IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-4984

KOTAM ELECTRONICS, INC.,
Plaintiff-Appellee,

v.

JBL CONSUMER PRODUCTS, INC.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

EN BANC BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLEE

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JBL CONSUMER PRODUCTS, INC.
v.
KOTAM ELECTRONICS, INC.

Case No. 94-4984

Certificate of Interested Persons
and
Corporate Disclosure Statement *

Magistrate Judge Brown

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JBL CONSUMER PRODUCTS, INC.
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CERTIFICATE OF TYPE SIZE AND STYLE

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INTEREST OF THE UNITED STATES

The United States shares with the Federal Trade Commission the primary responsibility for enforcement of the federal antitrust laws. Because federal enforcement resources are limited, however, the United States has a continuing concern with preserving the ability of private parties to act as private attorneys general in enforcing the antitrust laws in meritorious cases. Because the issue raised in this case -- the arbitrability of domestic antitrust disputes -- may significantly impact the continued vigor of antitrust enforcement by private attorneys general, the United States has an interest in the outcome of this case.

ISSUE PRESENTED

Whether the holding in Cobb v. Lewis, 488 F.2d 41 (5th Cir. 1974), that antitrust claims are non-arbitrable, remains

controlling precedent in this Circuit in light of intervening decisions of the United States Supreme Court.

STATEMENT OF THE CASE

1. Course of Proceedings and Disposition. Plaintiff-appellee Kotam Electronics, Inc. ("Kotam") filed this antitrust case in United States District Court in April 1994, alleging violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(a). R. I-1. Defendant-appellee JBL Consumer Products, Inc ("JBL") filed a motion to dismiss, or, in the alternative, to stay proceedings pending arbitration, pursuant to 9 U.S.C. 3. R. I-5. Adopting the recommendation of the magistrate judge, the district court denied JBL's motion. R. I-41. JBL appealed this denial (9 U.S.C. 16(a)(1)((A)) (R. I-43), and a divided panel of this Court affirmed the judgment of the district court (59 F.3d 1155 (1995)). On November 8, 1995, this Court entered an order directing rehearing en banc and vacating the panel opinion (69 F.3d 1097).

2. Statement of Facts. Kotam is a dealer and distributor of consumer electronic products. R. I-1 at 2. From 1984 to 1992, Kotam entered into annual dealer and distributor contracts with JBL, and JBL sold consumer electronics products to both Kotam and its competitors. R. I-1 at 3. The Kotam contracts contained an arbitration clause providing for arbitration of antitrust claims under rules of the American Arbitration Association ("AAA") (see 59 F.3d at 1156, n.1):

> Any controversy or claim arising out of or relating to this Agreement, or the breach or validity thereof, whether at common law or under statute, including without limitation claims asserting violation of the antitrust laws, shall be settled by final and binding arbitration in accordance with the Rules for Commercial Arbitration of the American Arbitration Association ("AAA") in effect at the time of the execution of this Agreement.

Despite the arbitration provisions, Kotam brought this antitrust action in federal court, alleging that JBL engaged in price discrimination against Kotam, in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(a). R. I-1 at 3-4. Kotam asked for damages and injunctive relief, as well as attorney's fees and costs. Id. at 4-5.

JBL moved to dismiss the complaint, or, in the alternative, to stay judicial proceedings pending arbitration, as provided by Section 3 of the Federal Arbitration Act ("FAA"), 9 U.S.C. 3. R. I-5. A magistrate judge recommended denying JBL's motion, and the district court adopted the magistrate judge's report and recommendation. R. I-28, I-41. The court found itself bound in the domestic context by Cobb v. Lewis's holding that antitrust claims are not arbitrable, and it rejected the suggestion that the Supreme Court had effectively overruled Cobb, thus rendering Kotam's antitrust claims arbitrable. See R. I-28 at pp. 4-6.

A divided panel of this Court affirmed, after reviewing the district court's decision de novo. It concluded that the Supreme Court's decision in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), which held the antitrust claims at issue in that case to be arbitrable, applied only to

international transactions, and does not control the present domestic dispute. 59 F.3d at 1157-1158. Further, "[n]one of the cases the Supreme Court has decided subsequent to Mitsubishi compel us to change this conclusion. No question exists that the Court has relied on Mitsubishi to expand the scope of statutory claims subject to arbitration. * * * In none of these cases, however, did the Court speak directly to the propriety of arbitrating domestic antitrust claims." Id. at 1158. Accordingly, the panel concluded, "Cobb remains controlling precedent in this circuit." Ibid.

