Colors Rest., 130 S. Ct. 2401 (2010) (citing *Stolt-Nielsen*, 130 S. Ct. 1758).

<sup>40</sup> *In re Am. Express Merchs.’ Litig. (Amex II)*, 634 F.3d 187 (2d Cir. 2011).

<sup>41</sup> *Id.* at 189.

<sup>42</sup> *Id.* at 200.

<sup>43</sup> *In re Am. Express Merchs.’ Litig. (Amex III)*, 667 F.3d 204, 206 (2d Cir. 2012).

<sup>44</sup> *Amex I*, 554 F.3d at 308.

<sup>45</sup> See, e.g., *Amex III*, 667 F.3d at 212.

<sup>46</sup> *Amex III*, 667 F.3d at 213.

<sup>47</sup> *Id.* at 214.



A critical fact in this litigation is that petitioner's individual stake in the damages award he seeks is only \$70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all.<sup>48</sup>

The court then looked to *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*<sup>49</sup> and noted that in dicta, the *Mitsubishi* Court said that should clauses in a contract operate "as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy."<sup>50</sup>

Quoting its own opinion in *Amex I*, the court noted:

While dicta, it is dicta based on a firm principle of antitrust law that an agreement which in practice acts as a waiver of future liability under the federal antitrust statutes is void as a matter of public policy. More than a half-century ago, the Supreme Court stated that 'in view of the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action,' an agreement which confers even 'a partial immunity from civil liability for future violations' of the antitrust laws is inconsistent with the public interest.<sup>51</sup>

The Second Circuit next looked to the Supreme Court's decision in *Green Tree Financial Corporation—Alabama v. Randolph*<sup>52</sup> and noted:

We continue to find [Green Tree] 'controlling here to the extent that it holds that when a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.'<sup>53</sup>

Finding that American Express had brought no serious challenge to the plaintiffs' demonstration that their claims cannot reasonable be pursued as individual actions, whether in federal court or in arbitration, and that the enforcement of the class action waiver in the Card Acceptance Agreement "flatly ensures that no small merchant may challenge American Express ['s] tying arrangements under the federal antitrust laws,"<sup>54</sup> the Court concluded:

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<sup>48</sup> *Id.* (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974)).

<sup>49</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

<sup>50</sup> *Amex II*, 634 F.3d at 197 (citing *Mitsubishi*, 473 U.S. at 637 n.19).

<sup>51</sup> *Id.* (quoting *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 329 (1955)).

<sup>52</sup> *Green Tree Fin. Corp.—Ala. v. Randolph*, 531 U.S. 79 (2000).

<sup>53</sup> *Amex II*, 634 F.3d at 197 (quoting *Green Tree*, 531 U.S. at 92).

<sup>54</sup> *Amex III*, 667 F.3d at 218 (quoting *Amex I*, 554 F.3d at 319).

Since the plaintiffs cannot pursue these claims as class arbitration, either they can pursue them as judicial class action or not at all. If they are not permitted to proceed in a judicial class action, then, they will have been effectively deprived of the protection of the federal antitrust-law. The defendant will thus have immunized itself against all such antitrust liability by the expedient of including in its contracts of adhesion an arbitration clause that does not permit class arbitration, irrespective of whether or not the provision explicitly prohibits class arbitration.

Therefore, in light of the fact that the arbitration provision at issue here does not allow for class arbitration, under *Stolt-Nielsen* and by its terms, if the provision were enforced it would strip the plaintiffs of rights accorded them by statute. We conclude that this arbitration clause is unenforceable. We remand to the district court with the instruction to deny the defendant's motion to compel arbitration.<sup>55</sup>

