



Class Action Alert

Recent developments in class action law

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UPDATE: Massachusetts SJC clarifies rule on class waivers in light of Amex III

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As we reported in a prior alert, the Massachusetts SJC attempted to avoid the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*¹ that prohibits courts from invalidating class waivers.² Notwithstanding *Concepcion*, the SJC in *Feeney v. Dell, Inc.* ("*Feeney IP*")³ held that a consumer-facing arbitration clause is unenforceable because its class waiver provision prevents customers from effectively vindicating their rights under Massachusetts's consumer protection statute.⁴

That decision was abrogated just a few days later by the Supreme Court's decision in *Am. Express Co. v. Italian Colors Restaurant* (*Amex III*),⁵ where the majority of the Court specifically held that the FAA does not allow the invalidation of class waivers merely because the costs of arbitrating claims individually may outweigh the potential recovery.⁶

On petition for rehearing in *Feeney II*, the SJC concluded that its analysis "no longer comports with the Supreme Court's interpretation of the FAA."⁷ The SJC's decision makes clear its disagreement with the Supreme Court's analysis of *Concepcion*, characterizing as "untenable" the Supreme Court's view that the FAA trumps any interest in ensuring the prosecution of low-value claims, but concedes that "we are bound to accept that view as a controlling statement of Federal law."

This decision further affirms our prior advice that clients should review their arbitration and dispute resolution clauses and strategies. Although parties and courts may continue to find ways to invalidate arbitration provisions, the Supreme Court has reiterated a clear preference favoring parties' preferences for arbitration and traditional bilateral dispute resolution.

¹ 131 S. Ct. 1740 (2011)

² For a summary of *Concepcion*, see our prior alert, "U.S. Supreme Court upholds class action waivers in consumer contracts: *AT&T Mobility v. Concepcion*," April 27, 2011, available [here](#).

³ 465 Mass. 470, 2013 WL 2479603 (June 12, 2013)

⁴ See "Massachusetts SJC rules on class waivers days before United States Supreme Court issues *Amex* decision," June 19, 2013, available [here](#).

⁵ No. 12-133, 2013 U.S. LEXIS 4700 at *16-17 (2013)

⁶ See "SCOTUS upholds class action waiver again: *Amex III* significantly limits the 'effective vindication' of statutory rights doctrine," June 24, 2013, available [here](#).

⁷ See *Feeney, et al v. Dell, Inc., et al*, Lawyers Weekly No. 10-142-13 (August 1, 2013).

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