Supreme Court Strikes Blow to Class Actions of Arbitrable Disputes

In a significant decision expanding the enforceability of arbitration clauses in consumer contracts of adhesion, the United States Supreme Court has dramatically expanded the opportunity for businesses to compel arbitration of claims by consumers and potentially of employees. In *AT&T Mobility LLC v. Concepcion*, 2011 U.S. LEXIS 3367 (April 27, 2011), the Court held that California's public policy against the enforceability of class action waivers in arbitration clauses of consumer contracts "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in Section 2 of the Federal Arbitration Act, which makes agreements to arbitrate "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* at 18, *quoting Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Although the decision arose in the context of class action waivers in consumer contracts, it could be used to defeat a wide range of reasons courts have invoked to avoid arbitrability of both consumer and employment claims.

Providers of consumer services often include arbitration clauses in their form contracts with consumers. In many instances, those arbitration clauses allow arbitration only of individual claims and prohibit class action relief. The California Supreme Court's decision in *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 162 (2005) involved a seller's scheme to defraud a large number of consumers of a small amount of money. The Court held that class action waivers are unconscionable when included in a consumer contract of adhesion. *Discover Bank* also has been applied to void class action waivers in arbitration clauses in employment contracts.

In *AT&T Mobility*, Vincent and Liza Concepcion entered into a cellular telephone contract with AT&T that provided for arbitration of all disputes between the parties but required that the claims be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class action or representative proceeding." The Concepcions purchased AT&T services that were advertised as including free phones. They were not charged for their phones, but were charged $30.22 in sales tax. The Concepcions filed a claim against AT&T in the Southern District of California, where their claim was consolidated with a putative class action. AT&T moved to compel arbitration and the District Court, relying upon *Discover Bank*, held that the arbitration provision was unconscionable because it was part of an adhesion contract and the individual arbitration, even though providing generous incentives to arbitrate, did not adequately substitute for the deterrent effect of class actions. *Laster v. T-Mobile USA, Inc.*, 2008 WL 5216255, *14 (SD Cal. August 11, 2008).

On appeal, the Ninth Circuit affirmed, expressly rejecting AT&T's argument that the *Discover Bank* rule was preempted by the Federal Arbitration Act ("FAA"). *Laster v. T-Mobile USA, Inc.*, 584 F.3d 849, 854 (9th Cir. 2009).The Court held that the *Discover Bank* rule merely placed class action waivers on "the exact same footing" as contracts that bar class action litigation outside of the context of arbitration. *Id.* at 857-58. The Supreme Court granted certiorari.

The key rulings

The 5-4 majority opinion of the Supreme Court held that Section 2 of the Federal Arbitration Act preempted judicially created impediments to arbitration. The Court specifically found that refusing to enforce arbitration agreements that contained class action waivers interfered with the fundamental attributes of arbitration. The Court explained that arbitrations should be efficient and streamlined. To that

end, arbitration agreements should be able to limit the issues subject to arbitration, require the arbitration be subject to specific rules, limit with whom a party will arbitrate, require the arbitrator to be a specialist in a particular field, or keep the proceedings informal and confidential. The Supreme Court held that the *Discover Bank* rule, which prohibited class action waivers in certain contexts, was judicially created rather than consensual and, hence, inconsistent with the FAA. 2011 U.S. LEXIS 3367, *25.

The Supreme Court acknowledged that consumer contracts were uniformly adhesive, but did not find that adhesion negated the consensual nature of the agreement to arbitrate. 2011 U.S. LEXIS 3367, *24. The Court noted that states were free to take steps to address the concerns attending to contracts of adhesion, for example, by requiring arbitration agreements to be highlighted. But the Court cautioned that such steps cannot frustrate the FAA's purpose to ensure that arbitration agreements are enforced according to their terms. 2011 U.S. LEXIS 3367, *24 n.6.

The implications of the decision are far-reaching

The decision immediately makes enforceable class action waivers found in existing arbitration agreements, even those found in consumer contracts of adhesion. Combining this decision with the Supreme Court's decision last year in *Stolt-Nielsen S.A. v. Animalfeeds Intl. Corp.*, 130 S. Ct. 1758 (2010) — which held that arbitration clauses that are silent as to class actions may be construed to preclude class actions — might require consumers to arbitrate individual claims only, even when their arbitration clauses do not expressly address class action claims.

The decision will undoubtedly encourage companies selling directly to consumers to incorporate arbitration clauses, including class action waivers, in their standard terms and conditions. That will be easiest where the consumer signs an agreement or otherwise expressly accepts the seller's terms, such as agreements for credit cards, loans, insurance, or on-line purchases. Because the decision accepts that contracts of adhesion are consensual, manufacturers selling through retailers also might consider incorporating arbitration clauses in literature accompanying the product and provide that the terms are deemed accepted if the product is not returned in some short period. *See, e.g., Hill v. Gateway 2000*, 105 F.3d 1147 (7th Cir. 1997)(arbitration clause enforced when consumer had 30 days to reject by returning product), *cited* in *AT&T Mobility*, slip op. at 12. This could, for example, potentially move product liability litigation out of the courts and into confidential arbitrations with sharply restricted discovery.

Finally, the decision might expand the enforceability of arbitration clauses with class action waivers in employment contracts. Employers whose agreements are subject to the FAA may be able to preclude employees from bringing class actions even for statutory claims such as Title VII or the Fair Labor Standards Act, so long as the right to individual relief is not abridged. The decision also may support elimination of other restrictions on employment arbitrations created by the courts, such as conditioning enforceability on the employer paying all of the costs of the arbitration.

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