3. Standard of Review. This case presents only a question of law, which is reviewed de novo by this Court. Luckie v. Smith Barney, Harris Upham & Co., 999 F.2d 509, 512 (11th Cir. 1993).

SUMMARY OF ARGUMENT

The panel correctly decided this case. The Supreme Court has not ruled on the arbitrability of domestic antitrust claims, either in Mitsubishi or in subsequent decisions, and accordingly there is no controlling authority that this Court must follow. And there is no reason to disturb Cobb v. Lewis, to the extent that it held that domestic antitrust disputes are not arbitrable. That decision correctly determined that an inherent conflict exists between domestic arbitration and the underlying purposes of the antitrust laws (see 488 F.2d at 47). While the considerations outlined in Cobb must give way in the international arena to the concerns enumerated in Mitsubishi (including international comity, respect for the capacities of

foreign tribunals, and sensitivity to the need for predictability in international commercial relations), the concerns outlined in Cobb remain valid in the domestic sphere. The antitrust laws hold a unique position as "the Magna Carta of free enterprise" (United States v. Topco Associates, Inc., 405 U.S. 596, 610 (1972)), and private antitrust suits are a critical part of the scheme for enforcement of those laws. Arbitration of domestic antitrust disputes will reduce the effectiveness of antitrust enforcement in a number of ways -- for example, by significantly reducing available discovery in meritorious cases, by creating a body of private law that allows illegal activities to escape public or governmental notice, and by blocking correction of most legal and factual errors made by the adjudicator. Cobb prevented these untoward results, and should be affirmed.

ARGUMENT

I. THE SUPREME COURT HAS NOT RULED ON THE ARBITRABILITY OF DOMESTIC ANTITRUST CLAIMS

1. In Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), a case involving arbitration of an antitrust dispute among international parties, the Supreme Court held that the antitrust claims at issue in that case were arbitrable. However, the Court expressly reserved the question whether antitrust disputes among domestic parties may be arbitrated. The Court has not had occasion directly to consider whether domestic antitrust claims are arbitrable. Nor does the rationale of any post-Mitsubishi decision require the conclusion

that domestic antitrust claims are arbitrable. Accordingly, there is no controlling precedent that binds this Court.

At the time Mitsubishi was decided, no court had held that domestic antitrust disputes were arbitrable, and the Court explicitly reserved the issue as to domestic agreements, as appellant JBL concedes (see, e.g., D.Reh.Br.[1] 5, 14) (473 U.S. at 629):

> We find it unnecessary to assess the legitimacy of the American Safety[2] doctrine [that antitrust claims are inappropriate for arbitration] as applied to agreements to arbitrate arising from domestic transactions. * * * [W]e conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.

Later in its opinion, the Court again emphasized that its decision was informed by the international nature of the transaction, noting that the federal policy in favor of arbitral dispute resolution "applies with special force in the field of international commerce." 473 U.S. at 631. The Court stated that it was "weigh[ing] the concerns of American Safety against a strong belief in the efficacy of arbitral procedures for the resolution of international commercial disputes * * *." Ibid.

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[1] "D.Reh.Br." refers to JBL's en banc brief. "P.Br." refers to Kotam's main brief in this Court.

[2] American Safety Equipment Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968).

The Mitsubishi decision expressed "skepticism" (id. at 632) about several elements of American Safety's rationale,[3] but as to the "core of the American Safety doctrine -- the fundamental importance to American democratic capitalism of the regime of the antitrust laws" (id. at 634) -- the Court explicitly confined its analysis to international agreements (id. at 636) (emphasis added):

> It follows that, at least where the international cast of a transaction would otherwise add an element of uncertainty to dispute resolution, the prospective litigant may provide in advance [for arbitration of antitrust disputes].
>
> There is no reason to assume at the outset of the dispute that international arbitration will not provide an adequate mechanism.