## **B. The Continuing Validity of the American Express Trilogy**

Other courts have called into question the validity of the Second Circuit's analysis in the *American Express* cases. For example, *D'Antuono v. Service Road Corp.* calls into doubt the viability of the *American Express* reasoning following the Court's holding in *Concepcion*.<sup>56</sup> The plaintiffs in *D'Antuono* sued their employer alleging violations of both federal and state employment laws.<sup>57</sup> The *D'Antuono* court ultimately skirted the issue of whether *Concepcion* left *American Express* undisturbed, however, finding that the Connecticut Supreme Court has never been confronted with an arbitration agreement that included not only a class action waiver, but also a cost- and fee-shifting provision, such as the arbitration agreement in the case at hand.<sup>58</sup> The court did, however, call into doubt any attempts to thwart arbitration, noting:

It is not necessary for the Court to consider whether the FAA would preempt Connecticut law to the extent that it required invalidation of an arbitration agreement like the one at issue in this case, since the Court has no reason whatsoever to believe that the Connecticut Supreme Court would invalidate such an agreement.<sup>59</sup>

In response to the plaintiffs' argument that *Concepcion* distinguished between the preemption of the FAA over state *substantive* unconscionability principles, but not over state *procedural* unconscionability principles, the Court stated: "To the contrary, this Court reads the *AT&T Mobility* decision as casting significant doubt on virtually any 'device or formula' which might be a vehicle for 'judicial hostility toward arbitration.'"<sup>60</sup>

Shortly after the Connecticut court delivered its decision in *D'Antuono*, the plaintiffs sought an interlocutory appeal. In granting the motion to file an interlocutory appeal, the district court stated that it was persuaded that the case involved conflicting controlling questions of law.<sup>61</sup>

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<sup>55</sup> *Amex III*, 667 F.3d at 219.

<sup>56</sup> *D'Antuono v. Serv. Rd. Corp.*, 789 F. Supp. 2d 308, 322 (D. Conn. 2011).

<sup>57</sup> *Id.* at 313.

<sup>58</sup> *Id.* at 331.

<sup>59</sup> *Id.* at 330.

<sup>60</sup> *Id.*

<sup>61</sup> *D'Antuono v. Serv. Rd. Corp.*, No. 3:11CV33 (MRK), 2011 WL 2222313, at \*1 (D. Conn. June 7, 2011).

The court indicated that it had rendered its decision based on *American Express* and other case law involving the federal common law of arbitrability, but that “there is a great deal of uncertainty surrounding the continuing validity of the federal common law of arbitrability doctrines on which Plaintiffs rely.”<sup>62</sup>

In *Kaltwasser v. AT&T Mobility, LLC*, the plaintiff argued that *Concepcion* did not disturb the vindication of rights doctrine under federal common law.<sup>63</sup> The plaintiff contended that *Concepcion* left room for a court to conduct an “individualized case-by-case” analysis of whether binding the plaintiff to individual arbitration would prevent a vindication of rights, in which case the arbitration agreement should be unenforceable.<sup>64</sup> In support of this position, the plaintiff pointed to *American Express*, but the court found that because *American Express* involved litigation of federal claims, whereas *Kaltwasser* involved the litigation of state claims, *American Express* had no bearing on the case before it.<sup>65</sup>

Nonetheless, the *Kaltwasser* court stated that, even assuming that *American Express* and *Green Tree Financial Corporation – Alabama v. Randolph*,<sup>66</sup> (the Supreme Court case on which *American Express* was predicated) had involved state law claims, *Concepcion* still left no room for a case-by-case analysis of the cost and benefits at stake.<sup>67</sup> The court reasoned that *Concepcion* acknowledged that small-dollar claims might slip through the cracks due to the expenses incurred with litigating a claim (a fact that the *Concepcion* dissent found particularly troubling), but did not draw significant attention to this point in reaching its conclusion, which lead the *Kaltwasser* court to conclude that *Concepcion* does not allow the plaintiffs to avoid an arbitration agreement based on a case-by-case analysis of the costs and benefits at stake.<sup>68</sup> Moreover, even if the vindication of rights doctrine survives following *Concepcion*, the *Kaltwasser* court held that the application of the cost-benefit analysis is “confined to circumstances in which a plaintiff argues that costs specific to the arbitration process, such as filing fees and arbitrator’s fees, prevent her from vindicating her claims,” and not the costs of pursuing the underlying cause of action.<sup>69</sup>

