SUPREME COURT UPHOLDS ARBITRATION CLAUSES IN CONSUMER ADHESION CONTRACTS, INCLUDING CLAUSES PROHIBITING CLASS ARBITRATION

April 27, 2011

To Our Clients and Friends:

This morning, in *AT&T Mobility LLC v. Concepcion*, the U.S. Supreme Court decided, 5-4, that the class action waiver in AT&T's standard consumer contract is enforceable, notwithstanding the California Supreme Court's 2005 determination in the *Discover Bank* case that such clauses are unconscionable, unless they include the possibility of classwide arbitration, because waivers deprive consumers of the "deterrent effect" of class actions.

The Supreme Court's decision had two principal components. First, it held that the Federal Arbitration Act ("FAA") requires courts to uphold arbitration clauses even in the context of consumer adhesion contracts. As the majority opinion, written by Justice Scalia, put it, "the times in which consumer contracts were anything other than adhesive are long past." Second, the Court held that the FAA's policy judgment in favor of arbitration trumps the California Supreme Court's policy judgment that arbitration clauses are unconscionable unless they allow claimants to proceed on behalf of all others similarly situated.

One of the FAA's purposes, according to the Court, was to "achieve streamlined proceedings and expeditious results." The Court noted that the average individual consumer arbitration concludes within just a few months. Classwide arbitration, by contrast, is so complex that (1) the mean time from filing to settlement, withdrawal or dismissal has been 630 days, and (2) no case has yet proceeded to a final judgment on the merits. The Court noted, moreover, that arbitrators are less likely than judges to have experience in class action procedures, and therefore are more likely to commit errors, and that the party aggrieved by an allegedly incorrect decision on a motion for certification or other aspects of the class procedure would not have the ability to seek review of that decision. For these reasons, it thought claimants would be better off in quick, bilateral arbitration with AT&T than in protracted class arbitration.

In addressing the California Supreme Court's decision that class action waivers should be unenforceable as a matter of public policy, the majority likened this to a finding that arbitration clauses should be rejected if they "fail to provide for judicially monitored discovery," or "fail to abide by the Federal Rules of Evidence." These kinds of safeguards would protect aggrieved consumers, too, the Court held, but the FAA would bar states from

imposing these policy judgments because they, too, would prolong and complicate disputes — exactly what the FAA permits parties to avoid by agreeing to arbitration.

The four-Justice minority, led by Justice Breyer, would have found that California judges have the right to find class action waivers unconscionable, so long as the rule they adopt (in this case, a ban on serving as a class representative) is equally applicable to clauses purporting to govern standard litigation. The minority took no issue with the idea that class arbitrations would proceed more slowly than bilateral arbitrations, but did not share the majority's skepticism about arbitrators' ability to handle class proceedings, and thought that class arbitrations would proceed at least as quickly and fairly as class action litigation.

The Court's decision addressed only AT&T's arbitration clause, which, the majority noted, is quite favorable to consumers. It specifies, among other things, that "AT&T must pay all costs for nonfrivolous claims; that arbitration must take place in the county in which the customer is billed; . . . and that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages." The clause not only bars AT&T from seeking its own attorneys' fees, but it provides, "in the event that a customer receives an arbitration award greater than AT&T's last written settlement offer," that AT&T must pay a $10,000 "minimum recovery" and *twice* the amount of the claimant's attorneys' fees.

Conceivably, a less favorable clause could have yielded a different result. We note that, just last month, in a decision involving American Express, the Second Circuit refused to enforce an arbitration clause because it would have been economically infeasible for the plaintiffs to have pursued complex antitrust theories in individual arbitration. Further proceedings in that case, and others, will show just how widely today's decision will apply.

The majority also noted, in an important footnote, that "[o]f course States remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class action waiver provisions in adhesive arbitration agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms."

The Court's decision today has the potential to change fundamentally the practice of consumer class action law by enabling companies to avoid class actions entirely, both in court and in arbitration. The decision should cause companies to reexamine existing arbitration clauses and, if they are not already including arbitration clauses in their consumer contracts, to consider whether doing so now, with a class action waiver, makes sense.

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Please do not hesitate to contact us if you have any questions.

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