And in closing, the Court noted that it was requiring "national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration." Id. at 638-639. The Court, clearly, was not ruling on those "domestic notions."

2. Since Mitsubishi, the Supreme Court has not decided any case involving whether domestic antitrust claims are arbitrable.

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[3] Thus the Court was skeptical that antitrust disputes routinely involve contracts of adhesion, or that all antitrust disputes are inherently too complex for arbitration. 473 U.S. at 632-634. The court also rejected "the proposition that an arbitration panel will pose too great a danger of innate hostility to the constraints on business conduct that antitrust law imposes." 473 U.S. at 634.

Two years after Mitsubishi, the Court did reiterate that "the holding in Mitsubishi was limited to the international context." Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 239 (1987) (holding domestic claims under the Securities Exchange Act of 1934 and RICO claims to be arbitrable). And nothing in the Supreme Court's two other post-Mitsubishi non-antitrust arbitration cases sub silentio overrules this Court's decision in Cobb v. Lewis. See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (Age Discrimination in Employment Act of 1967 ("ADEA")); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) (Securities Act of 1933). Determining arbitrability requires analysis of the text and legislative history of the particular statute, and whether there is an "'inherent conflict' between arbitration and the [statute's] underlying purpose." Gilmer, 500 U.S. at 26, quoting McMahon, 482 U.S. at 227. This is an inquiry that must be carried out for the individual statute, and accordingly a determination that securities or RICO or ADEA claims are arbitrable does not speak to the arbitrability of antitrust claims.[4]

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[4] Indeed, the Court in McMahon recognized that the antitrust laws have a unique position among federal statutes. Certainly, the RICO treble damages provisions have not proved as central to advancing the national welfare as the antitrust treble damages provisions. See McMahon, 482 U.S. at 241-242 ("[t]he (continued...)

In short, therefore, the arbitrability of the claims in this case is not settled by Supreme Court precedent, and this Court remains free to affirm Cobb.

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[4] (...continued)
private attorney general role for the typical RICO plaintiff is simply less plausible than it is for the typical antitrust plaintiff"; "in fact [civil] RICO actions are seldom asserted 'against the archetypal, intimidating mobster'" at whom the RICO treble damages provisions were aimed). And there are significant other distinctions. For example, arbitration under the securities laws is supervised by a federal agency, to ensure that arbitration is conducted fairly. The Court weighed this factor in concluding that the securities claims are arbitrable. See Quijas, 490 U.S. at 483; McMahon, 482 U.S. at 233-234. There is no similar federal supervision of antitrust arbitration. And, unlike the statutes considered in Gilmer and Quijas, the antitrust laws do not provide for concurrent adjudication in state and federal courts. See Gilmer, 500 U.S. at 29; Quijas, 490 U.S. at 482-483. Accordingly, there is no suggestion that Congress intended to allow antitrust claimants "'a broader right to select the forum for resolving disputes * * * .'" Gilmer, 500 U.S. at 292, quoting, Quijas, 490 U.S. at 483.

II. COBB v. LEWIS CORRECTLY HELD THAT ARBITRATION OF DOMESTIC ANTITRUST CLAIMS CONFLICTS WITH THE UNDERLYING PURPOSES OF THE ANTITRUST LAWS

In evaluating arbitrability, a court will look at the text of the statute, its legislative history, and whether there is an "'inherent conflict' between arbitration and the [statute's] underlying purpose." Gilmer, 500 U.S. at 26, quoting McMahon, 482 U.S. at 227. The Supreme Court in Mitsubishi noted "the fundamental importance to American democratic capitalism of the regime of the antitrust laws (473 U.S. at 634-635), and this Court in Cobb emphasized the same concept, in concluding that arbitration of antitrust claims is inconsistent with "the broad range of public interests affected by private antitrust claims." 488 F.2d at 47.[5]

In the international area the considerations relied on in Cobb are no longer enough to preclude arbitration, because of "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes" (Mitsubishi, 473 U.S. at 629). However,

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[5] The Department of Justice recognizes the usefulness of arbitration in appropriate cases. Indeed, in April 1995, Attorney General Janet Reno adopted a strong policy directing the Department to make broader use of alternative dispute resolution in civil litigation.

in the domestic sphere, where the countervailing considerations enumerated by Mitsubishi do not apply, we believe that concerns outlined by Cobb remain valid.