Accordingly, while some lower courts have clearly set specific parameters on the scope of *Concepcion*, lingering issues regarding the breadth of the *Concepcion* holding – particularly whether *Concepcion* applies to federal and state statutes and whether the vindication of rights doctrine is intact – remain. Given the conflicting holdings of lower courts and the high stakes involved with lawsuits of this type, it is likely that *American Express* will make its way to the Supreme Court. Several uncertainties remain following *Concepcion* and the interpretations of lower courts, including:

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<sup>62</sup> *Id.*

<sup>63</sup> *Kaltwasser v. AT&T Mobility LLC*, 812 F. Supp. 2d 1042, 1046 (N.D. Cal. 2011).

<sup>64</sup> *Id.* at 1047.

<sup>65</sup> *Id.* at 1048.

<sup>66</sup> *Green Tree Financial Corporation – Alabama v. Randolph*, 531 U.S. 79 (2000).

<sup>67</sup> *Kaltwasser*, 812 F. Supp. 2d at 1048-49.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 1050.

1. Will the vindication of rights doctrine as set out in *American Express* and similar cases be taken up by the Supreme Court?
2. Under the federal common law of arbitrability, as set forth in *American Express* and similar cases, and in light of *Concepcion*, are district courts permitted to inquire into general public policy concerns and the vindication of rights doctrine in determining whether a particular arbitration agreement is enforceable, or must they instead only look to the economic feasibility of arbitration under the circumstances?
3. How will the courts square differing congressional objectives of various federal statutory laws, such as the FAA, the Sherman Act, Title VII of the Civil Rights Act, and federal employment laws?

#### IV. CONCLUSION

In the one year since the U.S. Supreme Court handed down the *Concepcion* decision, the decision has continued to be as unsettling as it appeared to be when the decision was first handed down. Given the prevalence of arbitration in our legal system today, it is not surprising that the *Concepcion* decision has had far-reaching implications. What is surprising, however, is the broad range of interpretations that have been pronounced by the lower courts in the relatively short time since the decision was rendered. Some courts seem reluctant to follow *Concepcion* and find a way to hold fast to previous standards of unconscionability with respect to arbitration agreements. Other courts have made distinctions based on the application of state or federal statutory law, versus common law or court-made law, to the underlying claim. And other courts have explicitly acknowledged that *Concepcion* calls into doubt precedent that is central to the enforceability of arbitration agreements, such as the vindication of rights doctrine and a plaintiff's ability to avoid an arbitration agreement based on a cost-benefit analysis. One thing remains certain: we have not seen the end of *Concepcion*-driven issues. However, it is worth noting that the Supreme Court has not lost its commitment to sustaining arbitration agreements against competing state laws based on a state's policy preferences.

Most recently, the Supreme Court overturned a decision of the West Virginia Supreme Court holding that an agreement to arbitrate claims against a nursing home, including those involving personal injury or wrongful death, was unenforceable.<sup>70</sup> In *Marmet Health Care Center v. Brown*, the Supreme Court issued a *per curiam* opinion in which it found that the "West Virginia court's interpretation was both incorrect and inconsistent with clear instruction in the precedents of this Court [and that] the FAA provides no exception for personal-injury or wrongful-death claims. [Rather,] it 'requires courts to enforce the bargain of the parties to arbitrate.'"<sup>71</sup> The Court went on to find that the West Virginia Supreme Court's decision to except personal injury and wrongful death claims from agreements to arbitrate in the nursing

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<sup>70</sup> *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012).

<sup>71</sup> *Id.* at 1203.

home area amounted to a categorical prohibition on the arbitration of a certain type of claim, which is contrary to the terms and coverage of the FAA.<sup>72</sup>

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<sup>72</sup> *Id.* at 1203-04.