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UPDATE
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Supreme Court Rules That Arbitration Clauses Can Bar Class Actions

On April 27, 2011, the United States Supreme Court issued a significant decision in *AT&T Mobility LLC v. Concepcion* , No. 09-893, slip op. (U.S. Apr. 27, 2011), holding that the Federal Arbitration Act (FAA) preempts state law where state law bars the use of an arbitration clause prohibiting a consumer from bringing a class action arbitration. This case appears to open the door for businesses to avoid class action lawsuits by using a contract that requires disputes to be resolved by arbitration and that prohibits classwide arbitration proceedings. This opinion appears to invalidate any state law rule under which an arbitration agreement is unenforceable simply because it does not provide for class treatment. Any such arbitration clause, however, still must comply with other applicable legal requirements.

In *Concepcion*, the named plaintiff sued AT&T, alleging that the company had engaged in false advertising and fraud by charging sales tax of approximately $30 on phones that AT&T had marketed as "free." A provision in AT&T's standard customer contract provided for the arbitration of all disputes and expressly prohibited class arbitration. However, the arbitration clause also had various procedures favorable to claimants - AT&T would pay all the costs for nonfrivolous claims, the arbitration would be held where the claimant resides or by telephone, and claimants receiving an award higher than AT&T's last settlement offer would be awarded a minimum of $7,500 plus twice their attorneys' fees. Nevertheless, the plaintiff claimed that such a contract term was unenforceable under the California Supreme Court's *Discover Bank* decision, under which an arbitration clause not allowing class treatment was found to be unconscionable. AT&T argued that § 2 of the FAA preempted state law. Both the district court and the Ninth Circuit agreed with the plaintiffs that AT&T's contract provision was unconscionable and that the FAA did not preempt state law. In a 5-4 decision, the Supreme Court reversed the Ninth Circuit.

Justice Scalia wrote the majority opinion, which was joined by Chief Justice Roberts and Justices Thomas, Kennedy, and Alito. The majority concluded that California's *Discover Bank* rule stood "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and was therefore preempted by the FAA. (Slip op. at 18.) In so holding, the Court explained that the FAA reflects a "liberal federal policy favoring arbitration." Section 2 of the FAA provides that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (Slip op. at 3-4.) This "savings clause" permits the invalidation of arbitration agreements by "generally accepted

contract defenses, such as fraud, duress, or unconscionability, but not defenses that apply only to arbitration." (Slip op. at 5.) The Court found that the *Discover Bank* rule did not fit within § 2's savings clause because nothing in § 2 "suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." (Slip op. at 9.) The majority reasoned that California law interfered with the arbitration process because, by effectively mandating class treatment, it sacrificed informality, the "principal advantage of [bilateral] arbitration," and efficiency by creating a procedural morass and because class arbitration requires procedural, time-consuming formality and "greatly increases risks to defendants" by not providing a multilayered appeals process. (Slip op. at 14-15.) Finding class arbitrations unworkable, Justice Scalia wrote that "[W]e find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision." (Slip op., at 16-17.) The Court concluded that states "cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." (Slip op. at 17.)

Justice Thomas, in "reluctantly" joining the majority opinion, would have further narrowed the savings clause of § 2 by requiring the enforcement of an agreement to arbitrate unless a party was able to successfully challenge *the formation* of the arbitration agreement, such as by proving fraud, duress, or mutual mistake. (Slip op., Thomas, J., concurring, at 4.) He concluded that because the "*Discover Bank* rule does not concern the making of the arbitration agreement," it is preempted by the FAA.

In a dissenting opinion, Justice Breyer, joined by Justices Ginsberg, Sotomayor and Kagan, argued that the California law is equally applicable to all contracts generally, not just arbitration contracts, and therefore falls squarely within the savings clause of § 2. (Slip op. at 3.) The dissent further argued that the *Discover Bank* law was consistent with the FAA's language and the primary objective of the FAA, ensuring "the enforcement of agreements to arbitrate." (Slip op. at 4.) The dissent downplayed the importance of the procedural and cost advantages relied on by the majority and contended that, contrary to the majority's assertion, class arbitrations are a "fair, balanced, and efficient means of resolving class disputes." (Slip op. at 4-5.) Also underlying the dissent was a concern that small-dollar claimants might "abandon their claims" rather than start an action; after all, what "rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?" (Slip op. at 9.)

For further information on this opinion or Robinson & Cole's class action practice, please contact Wystan M. Ackerman, chair of the firm's Class Action Team.
