

Supreme Court Decides Class-wide Arbitration Issue

May 9, 2011 by [Sean Wajert](#)

In recent years, corporate defendants facing consumer class actions in California and several other states have been unable to enforce arbitration agreements prohibiting class actions. Under the California Supreme Court's ruling in *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 162-63 (2005), class action waivers were unenforceable if the waivers were in "a consumer contract of adhesion," in disputes that "predictably involve small amounts of damages," when the "party with superior bargaining power" allegedly has harmed large numbers of consumers.

Last week, the U.S. Supreme Court, in a 5-4 [decision](#) in *AT&T Mobility LLC v. Concepcion*, No. 09-893, held that the Federal Arbitration Act ("FAA") preempted the *Discover Bank* rule. Significantly, the Supreme Court also held that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." Slip Op. at 9. This decision will significantly enhance corporate defendants' ability to enforce arbitration provisions in California and the many other states with similar limitations on class action waivers.

Some colleagues at the firm have put together a [short and sweet analysis](#) of the case, observing that this decision may have a substantial impact in consumer product markets, enabling businesses to enforce contractual individual arbitration agreements and thereby very significantly narrow the occasions for certain consumer class actions. Many companies had changed their standard contracts to take the *Discover Bank* rule into account, and they may now want to consider modifying those standard agreements back to include class action waivers. Although the California rule was the only state law at issue in the case, *Concepcion* likely will impact other similar state law rules that have rendered class action waivers unenforceable and that similarly created impermissible "obstacle[s] to the accomplishment and execution of the full purposes and objectives of Congress," in enacting the FAA. Id. at 18 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).