Westlaw Journal
CLASS ACTION

Litigation News and Analysis • Legislation • Regulation • Expert Commentary

VOLUME 18, ISSUE 8 / SEPTEMBER 2011

Expert Analysis

The Future of Consumer Class Actions: Understanding the New Legal Landscape After *AT&T v. Concepcion*

By James Schurz Esq., Morrison & Foerster, and Jenna Feistritzer

The U.S. Supreme Court handed the business community a huge victory April 27 in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), enforcing a class-action waiver in an arbitration clause in a standard customer agreement.

The decision set off a firestorm. The New York Times criticized the decision as a "devastating blow to consumer rights" and a major setback for individuals who lack the resources to challenge big companies.[1] Erwin Chemerinsky, dean of the University of California, Irvine School of Law, argued in the Los Angeles Times that "the court's conservative majority could not have been clearer that it was favoring businesses over consumers."[2]

And Public Citizen forecasted a bleak future: "The result will be more hidden fees and charges on your cellphone bill, more predatory lending, more discrimination — in short, a less just society."[3]

But does *Concepcion* mean the end of consumer protection or even the erosion of consumer class actions? No, but it changes the playing field, and it sharply limits the ability to pursue collective action in the consumer arena in certain areas. We do not predict the demise of consumer class actions. Rather, we expect different types of claims and increased attention (and investment) in adjudicating requests to compel arbitration. In this article, we identify some of the central issues that will be litigated in the aftermath of *Concepcion*.

DECODING CONCEPCION

The sharply divided court held that the Federal Arbitration Act, 9 U.S.C. § 1, preempts state laws that condition enforceability of arbitration agreements upon the availability of certain procedures, in this case, class actions.

Before the court was a California common-law rule — the *Discover Bank* rule — that effectively invalidated class-action waivers in arbitration agreements in adhesion contracts.

The lawsuit began in the Southern District of California. Vincent and Liza Concepcion filed a class action asserting that AT&T's practice of offering "free" phones to new

subscribers, but then charging $30.22 in sales tax based on the retail value of the phone, violated California state consumer-protection laws and amounted to fraud. AT&T argued that the contract required the Concepcions to submit their claim to individual arbitration.

Relying on the California Supreme Court rule in *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), the District Court and the 9th U.S. Circuit Court of Appeals held that AT&T's class-action-waiver provision was unconscionable under California law. Both courts allowed the Concepcions to move forward in their class action against the company. AT&T appealed.

Writing for the majority, Justice Antonin Scalia reasoned that the *Discover Bank* rule, although it purported to apply to all contracts, was disproportionately used to invalidate arbitration agreements. Moreover, the *Discover Bank* rule stood as an obstacle to the accomplishment of the FAA's objectives.

Concepcion *has not destroyed procedural unconscionability challenges, but it has just raised the threshold in states where the results were viewed as too one-sided.*

The court observed that the *Discover Bank* rule allowed plaintiffs to argue that an arbitration agreement was unconscionable if it required individual arbitration and prohibited classwide arbitration. The consequence of the *Discover Bank* rule was to *require* the availability of class arbitration, which, the court reasoned, interfered with the fundamental attributes of arbitration — its efficiency and informality — protected by the FAA.

In finding the *Discover Bank* rule preempted by the FAA, the court explicitly rejected the argument that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system," finding instead that "states cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." The court then extolled how ill-suited arbitrators are to the demands of class proceedings.

By contrast, the court acknowledged the consumer-friendly nature of AT&T's arbitration process and emphasized that the Concepcions would be able to seek redress. In citing the attributes of the AT&T arbitration process, the court stopped short of saying any of the consumer-friendly provisions were required or necessary.

In the end, the court's opinion left more questions unanswered than it resolved. Did the court deal a deathblow to consumer class actions? Are consumers powerless to deter fraudulent corporate practices? No and no.

Although the impact of *Concepcion* is significant, it does not spell the end of class actions in the consumer arena. The immediate effect of the court's decision is more modest: It brings California's unconscionability analysis more in line with that of the rest of the country, removing the disproportionate impact of the *Discover Bank* rule on arbitration provisions. There remains rich fodder for litigation. As attorneys wade through the murky aftermath of *Concepcion*, five issues are rising to the surface.

