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LEGAL ALERT

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Supreme Court Hears Argument in Significant Consumer Arbitration Case

On November 9, 2010, the U.S. Supreme Court heard the much-anticipated oral argument in *AT&T Mobility LLC v. Concepcion*. The Concepcions, who entered into a wireless service contract with AT&T, filed a class action against the company in 2006 alleging various violations of California's consumer protection statutes. AT&T moved to compel individual arbitration of the dispute pursuant to the contract's arbitration agreement, which contained a class action waiver. The U.S. District Court for the Southern District of California denied the motion, finding the agreement unconscionable under California law because it precluded class actions. The Ninth Circuit affirmed. Certiorari was granted to decide "[w]hether the Federal Arbitration Act ["FAA"] preempts States from conditioning the enforceability of an arbitration agreement on the availability of particular procedures—here, class-wide arbitration—when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims." Sutherland's Legal Alert on the grant of certiorari is available here.

Counsel for AT&T focused the Court's attention on the FAA's "revocation savings clause." Section 2 of the FAA provides that an arbitration agreement may be held unenforceable only on such grounds as exist for the revocation of **any contract.** The company argued that a law that renders an arbitration agreement unconscionable if it precludes class proceedings does not apply to contracts generally and runs afoul of the FAA. The Court, however, questioned AT&T's interpretation of the "any contract" language. Justice Ginsburg noted that the FAA was enacted to ensure that courts would not favor the judicial forum over the arbitral forum and, consistent with that purpose, California's unconscionability analysis applies equally to judicial class action waivers **and** class arbitration waivers. AT&T maintained that the test for FAA preemption is not whether a law applies equally to arbitration and litigation. If that were the case a state could require full discovery, a judge, a jury, and application of the federal or state rules of evidence and procedure in every arbitration—requirements that, though equally applicable to court proceedings, would clearly discriminate against arbitration, in violation of the FAA.

In response, counsel for Concepcion asserted that the class waiver at issue transforms the arbitration agreement from a forum selection clause into an exculpatory clause that effectively immunizes AT&T from large-scale liability for violations of state law. Justices Roberts and Alito expressed their skepticism, questioning whether an inability to represent the interests of third parties in arbitration could form the basis for a finding of unconscionability, particularly where the terms of the arbitration agreement allow individual rights to be vindicated in a bilateral proceeding. It was, however, Justice Ginsburg who posed a key question for many since the Court's April 27, 2010, decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*: "So why isn't *Stolt-Nielsen* dispositive in this case?" In *Stolt-Nielsen*, the Supreme Court held that a party to an arbitration agreement cannot be compelled to submit to class arbitration unless the party explicitly agrees to do so. (Sutherland's Legal Alert on the *Stolt-Nielsen* decision is available here.) Counsel for Concepcion attempted to distinguish *Stolt-Nielsen* by arguing that its reach is limited to contract interpretation, not contract enforceability. Justice Ginsburg seemed unconvinced, emphasizing that "here you have an unwilling defendant who doesn't want class arbitration."

Throughout the argument, the Court pushed the parties to define a generally applicable test that would enable it to distinguish contract law defenses that are preempted under the FAA from those that are not, particularly where a defense may appear on its face to be neutral. As Justice Sotomayor asked Concepcion's counsel, "How would you propose to distinguish between facially neutral contract law defenses that implicitly discriminate against arbitration and those that do not? What's the test you would

use to tell the difference between the two?" That question has plagued courts confronted with challenges to the enforceability of arbitration agreements since enactment of the FAA, and neither side's responses appeared to satisfy the Justices.

Because courts in many states have held that class action waivers may be found unconscionable under state contract unconscionability principles, the Supreme Court's decision has the potential to mark a significant shift in the arbitration arena. It is expected that the decision will be issued in the Spring of 2011. For more information on the possible implications of *Concepcion* and other recent Supreme Court decisions addressing arbitration and class action waivers, Sutherland's article "Supreme Court's 2009-2010 term sets up showdown over class-action waivers in arbitration agreements" is available here.

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