



Arbitration's Rise and the Class Action's Fall: AT&T Mobility LLC v. Concepcion

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Stepping into a heated dispute between consumer and employee advocates and businesses that employ class action waivers in arbitration agreements, this week the United States Supreme Court adopted the business view in the closely-watched case *AT&T Mobility LLC v. Concepcion*.

The dispute concerned whether an arbitration clause in an adhesive consumer contract could prevent consumers from pursuing class action remedies. In a narrow 5-4 decision issued on April 27, 2011, the high court reaffirmed the long-established principle that arbitration agreements are matters of consent that must be enforced according to their terms. That is, the Federal Arbitration Act ("FAA") preempts state-law limitations on the enforceability of arbitration agreements containing class action waivers. Therefore, if an arbitration clause prohibits a consumer or employee from pursuing class or representative relief, that prohibition must be enforced.

Significantly for California businesses, the decision of the United States Supreme Court is directly contrary to a 2005 California Supreme Court case that had invalidated, as unconscionable, an arbitration clause that foreclosed the right to seek class action relief.

Background: Discover Bank Deems Class Action Waivers in Contracts of Adhesion Unconscionable and Unenforceable in California

In *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), the California Supreme Court refused to enforce a waiver of class action rights contained in an adhesive consumer agreement. Such waivers were unconscionable and unenforceable if they were contained in contracts of adhesion, involved individually small sums of damages, and were part of a scheme to defraud by the party with superior bargaining power. *Id.* at 162.

As a result, in California and other jurisdictions that took the approach of *Discover Bank*, businesses could not use arbitration agreements to obtain waiver of rights to pursue or participate in class-wide relief. *E.g.*, *Muhammad v. County Bank of Rehoboth Beach, Delaware*, 189 N.J. 1 (2006). The effect of such decisions was to depart from the contract as written, invalidate the waiver, and permit plaintiffs to bring their claims as class actions.

The AT&T Mobility LLC Decision

AT&T Mobility LLC changes this landscape significantly. In *AT&T Mobility LLC*, two individual cellular telephone customers signed a form agreement with AT&T Mobility LLC ("AT&T"). The contract's arbitration clause required the customers to bring claims in their "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." Interestingly, the contract contained incentives for the claimant to pursue individual arbitration instead of class arbitration or litigation, including allowances for minimum recovery and an award of twice the claimant's attorney's fees under certain circumstances. AT&T also provided a website for the processing of claims, including the ability for the claimant to file a Demand for Arbitration online.

When the customers sued AT&T for charging sales tax on phones advertised as free, AT&T moved to compel arbitration. Following the rule of *Discover Bank*, the California district court denied the motion on the ground that the contract was unconscionable and unenforceable. The Ninth Circuit affirmed, following *Discover Bank* to hold that the FAA did not preempt the unconscionability principles of California state law. *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 855 (2009).

The Supreme Court reversed the Ninth Circuit, holding that "class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA." Although Section 2 of the FAA allows for the invalidation of arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, California's prohibition on enforcement of class action waivers in arbitration agreements on unconscionability grounds was not a permissible means of disregarding an agreement to arbitrate.

AT&T Mobility LLC and The Future

The effect of *AT&T Mobility LLC* is that businesses now have greater certainty that courts will enforce class action waivers included in consumer and employee arbitration agreements. It remains to be seen whether an arbitration process less robust and less claimant-friendly than the one at issue in *AT&T Mobility LLC* – with its promise of minimum damages, double attorney's fee awards, and online system for the processing of claims – will survive unconscionability challenges.

Plaintiffs will no doubt attempt to distinguish *AT&T Mobility LLC* on these facts. Defendants will argue that the United States Supreme Court has, once again, endorsed arbitration as a paramount federal interest, above even those created by the class action device.