PROVIDING CONSUMERS MEANINGFUL NOTICE

In footnote 6 of *Concepcion*, the Supreme Court attempts to limit the impact of its decision by leaving room for states to regulate the formation of arbitration agreements. States are still free to "requir[e] class-action-waiver provisions in adhesive arbitration agreements to be highlighted." The court cautions, however, that such steps cannot frustrate the purposes of the FAA.

This "highlighting" battle is ancient history. The Supreme Court resolved this question 15 years ago. In *Doctor's Associates Inc. v. Casarotto*, 517 U.S. 681 (1996), the court struck down a Montana law that required notice of arbitration to be underlined, capitalized and on the front page of the contract. The court reasoned that such procedural requirements unfairly singled out arbitration agreements. *Casarotto* makes it clear that state legislatures cannot subject arbitration provisions to more stringent notice requirements than are required for other contract provisions.

Then what did the court mean with footnote 6? Most likely, it meant that states are still free to scrutinize arbitration contracts on "procedural" unconscionability grounds. Procedural unconscionability focuses on "oppression" and "surprise" as bases for invalidating a contract.

Oppression occurs when the party with greater bargaining power leaves the weaker party with no meaningful choice and no opportunity to negotiate. Surprise occurs when the stronger party effectively hides contract terms in a contract that it drafted and is now seeking to enforce.

Casarotto makes clear that state legislatures cannot single out arbitration provisions for especially strict requirements. But footnote 6 suggests that states may require "meaningful notice" and sufficient disclosures designed to inform consumers of what they are agreeing to.

In California, this is no small matter. California courts have subjected arbitration agreements to more rigorous standards for procedural unconscionability than they have other contracts. The extent of this disparate treatment is discussed in a law review article that Justice Scalia cited approvingly in his opinion. *See* Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39 (2006).

Concepcion has not destroyed procedural unconscionability challenges, but it has just raised the threshold in states such as California where the results were viewed as too one-sided.

In their appeal to the Supreme Court, the Concepcions did not argue the issue of procedural unconscionability. They probably should have.

5 issues raised by *Concepcion*

- Providing consumers meaningful notice
- The public policy defense as a tool for invalidating arbitration agreements
- The end of nonarbitrable representative actions
- Prohibitive costs as a basis for invalidating an arbitration agreement
- The presence of "consumer-friendly" provisions in an arbitration agreement as "necessary" to support a class-action waiver

AT&T's arbitration provision specifically references the American Arbitration Association's procedures for consumer disputes. The AAA's consumer due process protocols advise businesses that consumers should be given "clear and adequate notice" of the arbitration provision. They also require providers of goods and services to "undertake reasonable measures to provide consumers with full and accurate information regarding consumer ADR [alternative dispute resolution] programs."

In a November 2005 order denying AT&T's motion to compel arbitration, the District Court found that many of the plaintiffs in the original lawsuit were not even aware that their claims were subject to arbitration. *Laster v. T-Mobile USA*, No. 05-CV-1167, 2008 WL 5216255 (S.D. Cal. Aug. 11, 2008).

Future plaintiffs are likely to argue that consumer contracts do not adhere to the AAA due process protocols or principles of procedural unconscionability in general. To defend against these claims, providers of goods and services should take steps to provide meaningful notice, such as having hard copies of the clause available at the point of purchase, incorporating summaries of the alternative dispute resolution procedures in customer literature and incorporating reference to the clause on the receipt.

Concepcion *has also influenced the enforceability of state law rules predicated on public policy.*

THE PUBLIC POLICY DEFENSE

Concepcion addressed California unconscionability law. The second issue raised by the case is its influence on the enforceability of state law rules predicated on public policy. In *Cruz v. Cingular Wireless,* 2011 WL 3505016 (11th Cir. Aug. 11, 2011), the 11th Circuit addressed the validity of AT&T's class-action waiver in the face of public policy challenges.

The *Cruz* plaintiffs were customers of AT&T Mobility. They filed a class-action lawsuit under Florida's unfair-trade laws challenging AT&T's practice of charging them $2.99 a month for an optional "roadside assistance plan" they claimed they never ordered.

After AT&T moved to compel arbitration, the *Cruz* plaintiffs argued the arbitration clause was unenforceable because it effectively immunized AT&T from liability for unlawful trade practices in violation of Florida public policy. The *Cruz* plaintiffs further argued (with evidentiary support in the form of affidavits from attorneys) that attorneys would refuse to represent customers in individual actions for these claims and that absent class procedures, the vast majority of AT&T customers would never know their rights had been violated.