1. The Federal Arbitration Act ("FAA"), 9 U.S.C. 1, et seq., was not enacted until 1925. Thirty-five years earlier, in 1890 when Congress enacted the Sherman Act,[6] Congress did not intend that private treble damage actions would be subject to arbitration. At that time, both federal and state courts were unsympathetic to enforcement of arbitration agreements. See Scherk v. Alberto-Culver Co., 417 U.S. 506, 510-511 & n.4 (1974); Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 123 (1924)(agreement to arbitrate will not be enforced in admiralty court by specific performance); Dorchy v. Kansas, 264 U.S. 286, 289 (1924)(system of compulsory arbitration of industrial disputes held unconstitutional). Congress undoubtedly understood that, at least in the absence of express statutory authorization,

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[6] The treble damages provisions were first enacted in 1890 as Section 7 of the Sherman Act, 26 Stat. 210. They were reenacted in 1914 as Section 4 of the Clayton Act, 38 Stat. 731. Section 4 provides that any person injured in his business or property by reason of anything forbidden in the antitrust laws (including the later-enacted Robinson-Patman Act amendments to Section 2 of the Clayton Act) shall recover treble damages, and the cost of the suit, including reasonable attorney's fees.

arbitration agreements involving the right to sue under the antitrust laws would be unenforceable.

More fundamentally, the importance Congress attributed to suits by private parties in the antitrust enforcement scheme makes it most unlikely that it would have intended such claims to be arbitrable in the absence of pressing countervailing considerations such as the Court found in Mitsubishi. The Sherman Act is "a comprehensive charter of economic liberty" that is "as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." United States v. Topco Associates, Inc., 405 U.S. 596, 610 (1972); Northern Pacific Ry. v. United States, 356 U.S. 1, 4 (1958). See also, Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-360 (1933)("charter of freedom" that may be fairly compared to a constitutional provision).

The Attorney General is primarily responsible for enforcement of the Sherman Act (15 U.S.C. 4), and the Attorney General and Federal Trade Commission have authority to enforce the Robinson-Patman Act (see 15 U.S.C. 21, 25). However, Congress knew that the government would have only limited resources with which to pursue antitrust violators. In order to encourage vigorous enforcement, Congress expressly authorized private parties injured by antitrust violations (including violations of the Robinson-Patman Act) to sue in federal courts, without regard to amount in controversy; it also permitted

private plaintiffs to recover treble damages and costs, including attorneys fees. 15 U.S.C. 15.[7] Treble damages were "unique in federal law when the statute was enacted." Mitsubishi, 473 U.S. at 653 (Stevens, J., dissenting).

Treble damages compensate injured parties, but they also constitute a special incentive to private parties -- who are in the best position to be aware of violations -- to pursue antitrust violators as "private attorneys general." Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130-131 (1969). And

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[7] As Justice Stevens observed in Mitsubishi, "[t]he unique public interest in the enforcement of the antitrust laws is repeatedly reflected in the special remedial scheme enacted by Congress," including criminal liability and civil penalties like treble damages. 473 U.S. at 652-653 (dissenting). In the past, this concern was reflected by creation of a special three-judge district court to hear antitrust claims on an expedited basis, and direct appeal to the Supreme Court. Id. at 652. To encourage plaintiffs, the courts have rejected in pari delicto defenses (id. at 653, n.21), and Congress has given the public access to depositions in government civil proceedings to enforce the Sherman Act (15 U.S.C. 30) and has allowed a final judgment or decree in a government case to constitute prima facie evidence of a violation in a subsequent treble damages case (15 U.S.C. 16(a)). See 473 U.S. at 655.

these treble damages serve as a particularly effective means of punishing those who violate the antitrust laws, and thus of deterring potential violators. See Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 138-139 (1968). "Without doubt, the private cause of action plays a central role in enforcing this regime. * * * The treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators." Mitsubishi, 473 U.S. at 635.[8]

In creating this extraordinary and unprecedented scheme of treble damages, it is not conceivable that Congress intended to give private parties the option to relinquish, by contract, the right to bring public judicial actions. And indeed there is concrete evidence of this intent: Congress was so concerned with

