U.S. SUPREME COURT OVERTURNS BAN ON CLASS ACTION WAIVERS IN ARBITRATION CLAUSES

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The U.S. Supreme Court held yesterday that the Federal Arbitration Act ("FAA") preempts California law banning class action waiver provisions in consumer arbitration agreements.

In *AT&T Mobility LLC v. Conception, et. al.*, __ S.Ct. __, No. 09-893 (April 27, 2011), the high court overturned the California Supreme Court's decision in *Discover Bank v. Superior Court*, 36 Cal.4th 148, 113 P.3d 1100 (2005), which held that an arbitration clause in a consumer agreement containing a class action waiver was unconscionable and therefore unenforceable as a matter of law.

The case arose from a class action filed by California consumers who alleged that AT&T engaged in false advertising and fraud by charging sales tax on "free" phones. In lower court proceedings, both the District Court and the Ninth Circuit Court of Appeal ruled that the FAA did not preempt the *Discover Bank* rule.

The plaintiffs argued that, as in *Discover Bank*, the class action waiver contained in the cellular telephone sale and servicing agreement was unconscionable and therefore unenforceable pursuant to Section 2 of the FAA, which provides that an arbitration agreement may be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract."

The Supreme Court disagreed, however, holding that the unconscionability argument was an end run around the FAA, which was enacted to overcome "widespread judicial hostility to arbitration agreements." The Court reviewed a number of previous attempts

to avoid the statute's "liberal policy favoring arbitration," stating that, "the judicial hostility towards arbitration that prompted the FAA … manifested itself in a great variety of devices and formulas declaring arbitration against public policy."

The Court found that the *Discover Bank* rule was inconsistent with the goals of the FAA because:

- Classwide, rather than bilateral, arbitration "makes the process slower, more costly, and more likely to generate procedural morass than final judgment."
- "[C]lass arbitration requires procedural formality."
- "Class arbitration greatly increases risks to defendants."

In sum, the Court concluded that "[a]rbitration is poorly suited to the higher stakes of class litigation."

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