The 11th Circuit rejected these arguments, citing *Concepcion.* "[T]o the extent that Florida law would be sympathetic to the plaintiffs' argument here, and would invalidate the class waiver simply because the claims are of small value, the potential claims are numerous," the court said, "and many consumers might not know about or pursue their potential claims absent class procedures, such a state policy stands as an obstacle to the FAA's objective of enforcing arbitration agreements according to their terms, and is preempted."

The *Cruz* line of reasoning has been adopted by a number of district courts. *See e.g., Boyer v. AT&T Mobility Servs.*, 2011 WL 3047666 (S.D. Cal. July 25, 2011) ("the court declines to find the arbitration agreement unenforceable for public policy reasons"); *Webster v. Freedom Debt Relief,*, 2011 WL 3422872 (N.D. Ohio July 13, 2011) ("In the wake of *Concepcion*, any public policy in favor of class action for consumers in the

... [Ohio Consumer Sales Practices Act] is clearly superseded by the FAA as it is an obstacle to the accomplishment of the purposes and objectives of Congress.").

Still, we can expect to see public policy challenges that seek to limit the impact of *Concepcion* as it applies to a broad range of state law rules predicated on public policy.

THE END OF NONARBITRABLE REPRESENTATIVE ACTIONS

The third issue, and one of the most pressing questions left unanswered by the *Concepcion* decision, is the fate of state law decisions that certain statutory remedies brought under "private attorney general" provisions are nonarbitrable. The California Supreme Court, for example, in *Broughton v. Cigna Healthplans*, 21 Cal. 4th 1066 (1999), held that claims for injunctive relief under the state's Consumer Legal Remedies Act inherently conflict with arbitration and so must be adjudicated in court.

The court reasoned that the California Legislature preserved CLRA public injunctions for the benefit of the general public, not the individual claimant. So, the court reasoned, the judicial forum was the *only* appropriate forum for a party bringing an action as a private attorney general.

***States that have prohibited arbitration of certain remedies, like those brought under private attorney general statutes, should expect preemption challenges in light of* Concepcion.**

Four years later, in *Cruz v. PacifiCare Health Systems,* 30 Cal. 4th 303 (2003), the high court affirmed *Broughton* and extended its finding of nonarbitrability to California's unfair-competition and false-advertising laws.

Like the plaintiffs in *Broughton* and *Cruz*, the Concepcions brought unfair-competition, false-advertising and CLRA claims and sought injunctive relief from the District Court.[4] But the *Broughton* and *Cruz* decisions were nowhere in the U.S. Supreme Court arguments. What happened? The lawyers for the Concepcions and AT&T tailored the appeal to address the narrower (and more potent) question of whether the FAA preempted California's bar on class-action waivers in arbitration clauses, not whether certain California statutory rights were arbitrable.

Although the Supreme Court did not directly address the future of *Broughton* and *Cruz*, that issue has surfaced in the lower courts. In *Arellano v. T-Mobile USA,* 2011 WL 1842712 (N.D. Cal. May 16, 2011), the Northern District of California rejected a plaintiff's argument that her unfair-competition, false-advertising and CLRA claims were nonarbitrable according to the *Broughton* and *Cruz* decisions.

Calling the decision "regrettable," the District Court gave *Concepcion* a broad reading: "*Concepcion* ... decided that states cannot refuse to enforce arbitration agreements based on public policy."

In support of this conclusion, the District Court points to crucial language in the *Concepcion* opinion. Justice Scalia framed the policy of the Supreme Court to be "when state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: the conflicting rule is displaced by the FAA." This language destroys *Broughton* and *Cruz*.

This line of reasoning has been followed in a series of district court decisions. *See e.g., In re Apple & AT&T iPad Unlimited Data Plan Litig.,* 2011 WL 2886407 (N.D. Cal. July 19, 2011) ("Plaintiffs argue that despite *Concepcion*, their claims for public injunctive relief under the CLRA or UCL [unfair-competition law]are still exempt from arbitration. But *Concepcion* would seem to preempt California's arbitration exemption for claims requesting public injunctive relief."); *Boyer*, 2011 WL 3047666 (plaintiff's argument

to invalidate arbitration agreement on public policy grounds to prevent defendant from continuing to engage in fraud is preempted by FAA); *In re Gateway LX96810 Computer Prods. Litig.*, No. 10-1563-JST(JEMx) (C.D. Cal. July 21, 2011) (plaintiffs' claims for injunctive relief under the CLRA and UCL must be resolved in arbitration).

