A Change in the Landscape of Wage-and-Hour Litigation?

Thoughts on the impact of the Supreme Court's decision in AT&T Mobility LLC v. Concepcion.

Announcing its decision, in which it endorsed the legality of class arbitration waivers, the United States Supreme Court may have changed the future of wage-and-hour litigation in this country, and particularly in California. On April 27, 2011, the Supreme Court published its opinion in the matter of *AT&T Mobility LLC v. Concepcion*, 563 U.S. ___ (2011). In a 5-4 decision, the Court repudiated California's prohibition of class-wide arbitration, ruling that federal law allowed for parties to waive class arbitration and California courts could not interfere with such fundamental attributes of arbitration by rendering these waivers unenforceable. Although the *AT&T* decision dealt specifically with a consumer-based arbitration agreement, the decision is likely to have a significant impact on many other forms of class action litigation, particularly employee-based wage-and-hour claims. Indeed, as discussed below, employers who modify their hiring procedures in accordance with *AT&T*'s guidance appear primed to benefit dramatically from this opinion.

A Closer Look at the Supreme Court's Decision in AT&T Mobility LLC v. Concepcion.

In order to better understand the full impact of the *AT&T* decision on employee-employer litigation, it is helpful to first review the facts underlying and leading up to the *AT&T* decision. In 2002, Vincent and Liza Concepcion became customers of AT&T by taking advantage of a "free" mobile phone offer advertised by the company. Although the offer advertised a free phone, the Concepcions were required to pay $30 in sales tax based upon the phone's retail value. As part of the free phone offer, the Concepcions were required to sign up for phone service with AT&T, which they did by entering into a sale-and-services agreement with the company.

The sale-and-services contract provided for arbitration of all disputes between the parties, but 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." The contract further outlined the procedure under which arbitration would be conducted. Initially, a complaining customer was obligated to initiate dispute proceedings by completing a one-page Notice of Dispute from AT&T's website. Once the Notice of Dispute was submitted, AT&T then had the opportunity to make a settlement offer to resolve the dispute.

Thereafter, if the parties' dispute was not resolved, the customer could invoke arbitration by submitting a Demand for Arbitration. As for the actual procedure in how the arbitration would be conducted, several aspects of the process required by the sale-and-services contract appeared reasonably aimed at providing fairness to the customer. For example, the contract required AT&T to pay all costs of the arbitration so long as the customer's claim was not ultimately found to be frivolous. The contract also required that arbitration take place in the county in which the customer was billed; and, for claims of $ 10,000 or less, the customer could choose whether the arbitration proceeded in person, by telephone, or based only on written arguments. The contract also prohibited AT&T from seeking reimbursement of its attorney's fees from the customer. In the event that the arbitration

proceeded to its merits, and the customer received an award greater than AT&T's last written settlement offer, AT&T was obligated to pay a $ 7,500 minimum recovery (assuming the customer's award was lower than this amount), as well as twice the amount of the customer's attorney's fees.

In spite of the arbitration provision in their sale-and-services contract, the Concepcions filed a lawsuit against AT&T in federal court, complaining of false advertising and fraud on AT&T's part for its non-free "free" phone campaign. The Concepcions' claim was later consolidated with a class-action lawsuit alleging similar claims against AT&T. In response, AT&T filed a motion seeking to compel arbitration of the Concepcions' dispute under the terms of the sale-and-service contract. Both the trial court, and later the Ninth Circuit Court of Appeals, ruled that the arbitration provision in the agreement was unconscionable under California law (relying upon the California Supreme Court's decision in *Discovery Bank v. Superior Court*, 36 Cal. 4th 148 (Cal. 2005)). The case was then appealed to the U.S. Supreme Court.

In its decision on the matter, the U.S. Supreme Court held that the arbitration provision was not unconscionable simply because it waived the right to proceed in arbitration on a class basis. In reaching this conclusion, the Court rested upon the Federal Arbitration Act, the principle purpose of which the Court observed as being: to "ensure that private arbitration agreements are enforced according to their terms." The Supreme Court specifically relied upon § 2 of the FAA, which provides that arbitration agreements are "valid, irrevocable, and enforceable" as written, except where grounds exist (in law or equity) to revoke the contract generally. Although unconscionability is a ground to revoke contracts generally, the Court held that a waiver of class arbitration was not unconscionable, and to find otherwise would, in effect, undermine the FAA's protection of arbitrations in the first instance.

In reaching this conclusion, the Supreme Court emphasized that certain favorable aspects of arbitration should be preserved, as was the intention of the FAA. For example, arbitration is favored in large part for its informality and efficiency. The Supreme Court noted that class-based arbitration makes the [arbitration] process slower, more costly, and more likely to generate procedural morass than final judgment." In addition, the Supreme Court noted the inherent complexities of class-action matters and the difficulty of preserving the rights of class members through the class-action process. The Court questioned the wisdom of entrusting such a process with an arbitrator, who usually does not handle class-based matters. Finally, the Court observed that class arbitration would impose great risk to defendants, who would face little recourse (but massive damage) in the face of potential errors in the arbitration process. After all, unlike matters litigated in our civil court systems, the ability to appeal arbitration awards is severely limited.

