ANTIDOTE TO WAGE AND HOUR CLASS ACTIONS: SUPREME COURT INVALIDATES CALIFORNIA LAW ON CLASS ACTION WAIVERS

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On April 27, the U.S. Supreme Court held in *AT&T Mobility v. Concepcion* that the Federal Arbitration Act ("FAA") preempts California law prohibiting the enforcement of class action waivers in arbitration agreements. In a 5-4 vote, the Court narrowly overturned a ruling by the Ninth Circuit Court of Appeals that declared class action waivers unenforceable in California. Although *AT&T Mobility* was specific to arbitrations in the consumer context, it will surely impact the enforceability of class action waivers in arbitration agreements between employers and employees and may pave the way for employers to finally stem the tide of wage and hour class actions. Download a PDF version of AT&T Mobility v. Concepcion.

California Courts Historically Resisted Class Action Waivers

In the consumer context, California companies have tried to limit class actions by entering into agreements with their customers that provide for arbitration and waive the right to bring class action claims. Before the ruling in *AT&T Mobility*, these agreements were uniformly found by California appellate courts to be unconscionable and unenforceable under California law.

One of the first cases in this area, *Blue Cross of California v. Superior Court*, 67 Cal. App. 4th 42 (1998), held that a court could compel arbitration of class claims absent a clear agreement not to arbitrate on a class-wide basis. Four years later, a case hailing from a different California appellate district, *Szeleta v. Discover Bank*, 97 Cal. App. 4th 1094 (2002), found an arbitration agreement containing a class action waiver substantively unconscionable and in violation of public policy. Then, in 2003, the *Blue Cross* appellate court answered back with *Discover Bank v. Superior Court*, 105 Cal. App. 4th 326 (2003) ("*Discover Bank*"), which held that the FAA preempts California public policy on class action waivers in arbitration agreements governed by the FAA.

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The California Supreme Court granted review of *Discover Bank*, 36 Cal. 4th 148 (2005), to address the split among the California Courts of Appeal. It ultimately sided with the *Szeleta* court, holding that class action waivers in consumer arbitration agreements are unconscionable in adhesion contracts if the disputes are likely to involve small damages. Since *Discover Bank*, the California Supreme Court and the courts below it have extended the reasoning to preclude class arbitration waivers in employment arbitration agreements. *See*, e.g., *Gentry v. Superior Court (Circuit City Stores, Inc.)* 42 Cal.4th 443 (2007) (creating formidable obstacles to the enforcement of class action waiver clauses in employment arbitration agreements).

Supreme Court Finds California Law on Class Action Waivers Preempted by FAA

In *AT&T Mobility*, the Ninth Circuit applied *Discover Bank* to find AT&T's arbitration agreements with its cell phone customers unenforceable due to class arbitration waivers. The Ninth Circuit found the waiver unconscionable despite being free of charge to the customer in most cases and providing the consumer with a make-whole remedy because the waiver prevented class claims of any kind. The Ninth Circuit opined that the waiver was void as a matter of California public policy because it could shield a defendant from liability to a potentially large number of customers who were either unknowing or ambivalent to their claims.

Discover appealed and the Supreme Court overturned the ruling. The Supreme Court determined that California public policy, as set forth in *Discover Bank,* is preempted by the FAA, because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." The Court explained that "the switch from bilateral to class arbitration sacrifices the principal advantages of arbitration – and makes the process slower, more costly and more likely to generate a procedural morass than final judgment." The Court also stated that, even if class proceedings best vindicate small dollar claims that could otherwise fall through the cracks, "states cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."

AT&T Mobility Opens Door to Class Action Waivers in Employment Context

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The *AT&T Mobility* decision revives the possibility of enforceable class action waivers in arbitration agreements between employers and employees because the FAA preemption considerations are largely the same. The significance of this cannot be overstated for large employers who have faced expensive wage and hour class actions over the course of the past decade and who may now be able to avoid such litigation by expressly prohibiting class claims in their arbitration agreements under the FAA.

Although it is likely that class action waivers will face other lines of attack, be it through Congress or the National Labor Relations Board, in light of the Court's holding in *AT&T Mobility*, employers should consider whether it is in their interest to include class action waivers in their arbitration agreements with employees.