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Client Alert

Business Litigation Practice Group

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AT&T Mobility LLC v. Concepcion
Supreme Court Clears the Way for Class Action Waivers

On April 27, 2011, the Supreme Court issued its much-awaited opinion in *Concepcion v. AT&T Mobility LLC*, reaffirming the Court's commitment to the "liberal federal policy favoring arbitration." -- U.S. --, No. 09-893, Slip Op. at *4 (Apr. 27, 2011). Specifically, the Court held that the Federal Arbitration Act (FAA) preempts a California rule that class action waivers in consumer contracts are unconscionable.

In *Concepcion*, the plaintiffs filed a class-action complaint in federal court against their cell phone provider, AT&T, for allegedly charging sales tax on phones that were advertised as free. The parties' contract provided for arbitration of all disputes between the parties, and required that claims be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." Relying on that provision, AT&T moved to compel arbitration, and also argued that the arbitration clause precluded the plaintiffs from proceeding as a class action. The district court denied AT&T's motion. Relying on the California Supreme Court's ruling in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), the Ninth Circuit affirmed the district court's decision, holding that the arbitration agreement in the contract was unconscionable because it precluded classwide arbitration and mandated that all disputes regarding the contract be resolved on an individual basis.

The Supreme Court considered whether section 2 of the FAA "preempts California's rule classifying most collective-arbitration waivers in consumer contracts as unconscionable." Slip Op. at 5. Section 2 provides that "[a] written provision in any . . . contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2. The plaintiffs argued that because California considers class action waivers in adhesion contracts unconscionable, arbitration agreements containing such waivers are unenforceable under the FAA. AT&T countered that the restriction on class action waivers had a disproportionate impact on arbitration agreements and frustrated the purpose of the FAA.

The Supreme Court agreed with AT&T and reversed the Ninth Circuit's decision. To the Supreme Court, the "overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms

For more information, contact:

Dwight J. Davis
+1 404 572 4791
ddavis@kslaw.com

Barry Goheen
+1 404 572 4618
bgoheen@kslaw.com

S. Stewart Haskins
+1 404 572 4687
shaskins@kslaw.com

Jonathan R. Chally
+1 404 572 4673
jchally@kslaw.com

Zachary A. McEntyre
+1 404 572 4636
zmcentyre@kslaw.com

King & Spalding
Atlanta
1180 Peachtree Street, NE
Atlanta, Georgia 30309-3521
Tel: +1 404 572 4600
Fax: +1 404 572 5100

www.kslaw.com

so as to facilitate streamlined proceedings." *Id.* at *9. The Court concluded that the "*Discover Bank* rule," as the Court characterized the California rule, "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* Consequently, the Court held that any rule invalidating class action waivers in arbitration agreements has the effect of allowing parties to demand classwide arbitration *ex post*, after the parties have agreed to the terms of their contract. *Id.* at *12. Such a result, the Court reasoned, would flatly conflict with its decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. __, __ (2010), in which it held that an arbitration agreement that does not expressly select classwide arbitration cannot be construed to allow it.

In another example of the sharp ideological divide in the Supreme Court, five justices (Justice Scalia, who authored the opinion, Chief Justice Roberts, and Justices Kennedy, Thomas, and Alito) constituted the majority. The remaining four justices (Justices Ginsburg, Breyer, Sotomayor, and Kagan) joined in a dissenting opinion written by Justice Breyer.

The Supreme Court's holding in *Concepcion* is the third Supreme Court opinion in the last year addressing the scope and effect of the FAA, and the second (after *Stolt-Nielsen*) relating to the effect of the FAA in the class action context. The decision furthers the Court's clear directive that the FAA, and its liberal policy favoring arbitration, should be given full effect. Indeed, in *Concepcion*, the Court overturned both a long line of Ninth Circuit precedent invalidating arbitration agreements that contain class action waivers and cases from other Circuit Courts of Appeals similarly restricting the enforceability of arbitration agreements that require matters to be brought in arbitration on an individual basis.

The decision's ramifications are likely to be sweeping and positive for corporations that frequently find themselves the target of consumer class actions, particularly in the often treacherous Ninth Circuit. In the wake of *Concepcion*, businesses will have more security that arbitration agreements precluding class actions will be enforceable in California.