

AUTHORS

Thomas E. Gilbertsen
Ari N. Rothman
Molly T. Cusson

RELATED PRACTICES

Advertising and Marketing
Commercial Litigation

ARCHIVES

2012	2008	2004
2011	2007	2003
2010	2006	2002
2009	2005	

Articles

October 25, 2012

Court Reinforces Validity of Class Action Waivers and Arbitration Agreements

The California Court of Appeals' October 16, 2012 decision in *Sherf v. Rusnak/Westlake, et al.* invalidates a California law prohibiting class action waivers in consumer contracts. Under this ruling, marketers, including online marketers, may use arbitration waivers to compel arbitration and avoid class actions. However, such waivers cannot be hidden within the contract or contain provisions that are overly harsh, one-sided, or oppressive. Therefore, marketers should continue to include fair, clear and conspicuous class action waivers.

AT&T Mobility LLC v. Concepcion

In *Concepcion*, the cellular telephone contract between the parties provided for arbitration of all disputes, but prohibited classwide arbitration. When the cell phone purchasers brought a putative class action alleging false advertising and fraud, the carrier moved to compel arbitration pursuant to the contract. The federal district court and the Court of Appeals for the Ninth Circuit each held that the arbitration provision in the parties' agreement was unconscionable under California law because it disallowed classwide proceedings.

The Supreme Court reversed the appellate and trial courts, noting that the principal purpose of the Federal Arbitration Act ("FAA") is to ensure the enforcement of private arbitration agreements according to their terms so as to facilitate streamlined proceedings. Accordingly, the rule "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." Thus, the Supreme Court held that California's rule requiring the availability of classwide arbitration is preempted by the FAA.

Sherf v. Rusnak/Westlake, et al.

In *Sherf*, the plaintiff disputed certain service fees the defendants charged him following plaintiff's purchase of an automobile from defendants. The parties' contract contained an arbitration waiver provision informing the plaintiff that, if the parties arbitrated a dispute, the plaintiff waived his right to participate as a class representative or class member on any class claim, including any right to class arbitration.

Notwithstanding the arbitration requirement and class action waiver, the plaintiff brought suit alleging several class action causes of action. The defendant moved to compel arbitration of all causes of action under the terms of the contract. The trial court denied the motion, finding that the class action waiver violated California's Consumers Legal Remedies Act ("CLRA"), which permits class actions and finds unenforceable and void as contrary to public policy a consumer's purported waiver of the CLRA.

On appeal, the California Court of Appeal reversed the trial court and remanded the case. The appeals court found that the class action waiver was enforceable under the Supreme Court's decision in *Concepcion*. The court concluded that *Concepcion* "expressly holds that the FAA preempts and invalidates the [California] rule... that conditioned 'the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures.'" The court also rejected the plaintiff's argument that consumer contracts can be invalidated to vindicate statutory rights, including those rights under the CLRA to bring a class action and seek injunctive relief. Citing *Concepcion*, the court noted that "nothing in FAA 'suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives,' and arbitration agreements must be enforced 'notwithstanding any state substantive or procedural policies to the contrary.'"

Importantly, the appeals court remanded the case to the trial court to decide whether the specific waiver at issue was unconscionable, and thus tasked the trial court with deciding whether the waiver demonstrated any procedural and substantive unconscionability. The appellate court did so because, under the FAA, applicable contract defenses such as fraud, duress, and unconscionability may

invalidate arbitration agreements.

Impact of *Sherf v. Rusnak/Westlake, et al.*

The *Sherf* decision reinforces the strong policy favoring the enforcement of arbitration agreements. It clarifies that marketers, including online marketers, may use arbitration waivers to compel arbitration and avoid class actions, even where state law creates a statutory right to bring a class action. Because generally applicable contract defenses such as fraud, duress, and unconscionability may invalidate such arbitration agreements, however, marketers must continue to make clear and conspicuous disclosures of all contract terms so that courts will uphold the enforceability of arbitration agreements.