U.S. Supreme Court Invalidates California's Discover Bank Rule on Classwide Arbitration in AT&T Mobility v. Concepcion

Posted on April 28, 2011 by Barger & Wolen LLP

By Richard B. Hopkins and John C. Holmes

On April 27, 2011, the United States Supreme Court issued an important decision in *AT&T Mobility vs. Concepcion*, No. 09-893, impacting the ability of defendants to move to compel arbitration in response to consumer class action complaints.

In a 5-4 decision, the Court overturned a Ninth Circuit ruling that had held an arbitration provision in AT&T Mobility contracts to be invalid.

The arbitration provision in question required all disputes to be brought in "*the party's individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.*"

Plaintiffs originally filed an individual claim in federal district court alleging that AT&T improperly charged approximately $30 in sales taxes on mobile phones that AT&T advertised as free. The case was consolidated into a putative class action.

The question presented in the case was whether §2 of the Federal Arbitration Act preempts California's rule classifying most collective-arbitration waivers in consumer contracts as unconscionable. This rule is known as the Discover Bank rule, after the California Supreme Court's decision in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005).

The majority of the Supreme Court held that requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA. The Court further held that class arbitration, to the extent it is mandated by *Discover Bank* rather than consensual, is inconsistent with the FAA.

The Court noted that arbitration is poorly suited to the higher stakes of class litigation.

In litigation, a defendant may appeal a certification decision on an interlocutory basis and, if unsuccessful, may appeal from a final judgment as well.

However, in arbitration, decisions are subject to very limited review.

Moreover, the Court noted, arbitrators are seldom experienced in class action procedure and classwide arbitration consistently takes years to resolve.

Indeed, the Court noted that as of September 2009, the American Arbitration Association had opened 283 class arbitrations. Of those, 121 remained active, and 162

had been settled, withdrawn, or dismissed. Not a single one, however, had resulted in a final award on the merits.

The Court also emphasized that the district court and Ninth Circuit found that the arbitration provision at issue was

sufficient to provide incentive for the individual prosecution of meritorious claims that are not immediately settled, and the Ninth Circuit admitted that aggrieved customers who filed claims would be 'essentially guarantee[d]" to be made whole.'

At issue was an agreement which permitted customers to initiate a dispute by completing a form on AT&T's website. Thereafter, AT&T was permitted under its agreement to offer to settle the claim. If it did not settle within 30 days, the customer was required to submit the claim to arbitration.

The agreement required that in the event of arbitration, AT&T must pay all costs for nonfrivolous claims and that the arbitration must take place in the county in which the customer was billed. The agreement also provided, for claims under $10,000, that the customer could elect to conduct the arbitration via telephone, in-person or on written submissions only and that either party may bring a claim in small claims court in lieu of arbitration. The agreement also permitted the arbitrator to award any form of individual relief, including injunctions and presumably punitive damages.

The agreement also denied AT&T any ability to seek reimbursement of its attorney's fees, and, in the event that a customer receives an arbitration award greater than AT&T's last written settlement offer, required AT&T to pay a $7,500 minimum recovery and twice the amount of the claimant's attorney's fees.

Justice Scalia delivered the opinion of the Court, in which Justices Robert, Kennedy, Thomas and Alito joined. Thomas filed a concurring opinion. Breyer filed a dissenting opinion, in which Justices Ginsburg, Sotomayor and Kagan joined.