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Supreme Court Rules in Favor of Enforcing Class Action Waivers in Consumer Contracts

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On April 27, 2011, the Supreme Court issued a 5-4 decision in *AT&T Mobility LLC v. Concepcion* that supports the increasing use of arbitration provisions in consumer contracts. The *Concepcion* case involved a dispute as to preemptive scope of the Federal Arbitration Act (FAA). The decision emphasizes that the FAA reflects a "liberal federal policy favoring arbitration." In ruling in AT&T's favor, the Supreme Court concluded that state law cannot prohibit parties from contractually waiving class action rights in favor of individual arbitration, as that state prohibition would "stand as an obstacle to the accomplishment of the FAA's [pro-arbitration] objectives."

Section 2 of the FAA makes agreements to arbitrate "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." In *Concepcion*, the lower courts had struck down AT&T's arbitration agreement—finding that the prohibition against class actions included in the underlying agreement was "exculpatory" and "unconscionable" under California law. California's *Discover Bank* case had previously held, 'When the [class] waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, . . .[such] waivers are unconscionable under California law and should not be enforced." In *Concepcion*, a closely divided Court concluded that *Discover Bank*'s approach to class action waivers (affecting both class act litigation and class act arbitration) is irreconcilable with the FAA's promotion of "steamlined" arbitration.

The *Concepcion* decision rejects the "unconscionability" rationale underlying *Discover Bank*, i.e., "class proceedings are necessary to prosecute small dollar claims that might otherwise slip through the legal system." The Court effectively concluded that states cannot impose restrict arbitration agreements on policy grounds if those policies are inconsistent with the pro-arbitration objective underlying the FAA.

Concepcion does not guarantee that every class action waiver included in an arbitration agreement is enforceable in California or elsewhere. The decision notes, "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." The *Concepcion* decision simultaneously emphasizes that these requirements "cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms."

In light of the *Concepcion* decision, companies with consumer contracts that currently lack arbitration/class waiver provisions should reconsider whether they would like to incorporate such provisions in their agreements. Those companies with consumer contracts that already include these provisions should review the agreements to ensure they are drafted in a manner that maximizes the likelihood that they would withstand an enforceability challenge. The majority of the *Concepcion* Court was clearly influenced by the fact that the AT&T's contested arbitration

provisions included substantive and procedural measures that were relatively favorable to a consumer claimant. We have an active practice in this area, so please advise us if we can be of assistance.