In addition to emphasizing the desire to preserve the benefits of arbitration, the Supreme Court also recognized that the particular details of the arbitration provision in AT&T's contract provided adequate incentive for individual complainants to prosecute their claims. Because claimants in the Concepcions' situation did not have to incur the costs of the arbitration, could have their arbitrations conducted locally, and stood to receive a minimum of $7,500 and twice the amount of their attorneys' fees if they obtained a claim greater than AT&T's final settlement offer, the Supreme Court believed

consumer claims were "unlikely to go unresolved." With all of the above in mind, the Supreme Court gave a green light to class-arbitration waivers.

How Employers Might Use Lessons from AT&T to Minimize the Threat of Wage-and-Hour Class-Action Lawsuits.

In addition to the obvious impact on large commercial retailers and consumer transactions, the Supreme Court's decision in *AT&T* will almost assuredly have a substantial impact on the future of how employers, large and small, approach employee hiring and the threat of wage-and-hour litigation. In today's business climate, among the great threats to employers and the continuing financial health of their business are the debilitating cost and exposure imposed by a class-action lawsuit from employees for claims such as unpaid overtime and failure to provide meal and rest breaks.

Indeed, as any business who has ever opposed a class-action claim will attest, the class-action characteristic of employee lawsuits has extreme consequences. One needs only to engage in basic arithmetic to understand the harsh distinction between facing an overtime claim by an individual employee from one by a class of employees. For example, an employer who has failed to pay overtime wages to a single employee over a three year period might owe that employee $5,000 or so (not including attorneys' fees and penalties). However, once a class is certified for that claim, and a group of just 20 similarly situated employees are collected to form the class, the employer's liability exposure skyrockets to more than $100,000. Expand the class to just 100, and the employer's liability exposure explodes to more than $500,000. Keep enlarging the class, and the liability exposure continues to expand exponentially.

But the *AT&T* decision stands to deal a major blow to the frequency of such class actions, particularly among employers who take a proactive approach in response to the *AT&T* opinion. Of course, employers could have required arbitration agreements with their employees before the *AT&T* case, but in California and other states, employers still faced the possibility of having those arbitration proceedings turn into class-wide proceedings since class-arbitration waivers had been considered unconscionable in California. Thus, before *AT&T*, employers could not avoid the eventual possibility of facing a class-based claim by employees.

After the *AT&T* decision, however, such waiver provisions are no longer invalid. As such, an employer who does not want to face the threat of class action lawsuits by its employees need only require its employee to agree to arbitration at the start of his or her employment, and as part of that arbitration agreement, specifically require bilateral arbitration and prohibit any class-wide proceedings. Since such provisions are now protected under *AT&T*, California and other states can no longer find them to be facially unconscionable and thus unenforceable.

As a note of caution, however, employers should be mindful of the limitations they may face as they modify their hiring procedures around the *AT&T* case. Any implementation of class arbitration waivers in employment contracts should be coupled with so-called fairness provisions: aspects of the arbitration provisions which, for example, require the employer to pay for the costs of arbitration,

provide a minimum recovery and adequate attorneys' fees compensation for successful employee-claimants, and ensure that the designated forum and procedures for arbitration are fair and convenient to employees. Recall that, in upholding the class waiver provision in *AT&T*, the Supreme Court emphasized that the *AT&T* contract provided adequate incentive for claimants to prosecute their claims; employers should do the same if they want their arbitration provision to withstand challenge. Of course, some employers may balk at the extra cost these fairness provisions will impose upon them as they maneuver through future employee claims. Such extra costs, however, will be drastically outweighed by the liability exposure, costs and attorneys' fees, and overbearing pressure to give into large settlement demands that the same employers would face from just one class action matter, let alone the threat multiple class actions.

Finally, it must also be noted that, although the *AT&T* case was unwavering in its endorsement of bilateral-arbitration procedures and class-arbitration waivers in the commercial context, class-arbitration waivers have not yet been tested in the employment context following *AT&T*. After all, much of *AT&T*'s noteworthiness is its complete shift in direction in the treatment of class arbitration from the California courts who had previously dealt with the matter. It remains to be seen how strict future California court decisions will interpret the *AT&T* opinion, and the extent to which any exceptions are carved out as further appellate court decisions are rendered. We all should pay keen attention as to whether and how closely future California decisions continue down the path paved by *AT&T*, because, as drawn up by the Supreme Court in *AT&T*, that path posits an end to wage-and-hour class-action litigation as we have previously known it.