Nevertheless, some courts are reluctant to discard *Broughton* and *Cruz*. For example, in *In re DirecTV Early Cancellation Fee Marketing and Sales Practices Litigation*, No. 09-2093 (C.D. Cal.), the District Court found the injunctive relief remedies under California's consumer protection laws are not subject to arbitration since "[t]hese claims are not intended to remedy a primarily private right or rights merely incidental to the public benefit."

With a split in California's district courts and DirecTV intending to appeal, the 9th Circuit will be asked to resolve the question or could transfer the dispute to the California Supreme Court.

The question has also come up in the employment arena. In *Brown v. Ralphs Grocery Co.,* 128 Cal. Rptr. 3d 854 (Cal. Ct. App., 2d Dist. July 12, 2011), a California appellate court affirmed a lower-court decision to invalidate a class-action-waiver provision in an employment contract because it conflicted with California's Private Attorney General Act.

To reach this result, the court gave a narrow reading to *Concepcion*, limiting it to consumer contracts only. Then, implicitly acknowledging that *Broughton* and *Cruz* are not long for this world, the court went on to distinguish the PAGA from the legislation at issue in those cases.

Nevertheless, the court could not help but quote language from *Broughton* and apply the very same reasoning in his argument that the PAGA claims fundamentally are incompatible with arbitration. It seems that Justice Scalia's admonition that arbitration must stand "despite state policy to the contrary" fell on deaf ears in the 2nd District. Accordingly, some commentators have predicted that the *Ralphs* decision is a "significant hiccup" that ultimately will be "set aside."[5]

It follows that those states that have prohibited arbitration of certain remedies, such as those brought under private attorney general statutes, should expect preemption challenges in light of *Concepcion*.

PROHIBITIVE COSTS

In addition to the three issues raised earlier, *Concepcion* left undecided the fate of those plaintiffs who argue they cannot get relief through arbitration, citing prohibitive costs. In its order granting *certiorari*, the Supreme Court certified the question of whether states could require certain procedures to attend arbitration agreements "when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims."

The court noted the fairness of AT&T's arbitration procedure and was satisfied that the Concepcions could vindicate their claims through individual arbitration. This reasoning supported Scalia's interpretation of the issue as a choice between class arbitration or individual arbitration, as opposed to the characterization of the issue in Justice Stephen Breyer's dissent as one between class arbitration or no relief at all. Although this question colored the court's debate, it never received an explanation.

The 2nd Circuit, however, is addressing it now. In *In re American Express Merchants' Litigation*, 634 F.3d 187 (2d Cir. 2011), several merchants brought a class-action lawsuit against American Express for alleged antitrust violations under the Sherman Act. Each merchant had signed a contract in order to accept American Express credit cards, and those contracts required individual arbitration of disputes.

The 2nd Circuit invalidated the contracts because they included a class-action waiver, the result of which was to "effectively strip plaintiffs of their ability to prosecute alleged antitrust violations." The court cited expert testimony on the high costs associated with compiling evidence of an antitrust violation — either in court or in arbitration. The court was careful to state that its decision did not hold class-action waivers in arbitration agreements per se unenforceable; rather, it emphasized the need to evaluate each case individually.

In reaching its holding, the 2nd Circuit relied on a line of Supreme Court cases that have acknowledged that arbitration agreements could be so cost prohibitive as to deprive a party of a meaningful forum.

Most recently, the Supreme Court's decision in *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 90 (2000), recognized that "large arbitration costs could preclude a litigant ... from effectively vindicating her federal statutory rights in the arbitral forum." Several circuits have applied the "*Randolph* test" and evaluated the cost of arbitration agreements, but few have actually invoked *Randolph* to invalidate agreements.

Expect future litigation alleging that prohibitive costs have rendered the arbitral forum unavailable as a basis for invalidating an arbitration agreement.

After *Concepcion* was handed down, the 2nd Circuit requested letter briefs regarding the impact of *Concepcion* on its decision. Not surprisingly, the merchants argued that *Concepcion* had no impact because, unlike the Concepcions, the merchants would have no effective means of redress if they were forced to arbitrate their claims individually.

