Client Alert.

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Concepcion May Not Reach Claims Under the Magnuson-Moss Act

Recent decision has broad implications for companies that seek to enforce class action waivers in the Ninth Circuit

By Rebekah Kaufman and Alexei Klestoff

After the U.S. Supreme Court resuscitated class action waivers earlier this year in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), companies have once again sought to enforce those waivers or have considered adding them to their consumer agreements as a means of managing class action risk. The Ninth Circuit recently issued a decision in *Kolev v. Euromotors West/The Auto Gallery*, __ F.3d __, 2011 U.S. App. LEXIS 19254 (9th Cir. Sept. 20, 2011), that could have broad implications for companies that seek to enforce class action waivers in the Ninth Circuit.

NINTH CIRCUIT HOLDS THAT MAGNUSON-MOSS BARS PRE-DISPUTE MANDATORY ARBITRATION

The plaintiff in *Kolev* filed suit against a dealership after the car she purchased developed mechanical problems during the warranty period and the dealer refused to honor her warranty claims. She asserted claims for breach of express and implied warranty under the Magnuson-Moss Warranty Act ("Magnuson-Moss"), breach of contract, and unconscionability under California law. The dealership then successfully moved to compel arbitration based on a mandatory arbitration provision in the sales contract.

On appeal, the plaintiff argued that Magnuson-Moss barred the provision mandating arbitration of her warranty claims. Although Magnuson-Moss does not specifically address the validity of pre-dispute mandatory arbitration provisions, the plaintiff argued that the Federal Trade Commission (FTC), pursuant to its rulemaking authority under Magnuson-Moss, had issued a rule prohibiting judicial enforcement of such provisions with respect to consumer claims brought under the Act. *See* 16 C.F.R. § 703.5; 40 Fed. Reg. 60167, 60210 (Dec. 31, 1975).

The Ninth Circuit held that in issuing the rule, the FTC "reasonably construed" the Act's language, legislative history, and underlying purpose, and that interpreting Magnuson-Moss to bar pre-dispute mandatory binding arbitration "advances the [Act's] purpose of protecting consumers from being forced into involuntary agreements that they cannot negotiate." *Kolev*, 2011 U.S. App. LEXIS at *9, *15. The court was further persuaded by statements in the Act's legislative history on which the FTC relied to the effect that "[a]n adverse decision in any informal dispute settlement proceeding would not be a bar to a civil action on the warranty involved in the proceeding." *Id.* at *10 (quoting H.R. Rep. No. 93-1107, at 41, 1974 U.S.C.C.A.N. at 7723).

The Ninth Circuit rejected the argument that the FTC's construction is unreasonable in light of the Federal Arbitration Act's ("FAA") "liberal policy favoring arbitration agreements." *Id.* at *13. "[T]he FAA's mandate to enforce arbitration agreements, '[l]ike any statutory directive, may be overridden by a contrary congressional command.'" *Id.* (quoting *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987)).

THE DECISION CREATES A SPLIT IN THE CIRCUITS

The Ninth Circuit's decision creates a circuit split. The Fifth and the Eleventh Circuits have held that Magnuson-Moss does *not* bar mandatory arbitration clauses, concluding that Magnuson-Moss does not overcome the FAA's presumption that courts should enforce arbitration agreements: "We therefore hold that the text, legislative history, and purpose of [Magnuson-Moss] do not evince a congressional intent to bar arbitration of [Magnuson-Moss] written warranty claims. The clear congressional intent in favor of enforcing valid arbitration agreements controls in this case." *Walton v. Rose Mobile Homes, LLC*, 298 F.3d 470, 478 (5th Cir. 2002); *Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268, 1280 (11th Cir. 2002).

In light of this circuit split, the United States Supreme Court may ultimately resolve this issue. Though it is impossible to predict what the Court would decide, it has historically taken a pro-arbitration stance towards enforcement of agreements under the FAA, including where (as in *Kolev*) claims are brought under a federal statute that does not expressly bar arbitration. *See, e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (claims brought under the Sherman Antitrust Act are subject to binding arbitration under the FAA's presumption in favor of arbitration). The much anticipated decision by the Second Circuit in *In re American Express Merchants' Litigation* may add an additional wrinkle to the FAA's pro-arbitration presumption. In that case, the Second Circuit previously held that a class action waiver was unenforceable where the cost of plaintiffs individually arbitrating their claims was argued to be prohibitive, effectively depriving them of the statutory protections under federal antitrust statutes. The Second Circuit *sua sponte* decided to reconsider the decision in light of *Concepcion*. Its ultimate decision may itself be the subject of Supreme Court review.

THE DECISION IMPLICATES CLASS ACTION WAIVERS

Companies that have included pre-dispute mandatory arbitration provisions in their consumer contacts may see an increase in Magnuson-Moss claims in the Ninth Circuit (and circuits in which pre-dispute mandatory arbitration under Magnuson-Moss remains an open issue) by the plaintiffs' bar as an attempt to avoid mandatory arbitration. Moreover, though *Kolev* did not involve the enforceability of class action waivers in arbitration provisions, the decision will no doubt be cited by plaintiffs as barring the enforceability of class action waivers for claims under Magnuson-Moss. While *Concepcion* was directed at the FAA's preemption of state law, the decision may be helpful in addressing such arguments to the extent it exhibits a liberal policy toward enforcement of class action waivers.

Companies that are considering whether to add a class action waiver to their consumer agreements should evaluate the potential applicability of Magnuson-Moss to their operations and the risk that the waiver may not be enforceable for claims brought under the Act. Consideration should also be given to whether it would nonetheless be beneficial to retain the ability to enforce the waiver as to other types of claims that often accompany Magnuson-Moss claims, such as alleged violations of state consumer protection statutes. Though a company could potentially incur increased costs by litigating in two forums (civil action and arbitration), that scenario on balance may prove beneficial given the decrease in overall class action exposure. The risks of parallel proceedings may be mitigated by seeking a stay of the court proceedings.

Contacts:

Rebekah Kaufman
(415) 268-6148
rkaufman@mofo.com

James Schurz
(415) 268-6449
jschurz@mofo.com

Alexei Klestoff
(415) 268-6841
aklestoff@mofo.com

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