

The End of Consumer Class Actions?

By Erin E. Rhinehart

On April 27, 2011, the United States Supreme Court decided *AT&T Mobility LLC v. Concepcion*, No. 09-893, 563 U.S. ____ (2011), which found that collective arbitration waivers in consumer contracts are not unconscionable. The Court's decision is likely to alter considerably the landscape of consumer class actions.

In *AT&T Mobility*, Mr. and Mrs. Concepcion entered into a cellular telephone agreement with AT&T. The agreement provided that all disputes would be resolved by arbitration; however, classwide arbitration was prohibited. The Concepcions sued AT&T Mobility in the United States District Court for the Southern District of California, consolidated with other suits as a putative class action, alleging that AT&T Mobility engaged in false advertising and fraud by charging sales tax on phones it advertised as free. AT&T Mobility moved to compel arbitration, which the District Court denied. The Ninth Circuit affirmed and found that the *Discover Bank* rule, a California common law rule based on a 2005 decision by the Supreme Court of California that classified most collective arbitration waivers in consumer contracts as unconscionable, was applicable and not preempted by the Federal Arbitration Act (FAA).

AT&T Mobility appealed the Ninth Circuit's decision to the Supreme Court. The Court accepted the appeal and, in a 5-4 decision, reversed the Ninth Circuit's decision. The majority stated that, "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." The majority reiterated that the purpose of the FAA is to "ensure that private arbitration agreements are enforced according to their terms" and that there is a "national policy favoring arbitration" and a "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." Against this backdrop, the majority held that, "[b]ecause it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, California's *Discover Bank* rule is preempted by the FAA."

Because most consumer agreements include arbitration clauses, the Court's decision is likely to have broad consequences. For example, many lawyers may be advising their corporate clients to revise their consumer agreements to include provisions precluding class arbitration. Class litigation is preferable because most

consumer claims are based on little (if not nominal) individual damages. It may be the only way that a plaintiffs' lawyer will accept the case. Preventing such collective arbitration may limit a company's litigation risk. On the other hand, this decision is also likely to reinvigorate the efforts of certain members of Congress to pass the Arbitration Fairness Act, which would ban mandatory binding arbitration clauses in consumer, employment, and franchise contracts. Awaiting such congressional activity, state legislatures may also consider various methods of highlighting for consumers these anticlass arbitration provisions.

Erin E. Rhinehart is an attorney with Faruki Ireland & Cox P.L.L. in Dayton, Ohio, and can be contacted at erhinehart@ficlaw.com.

NEXT STEPS

- *Implications of AT&T Mobility v. Concepcion: Has the Supreme Court Sounded the Death Knell for Some Class Actions?* (Audio CD-ROM). 2011. PC # CET11AMCCDR. ABA Center for CLE, Section of Litigation, and Section of Public Utility, Communications and Transportation Law. Order online at www.ababooks.org.