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[8] Mitsubishi stated that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function" (473 U.S. at 637), but this statement was made in the context of the situation "where the international cast of a transaction would otherwise add an element of uncertainty to dispute resolution" (id. at 636-637). In view of its strong statement about the crucial role of treble damages (id. at 635), the Court's careful emphasizing of international concerns as the ground for permitting arbitration must be assumed to have been intentional.

keeping treble damage suits in the federal courts that it rejected an effort to amend the proposed legislation to authorize similar suits in state courts. Senator Hoar, the floor manager of the bill, successfully argued that Congress should not, and indeed could not, allow state courts to hear private treble damages actions because such actions had "penal" and "punitive" characteristics, and thus were proper for resolution only by federal judges. 21 Cong. Rec. 3146-3147, 3150 (1890). See also Blumenstock Bros. Advertising Agency v. Curtis Publishing Co., 252 U.S. 436, 440 (1920); Lyons v.Westinghouse Electric Corp., 222 F.2d 184, 189 (2d Cir.)(L. Hand, J.), cert. denied, 350 U.S. 825 (1955). Having precluded state courts from hearing antitrust claims, Congress surely did not intend to "allow private arbitrators to assume a jurisdiction that is denied to courts of the sovereign States." Mitsubishi, 473 U.S. at 654 (Stevens, J., dissenting).

2. In fact, arbitration presents numerous difficulties in the area of antitrust. Where there are no pressing international concerns (Mitsubishi, 473 U.S. at 629, 631, 636, 638-639), there is no reason to hobble antitrust enforcement by imposing these strictures.

a. Private Law. Arbitration could create a private body of antitrust law, without published opinions or even public knowledge of the dispute. Under the AAA Rules that apply in this case, awards do not usually include an opinion giving reasons for the decision, and the parties may specify the privacy of the

proceedings. American Arbitration Association, A Guide to Arbitration for Business People at 3, 16 (1993). This becomes a matter of serious concern if arbitration clauses are routinely used in an industry, or even by a single large franchisor or distributor. In that event, illegal activities in a particular sector of the economy can escape government and public notice, and legitimate suits by other private attorneys general and by government entities will be forestalled. Further, legal precedent concerning the type of economic relationship common to those industries cannot develop. Compare Gilmer, 500 U.S. at 31-32 (NYSE arbitration awards are in writing, award decisions are public).

b. Discovery. Discovery is at the option of the arbitrator, as is use of statutory subpoena powers such as 9 U.S.C. 7 (arbitrators may summon persons and require them to bring material records; court will enforce through subpoena). See American Arbitration Association, Commercial Arbitration Rules No. 31. Often, in commercial disputes, limiting discovery to what the arbitrator deems appropriate, and to production in the arbitrator's presence, is salutary as a method of speeding up arbitration. Indeed, limited discovery may be adequate even in some antitrust disputes involving vertical relationships, where relevant documents may be limited in number and of obvious nature (so that it is clear whether discovery has been adequate and complete). See Mitsubishi, 473 U.S. at 633.

But such limited discovery is unsuited to other types of antitrust claims. For example, Section 1 conspiracy claims may require discovery not only from the other party to the contract, but also from its competitors. This broader discovery would be difficult under 9 U.S.C. 7, which requires production in the arbitrator's presence. Similarly, Robinson-Patman claims may require obtaining extensive documents from third parties. Plaintiff in this case asserts that it seeks such third party documents to show that these parties received better prices than Kotam. P.Br. 16. The public interest in having viable public attorneys general is not served by limiting discovery in a meritorious case, if the limitation means that a meritorious case will fail.[9] While it might be possible to evaluate arbitrability on a case-by-case basis, after considering any claims that discovery will be inadequate if the case goes to arbitration, we cannot recommend such a time-consuming approach. Rather, the traditional rule of non-arbitrability should continue to be invoked.

