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The Future of Consumer Class Actions Following AT&T Mobility LLC v. Concepcion

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Recent years have seen a rise in consumer class actions across the country, including California. Typically, the first battleground in these cases is at the motion to dismiss stage. In the aftermath of the United States Supreme Court's April 27, 2011 decision in *AT&T Mobility LLC v. Conception*, companies that take care in drafting sales and service contracts now have a powerful additional weapon in seeking the dismissal of these lawsuits. Reaffirming its commitment to the "liberal federal policy favoring arbitration," the Supreme Court held, in a 5-4 decision, that the Federal Arbitration Act (FAA) preempts California law declaring class arbitration waivers in consumer contracts unconscionable.

AT&T Mobility provides an important additional tool for sellers that include arbitration provisions in their agreements to protect themselves from the increasingly common scenario where individual consumers try to convert their personal disputes into class actions or arbitrations (urged on by counsel looking, as the Supreme Court noted, to "reap far higher fees in the process"), and the "risk of 'in terrorem' settlements that class actions entail." The decision confirms the enforceability of arbitration clauses that waive the individual claimant's ability to bring putative class actions in court. *AT&T Mobility* is likely to cause manufacturers to require consumer contracts for the purchase of goods where no contract previously was required and to modify existing form contracts in order to prevent, or at least reduce the risk of, class action lawsuits.

Background

In 2002, the Concepcions signed a Wireless Service Agreement (WSA) with AT&T Mobility LLC (then Cingular) for cellular phone service. The service was advertised as including the provision of free cell phones. The Concepcions were not charged for the phones, but they were charged $30.22 in sales tax based on the phones' retail value. In 2006, the Concepcions filed a complaint in the U.S. District Court for the Southern District of California, which later was consolidated with a putative class action. The complaint alleged, among other things, that AT&T had engaged in false advertising and fraud by charging sales tax on phones it advertised as free. AT&T moved to compel arbitration under the terms of the WSA, which provided for arbitration of all disputes and required that all claims be brought in an "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding."

The District Court denied AT&T's motion. Relying on the California Supreme Court's decision in *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 113 P.3d 1100 (2005), the court found that the WSA arbitration provision was unconscionable because AT&T had not shown that bilateral arbitration adequately substituted for the deterrent effect of class actions. In *Discover Bank*, the California Supreme Court held that most class action waivers in consumer contracts are unconscionable because, in practice, the waivers allow corporations to exempt themselves from their own fraud.

On appeal, the Ninth Circuit affirmed, holding that the *Discover Bank* rule was not preempted by the FAA because that rule was simply "a refinement of the unconscionability analysis applicable to contracts generally in California."

The Supreme Court's Decision

The Supreme Court granted certiorari to answer the question of "whether §2 [of the FAA] preempts California's rule classifying most collective-arbitration waivers in consumer contracts as unconscionable." The Court reversed the Ninth Circuit's decision and held that because the *Discover Bank* rule "stands as an obstacle to the accomplishment and execution of the full purposes of objectives" of the FAA, it is preempted.

As an initial matter, the Court noted that §2 of the FAA reflects "both a liberal policy favoring arbitration . . . and the fundamental principle that arbitration is a matter of contract." As such, "courts must place arbitration agreements on equal footing with other contracts . . . and enforce them according to their terms." Section 2 of the FAA, however, also contains a savings clause, which permits arbitration agreements to be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability," but not by defenses that apply only to arbitration. The Court had to decide whether the *Discover Bank* rule fits within §2's savings clause.

The Concepcions argued that the *Discover Bank* rule applies to any contract, not just arbitration, and therefore is not preempted by §2. However, the majority disagreed, holding that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." While the Court acknowledged that "the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration," it concluded that that no state rule can "stand as an obstacle to the accomplishment of the FAA's objectives."

According to the Court, the "overarching purpose" of the FAA is "to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." The *Discover Bank* rule, which requires the availability of class arbitration, "interferes with the fundamental attributes of arbitration" and is thus, in the majority's view, inconsistent with the FAA. First, "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration – its informality – and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." Second, "class arbitration *requires* procedural formality." Third, "class arbitration greatly increases risks to defendants" and "is poorly suited to the higher stakes of class litigation."

Implications

The *AT&T Mobility* decision makes clear that courts must place arbitration agreements on equal footing with other contracts and enforce them according to their terms. It also establishes that class arbitration waivers may not be deemed unconscionable per se. Plaintiffs' counsel already are expressing concern about the impact of *AT&T Mobility* on their ability to file consumer class action lawsuits. Companies that include such a waiver in their consumer contracts may further reduce, and possibly prevent, the risk of being drawn into class actions.

In the aftermath of *AT&T Mobility,* plaintiffs' counsel are unlikely to stop filing consumer class actions. Instead, plaintiffs' counsel likely will push the battle to a new arena by arguing, for example, that defendants lack a contract with putative class members or buried the arbitration agreement in a document that the consumer does not see at the time of purchase (such as a warranty or product description). Companies can take steps now to address and reduce these risks. Manufacturers should consider requiring consumers to sign contracts for the sale of certain goods. Companies with consumer contracts should make the arbitration agreement as consumer-friendly and conspicuous as possible, and try to include the agreement in a document that the consumer reviews and signs at the point of sale (such as an invoice).