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AT&T MOBILITY LLC v. CONCEPCION: THE END OF CONSUMER CLASS ACTIONS?

The United States Supreme Court's decision this week in *AT&T Mobility LLC v. Concepcion*¹ is a significant victory for the business community. In a five to four decision split along now familiar ideological lines, the Supreme Court upheld a class action waiver provision in a consumer service contract finding that states cannot condition the enforceability of consumer arbitration agreements on the availability of classwide arbitration procedures. Specifically, the Supreme Court held that the Federal Arbitration Act ("FAA") preempts a California state court decision prohibiting class action waivers in contracts as unconscionable. The decision will have far reaching consequences on consumers' ability to challenge companies in court and through the class action vehicle. While the decision may not be the death knell for consumer class actions, it makes clear that a company can take specific steps to protect itself from (or at least reduce the risk of exposure to) class action lawsuits.

Background

In 2002, the Concepcions purchased AT&T cellular service as part of a promotion including "free" phones. They received the free phones but were charged \$30.22 in sales tax. In 2006, they filed a complaint in the Southern District of California, which was later consolidated with a putative class action, alleging, among other things, false advertising and fraud. AT&T moved to compel arbitration with the Concepcions under the terms of the service contract, which provided for arbitration of all disputes and that the claims be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding."²

The district court, relying on the California Supreme Court's decision in *Discover Bank v. Superior Court* ("*Discover Bank*"),³ held that the arbitration provision was unconscionable because AT&T had not shown that bilateral arbitration was an adequate substitute for a class action in light of the deterrent effects of the availability of class action litigation. In *Discover Bank*, the California Supreme Court held that most collective-arbitration waivers in consumer contracts are unconscionable because they allow, in substance, a defendant to exculpate himself against his own fraud. AT&T appealed to the Ninth Circuit Court of Appeals.

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¹ Civ. No. 09-893, 2011 WL 1561956 (Apr. 27, 2011).

² *Id.* at *3. The contract also provided that "the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over an form of a representative or class proceeding." *Id.* at *3 n.2.

³ 113 P.3d 1100 (Cal. 2005).

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The Ninth Circuit affirmed the District Court's holding, finding the arbitration provision unconscionable under the "Discover Bank rule." The Ninth Circuit also held that the FAA did not preempt California common law because it was "a refinement of the unconscionability analysis applicable to contracts generally in California."⁴ AT&T appealed to the Supreme Court.

The Supreme Court's Decision

Writing for the majority, Justice Antonin Scalia framed the issue before the Court as "whether §2 [of the FAA] preempts California's rule classifying most collective-arbitration waivers in consumer contracts as unconscionable."⁵ The Supreme Court answered in the affirmative. The Supreme Court held that the FAA preempts California common law because the Discover Bank rule "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁶

In arriving at this holding, the Supreme Court focused on the final phrase of §2 of the FAA, which permits arbitration agreements to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." The Court asked whether the Discover Bank rule fit within §2's saving clause. The Supreme Court held that "[a]lthough §2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives."⁷

Relying on the text of the FAA as well as case law, the Supreme Court held that "[t]he 'principal purpose' of the FAA is to 'ensure that private arbitration agreements are enforced according to their terms.'"⁸ The Discover Bank rule frustrates this purpose, so the argument goes, because it allows any party to a consumer contract to demand classwide arbitration after-the-fact.⁹ According to the Court, "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."¹⁰ Citing statistics and examples, the Court noted that class arbitrations are less likely to be resolved, are more prone to errors because of the informal procedures, and are poorly suited to the higher stakes of class litigation.

Justice Thomas' Concurring Opinion

Justice Thomas wrote a separate opinion because, although he agreed with the majority's ultimate outcome, he reached his decision based on a strictly textual interpretation of the FAA, which he acknowledged "ha[d] not been fully developed by any party."¹¹ According to Justice Thomas, if § 2 and §4 of the FAA are read together, it is clear that the grounds for revocation under § 2 relate only to legal concepts concerning the *formation* of an arbitration agreement, such as fraud, duress, or mutual mistake—not other contract defenses such as public policy. Therefore, under this interpretation, Justice Thomas framed the relevant question as "whether California's Discover Bank rule relates to the making of an agreement."¹² Justice Thomas concluded that because the California Supreme Court in *Discover Bank* determined that it would not enforce the at-issue contract because it was against public policy, it did not concern the formation of the agreement. Therefore, the Discover Bank rule could not be a basis for revocation of a contract under the FAA.

⁴ *Laster v. AT&T Mobility LCC*, 584 F.3d 849, 857 (9th Cir. 2009).

⁵ *AT&T Mobility LLC v. Concepcion*, 2011 WL 1561956, at *5.

⁶ *Id.* at *13 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

⁷ *Id.* at *7.

⁸ *Id.* at *8 (internal citations omitted).

⁹ *Id.* at *9.

¹⁰ *Id.* at *10.

¹¹ *Id.* at *14.

¹² *Id.* at *15.

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The Dissent

Writing for the dissent,¹³ Justice Breyer stated that the “Court is wrong to hold that the federal act pre-empts the rule of state law.”¹⁴ Justice Breyer argued that the Discover Bank rule is consistent with the FAA because it “falls directly within the scope of the Act’s exception permitting courts to refuse to enforce arbitration agreements on grounds that exist ‘for revocation of any contract.’”¹⁵

Practical Implications

AT&T Mobility LLC v. Concepcion is a significant victory for the business community as it could have far reaching effects on consumers’ ability to challenge companies in court over future disputes. While the decision does not mean that consumer class actions will disappear entirely or guarantee the viability of all consumer arbitration clauses, it does solidify a company’s right to protect itself, contractually, from class actions in adhesion contracts and reinforces federal policy favoring arbitration. One can reasonably expect that every competently drafted consumer contract going forward will utilize the protection from class action litigation utilized by AT&T in *Concepcion*.

It remains to be seen, however, whether the decision will be interpreted to apply to contracts outside of the consumer service context, such as employment contracts, or whether the fact that the case arose in the consumer context will create a window for trial courts to narrow the scope the decision’s holding. In addition, considering the implications of this decision on consumers, who have little bargaining power when confronted with cell phone and other similar adhesion contracts, this case (which was widely followed in the press) could result in legislative initiatives to either overturn or otherwise modify through the legislative process the potentially far reaching implications of the Court’s holding.

¹³ Justices Ginsburg, Sotomayor and Kagan joined in the dissent.

¹⁴ *AT&T Mobility LLC v. Concepcion*, 2011 WL 1561956, at *16.

¹⁵ *Id.* at *17 (quoting 9 U.S.C. §2).

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