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[9] Mitsubishi states that a concern with case "complexity" is not enough "alone" to preclude arbitration (473 U.S. at 633-634). But there are other factors, including inadequate discovery and the problems with private law, that must be considered.

c. Concurrent arbitration and litigation. Arbitration simply complicates matters where defendants include some defendants subject to an arbitration agreement, and some who are not. Litigation is not avoided, and the possibility of inconsistent results is significant and undesirable.

d. Contracts among firms with unequal bargaining power. Antitrust claims often involve firms that singly or by agreement possess monopoly power. While contracts imposed by these firms are not technically contracts of adhesion (see Mitsubishi, 473 U.S. at 632-633), there is likely to be significant disparity in economic power between the parties, which makes it more likely that the weaker party will relinquish its right to judicial settlement, even when it would not have done so if its bargaining position had been stronger. It is detrimental to the public interest to permit contracts imposed through the exercise of such economic power -- which it is the purpose of the antitrust laws to regulate -- to determine that a private, non-judicial forum will be used.

e. Judicial review. Arbitral awards may not be set aside for errors of law or interpretation, unless they are clearly irrational or arbitrary. See 9 U.S.C. 10, 11; Ainsworth v. Skurnick, 960 F.2d 939, 941 (11th Cir. 1992), cert. denied, 113 S. Ct. 1269 (1993). While this limitation is workable and useful for resolution of other types of commercial disputes, it hinders the effectiveness of antitrust claimants in acting as private

attorneys general.[10] Meritorious claims can be incorrectly rejected, and the injured party generally has no recourse.

f. Absence of federal oversight. Unlike the securities laws, there is no federal oversight of antitrust arbitration. Compare, McMahon, Quijas. We note that even securities arbitration has been subjected to criticism, and National Association of Securities Dealers arbitration is currently the subject of a comprehensive review.[11] Among the areas for complaint have been discovery; training and expertise of arbitrators; and qualifications and abilities of non-lawyers who represent investors. Michael Siconolfi, Revised Rules Are Mapped for Securities Arbitration, Wall St. J., Nov. 14, 1995 at C1. See also, e.g. Michael Siconolfi, Major Changes Loom for Securities Arbitration, Wall St. J., Jan. 15, 1996 at A3 ("as

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[10] There is also some question whether arbitrators will award punitive damages and costs including attorneys fees. Since punitive damages and costs are so central to the statutory rights conferred by the antitrust laws, a denial of such relief would invalidate the arbitral award. See Mitsubishi, 473 U.S. at 637 n.19.

[11] Proposals for reform were made January 22, 1996, by a task force known as the Ruder Commission, to the National Association of Securities Dealers. Michael Siconolfi, New Arbitration Rules: Mixed Bag for Investors, Wall St. J., Jan 23, 1996, at C1.

mandatory [securities] arbitration has evolved, it has come to resemble the costly, drawnout paper wars of civil litigation).

3. To date, only the panel of this Court and one other court of appeals have expressly ruled on the issue of arbitrability of domestic antitrust claims. A panel of the Ninth Circuit concluded in Nghiem v. NEC Electronic, Inc., 25 F.3d 1437, 1441-1442 (9th Cir.), cert. denied, 115 S. Ct. 638 (1994) -- without recourse to en banc hearing -- that "Mitsubishi effectively overruled American Safety and its progeny," (id. at 1442) and that subsequent Supreme Court decisions construing other statutes "in combination with the FAA can only mean the judicially implied antitrust exemption to the FAA no longer exists" (id., quoting, 35 UCLA L. Rev. 623, 624 n.7 (1988) (emphasis omitted). For the reasons we have discussed, however, that panel misread Mitsubishi; and subsequent Supreme Court decisions, which addressed the arbitrability of other statutes, had no cause to rule on the considerations specific to arbitrability of domestic antitrust disputes. For these reasons, Nghiem was incorrectly decided, and should not be followed by this Court.[12] Clearly, Mitsubishi left for another day any further consideration of "domestic notions of arbitrability" (473

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[12] Because the Ninth Circuit panel incorrectly decided that the matter of arbitrability had been ruled upon by the Supreme Court, the issue of the wisdom of overruling existing circuit precedent that precluded arbitration did not arise.

U.S. at 639). Upon review of these "notions" two decades after Cobb, the reasons for precluding arbitration of domestic antitrust disputes remain sound.

CONCLUSION

The judgment of the district court should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that on January 24, 1996, I caused a copy of the foregoing EN BANC BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLEE to be served upon the following counsel in this matter by overnight courier:

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