The merchants highlighted the detailed evidentiary record they developed, including expert declarations, that established the costs associated in pursuing their antitrust claims. By contrast, American Express emphasized the majority's language that courts cannot "condition the enforceability of certain arbitration agreements on the availability of class-wide arbitration procedures."

The 2nd Circuit may be reluctant to change its original decision. From this perspective, *Concepcion* never addressed the *Randolph* test, and it would be a stretch to read *Concepcion* to have precluded an entire line of Supreme Court precedent indirectly.

Another factor the 2nd Circuit will likely use to differentiate *Concepcion* is the difference between the federal and state claims in the two cases. *Randolph* discussed the concept of prohibitive arbitration costs in the context of vindicating a federal right. And, in a case unrelated to the costs of arbitration, this federal-versus-state distinction already has proved crucial.

The case, *Chen-Oster v. Goldman, Sachs & Co.,* 2011 WL 2671813 (S.D.N.Y. July 7, 2011), declined to compel arbitration of a gender discrimination claim brought under Title VII of the Civil Rights Act of 1964.

First, the court noted that federal case law interpreting Title VII prohibited *individuals* from bringing claims that an employer engaged in a "pattern or practice" of discrimination. Therefore, the court reasoned that the plaintiff was not arguing for the right to proceed on a class basis; rather, she was arguing for her right to assert the

underlying claim — that her employer had engaged in a pattern or practice of discrimination — which federal law only permitted her to do as a representative of a class.

Relying on the *American Express* decision and the Supreme Court cases it cites, the District Court ultimately held that class procedures were necessary for the plaintiff to vindicate her claim. The court noted that the *American Express* court reached this outcome through a functional analysis related to the costs of arbitration, whereas the instant case concerned an actual legal prohibition against individual claims.

The analysis is trickier for plaintiffs alleging violations of state law. Still, there remains room for argument. In *Concepcion*, the incompatibility of class arbitration with the efficiency and informality of individual arbitration made it beyond the power of states to require. So, even if it would be more cost-effective to aggregate the proceedings into a class, states cannot require class arbitration when it is inconsistent with the FAA.

On the other hand, parties may argue that the *Concepcion* court did not predicate its ruling on the availability of provisions that defendant AT&T would bear the costs of any arbitration or the "feasibility" of plaintiffs' ability to pursue a particular claim in arbitration. As a result, arguments of "prohibitive costs" are simply not relevant to this Court's determination of the enforceability of AT&T's arbitration provision after *Concepcion*.

The Northern District of California in *Arellano* rejected an argument that the prohibitive costs associated with arbitration would preclude an individual from bringing claims under the California unfair-competition law, the California Consumer Legal Remedies Act, the California False Advertising Act and the Federal Communications Act. This court found the argument unavailing:

> Plaintiff's arguments to the contrary are unavailing. *First*, plaintiff argues that "the arbitration clause is void because it agrees to forego substantive rights afforded by statute. Such is accomplished ... by the fact that the arbitration clause in question would preclude an individual from ever bringing these types of claims by foisting prohibitive costs on the individual plaintiff."

Perhaps regrettably, this argument was rejected by *Concepcion*.

The specter of "prohibitive costs" that would effectively preclude the ability to pursue a claim was insufficient to avoid arbitration. The District Court went on to explain that "despite public policy arguments thought to be persuasive in California, *Concepcion* has trumped these considerations."

Similarly, following *Concepcion,* the District of Colorado rejected plaintiffs' argument that "if they are not allowed to proceed as a class — either in arbitration or through this lawsuit — they will not be able to pursue their claims." *Bernal v. Burnett,* 2011 WL 2182903 (D. Colo. June 6, 2011).

The *Bernal* plaintiffs argued that the nature of their underlying claim "takes time and upfront work to develop, and that no attorney will be willing or able to do that on an individualized basis."

The District Court compelled arbitration and enforced the class-action waiver. "There is no doubt that *Concepcion* was a serious blow to consumer class actions and likely

foreclosed the possibility of any recovery for many wronged individuals," the court said.

The court observed that the dissent in *Concepcion* "argued that [the majority's opinion] would effectively end the ability to prosecute small-dollar claims and that those claims would slip through the legal system."

