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Customers' Efforts to Use Arbitration to Challenge AT&T/T-Mobile Merger Fail

Jeffrey May (Wolters Kluwer) · Monday, October 31st, 2011

Federal district courts around the country have blocked AT&T Mobility LLC customers from pursuing arbitration to challenge the merger of AT&T Mobility and T-Mobile USA Inc.—a transaction valued at approximately $39 billion.

At least four federal district courts have granted AT&T Mobility's motions for preliminary injunctions, and a fifth federal district court did not reach the motion for preliminary injunction but denied a customer's motion to compel arbitration. The courts have ruled that AT&T is likely to succeed on the merits of its claim the arbitration demands exceed the scope of the arbitration agreement.

More than 1,000 AT&T Mobility customers have filed demands with the American Arbitration Association (AAA). The demands seek both a declaration that the merger violates Section 7 of the Clayton Act and an injunction against the merger or, alternatively, conditions on the deal. The customers do not seek damages for any injury that the merger allegedly would cause to a customer individually. Over AT&T's objection, the AAA had begun administering the cases.

According to the Bursor and Fisher law firm, which represents many of the customers, AT&T's contracts require AT&T to pay all costs of arbitration. If the arbitrator finds in favor of the customer, then there is a guaranteed minimum recovery of $10,000.

AT&T has suggested that the arbitration demands are part of a scheme to pressure it into settling "meritless claims."

The arbitration constituted "any form of a representative or class proceeding" and was therefore prohibited by the arbitration agreement. In an October 26, 2011, decision on the issue, the federal district court in San Francisco explained that the customers' demands did not seek "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." The broad injunctive relief would have been incompatible not only with the language of the agreement but also the nature of arbitration generally, according to the court.

It was pointed out that a number of difficult issues would have arisen had arbitration been allowed to proceed. Among the questions raised were:

- Would an arbitrator have the power to enjoin a merger that the Federal Communications

Commission, Department of Justice, and various state agencies were concurrently reviewing?
- Would one arbitrator's findings and decision bind another or even the federal district court in Washington, D.C., which was considering the Justice Department's challenge to the transaction?

The courts did not decide whether an antitrust claim arising under Section 7 of the Clayton Act would ever by properly subject to arbitration. The issue did not need to be reached in light of the determination that the arbitration would be outside the scope of the arbitration agreement.

***Concepcion* Case**

The district courts cited the recent U.S. Supreme Court decision in *AT&T Mobility LLC v.Concepcion*, 131S. Ct.1740 (2011), as authority for enforcing arbitration agreements according to their terms.

In that case, which involved a dispute over a consumer contract with an arbitration clause that included a class action waiver, AT&T successfully argued that Federal Arbitration Act preempted a California rule of law that barred the waiver as unconscionable. The Supreme Court upheld the validity of a clause both requiring that arbitration proceed on an individualized basis and prohibiting any form of class or representative action.

The federal district court in Philadelphia addressed the issue of AT&T taking one position in *Concepcion* and another position in the current context that was "seemingly in contention" with its earlier position. According to the customer in that litigation, "AT&T specifically told the Supreme Court [in *Concepcion*] that the arbitration agreement was designed to incentivize customers and an 'enterprising lawyer' to bring '4,700…serial arbitrations.'" The customer asserted that she and other customers were only doing what AT&T suggested they do under the arbitration agreement.

"The fact that ATTM took one position in one factual circumstance does not preclude ATTM from taking a different position in an entirely different context," the court decided. "ATTM made this "enterprising lawyer" statement in a very different context than the one presented here."

The October 26, 2011, decision of the federal district court in San Francisco in *AT&T Mobility LLC v. Bernardi*, No. C 11-03992 CRB, appears at **CCH 2011-2 Trade Cases ¶77,653**.

The October 7, 2011, decision of the federal district court in New York City in *AT&T Mobility LLC v. Gonnello*, Civil No. 11CV 5636, appears at **CCH 2011-2 Trade Cases ¶77,652**.

The October 7, 2011, decision of the federal district court in Philadelphia in *AT&T Mobility LLC v. Smith*, Case No. 2:11-cv-05157, appears at **CCH 2011-2 Trade Cases ¶77,651**.

The September 23, 2011, decision of the federal district court in West Palm Beach, Florida, in *AT&T Mobility LLC v. Bushman*, Case No. 11-80922, appears at **CCH 2011-2 Trade Cases ¶77,650**.

The October 28, 2011, decision of the federal district court in Baltimore in *AT&T Mobility LLC v. Fisher*, No. 11-2245, will appear at **CCH 2011-2 Trade Cases ¶77,663**.

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