And the District Court further observed that the Supreme Court considered the fact that the Concepcions and other class plaintiffs would be denied any recovery by its ruling, and ruled against the class plaintiffs nonetheless. "The court is bound by this ruling and, therefore, cannot be persuaded in this case by the fact that ordering the parties to arbitration may impact plaintiffs' ability to recover," the court said.

We can expect future litigation alleging that prohibitive costs have rendered the arbitral forum unavailable as a basis for invalidating an arbitration agreement. The effect of *Concepcion* may be to reinvigorate *Randolph*.

'CONSUMER-FRIENDLY' PROVISIONS

Finally, the last issue raised in the aftermath of *Concepcion* is the unresolved question of whether any of the "consumer-friendly" provisions in AT&T's arbitration regimen are *necessary* for purposes of defending against invalidity attacks.

The AT&T arbitration agreement provided that AT&T would pay claimants a minimum of $7,500 (now bumped up to $10,000) and twice their attorneys' fees if claimants obtained an arbitration award greater than AT&T's last settlement offer. The AT&T arbitration process was also essentially cost-free for claims found to be "non-frivolous"; AT&T disclaimed any right to attorneys' fees; the arbitrator could grant the full range of remedies; and either party could opt for small-claims court instead of arbitration.

Although the *Concepcion* majority applauded AT&T's process, it did not *require* or specify any of these consumer-friendly provisions as *necessary* to find the class-action-waiver provision valid.

Is there any one aspect of AT&T's arbitration process that, if absent, would have made *Concepcion* turn out differently? No. The specific attributes of the AT&T regimen are irrelevant to the majority's preemption analysis. States, however, may still invalidate arbitration agreements they find to be excessively unfair or one-sided.

In the wake of *Concepcion*, expect courts to grapple with defining those procedures that are necessary to vindicate a claim as they seek to draw a line between AT&T and other less consumer-friendly procedures for dispute resolution.

CONCLUSION

Concepcion will probably encourage more businesses to adopt ADR provisions that require individual arbitration in their consumer contracts. However, the impact on the ability of consumers to challenge arbitration agreements that include such class-action waivers will probably turn on those questions that the Supreme Court did not answer.

We can expect further litigation to focus on the notice provided to consumers, the public policy defense, the arbitrability of "private attorney general" statutes and remedies, the economic viability of pursuing claims, and the "consumer-friendly" attributes of the dispute resolution regimen being challenged.

NOTES

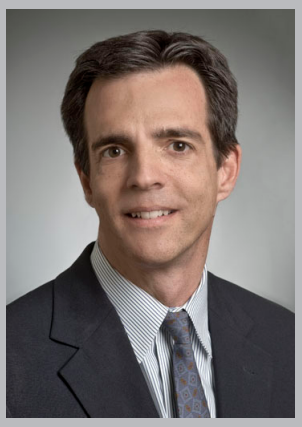
1 Editorial, *Gutting Class Action,* N.Y. TIMES, May 12, 2011, at A26, *available at* http://www.nytimes.com/2011/05/13/opinion/13fri1.html.

2 Erwin Chemerinsky, *Supreme Court: Class (Action) Dismissed,* L.A. TIMES, May 10, 2011, *available at* http://articles.latimes.com/2011/may/10/opinion/la-oe-chemerinsky-class-action-20110510.

3 *Congress Must Undo Damage of U.S. Supreme Court's Latest Anti-Consumer Decision,* Statement of Public Citizen Attorney Deepak Gupta on the Introduction of the Arbitration Fairness Act (May 17, 2011) *available at* http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=3346

4 Although the plaintiffs' complaint under the CLRA was dismissed with prejudice for failing to satisfy a 30-day notice requirement, the unfair-competition and false-advertising claims were not dismissed.

5 Laura Ernde, *Ruling Clears Path for Plaintiffs Trying to Skirt* Concepcion, DAILY J., July 14, 2011 (quoting counsel for the defense, Richard Simmons).



James Schurz, a partner with Morrison & Foerster in San Francisco, practices in the areas of consumer class action and international arbitration. Schurz is an adjunct professor at the University of California Hastings College of the Law, where he teaches international commercial arbitration. **Jenna Feistritzer** is a law student at **Duke University School of Law**, and she was a 2011 summer associate with Morrison & Foerster.