High Court Approves Ban on Classwide Arbitration

On April 27, 2011, in a decision that could substantially limit the use of class actions in consumer litigation, the Supreme Court held that mandatory arbitration provisions that prohibit classwide arbitrations are enforceable. The decision of *AT&T Mobility LLC* v. *Concepcion*[1] overturns *Discover Bank* v. *Superior Court,*[2] a California Supreme Court decision that found similar provisions unconscionable and unenforceable.

Background

The *Concepcion* plaintiffs filed a class action complaint in the United States District Court for the Southern District of California, alleging that AT&T had deceived them (and others similarly situated to them) by charging sales tax on phones advertised as free with the purchase of wireless services.[3] AT&T moved to dismiss and to compel individual arbitration, invoking the mandatory arbitration provisions in the service contract and specifically the requirement that any consumer bringing such an arbitration do so in their "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding."[4]

The district court denied AT&T's motion. Relying on *Discover*, the court found the no-class-arbitration clause in the arbitration provision unconscionable and unenforceable under California law.[5] The Ninth Circuit affirmed, and also considered whether the district court's holding, and *Discover* itself, conflicted with the Federal Arbitration Act (FAA), which provides that written arbitration provisions in contracts are "valid, irrevocable and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract."[6] Reasoning that *Discover* merely applied California's law of unconscionability, a generally applicable law that "exist[s] … for the revocation of any contract," the Ninth Circuit found no preemption by the FAA.[7]

The High Court's Ruling

The Supreme Court reversed in a 5-4 decision. Justice Scalia wrote the majority opinion, which was joined by Chief Justice Roberts, and Justices Alito and Kennedy. Justice Thomas concurred; Justice Breyer wrote the dissent, which was joined by Justices Sotomayor, Kagan, and Ginsburg. The Court found that the rule of *Discover* "stands as an obstacle

1 563 U.S. __, No. 09-893 (April 27, 2011).
2 36 Cal. 4th 148 (2005).
3 *Concepcion*, Slip. Op. at 3.
4 *Id.* at 1.
5 *Laster* v. *T-Mobile U.S.A., Inc.*, 2008 WL 5216255, at *14 (S.D. Cal. 2008).
6 *Laster Bank* v. *AT&T Mobility LLC*, 584 F.3d 849, 855 (2009) (citing 9 U.S.C. § 2).
7 *Id.* at 857.

Contacts


Angel A. Garganta
+1 415.356.3041


Trenton H. Norris
+1 415.356.3040


Eric A. Rubel
+1 202.942.5749


James F. Speyer
+1 213.243.4141


George Langendorf
+1 415.356.3005

to the accomplishment and execution of the full purposes and objectives of Congress," and is therefore preempted.[8]

The Supreme Court agreed that unconscionability is a generally applicable basis for revoking a contract—thus technically fitting within the savings clause of 9 U.S.C. § 2—but noted that "the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as … unconscionability, is alleged to have been applied in a fashion that disfavors arbitrations."[9] The Court reasoned that such a result could occur if the attributes that are the essence of arbitration—i.e., limited or no discovery and no Federal Rules of Evidence—are the basis for finding the arbitration provision unconscionable.[10] In other words, "[t]he Act cannot be held to destroy itself."[11]

The Court found the relationship between classwide representation and arbitration to be largely incompatible. It reasoned that "arbitration is poorly suited to the higher stakes of class litigation" because, among other things, there are "no effective means of review" and because the whole point of arbitration is to employ "streamlined proceedings" to achieve "expeditious results."[12] Consequently, the Court found that the rule of *Discover*—that arbitration provisions *must* allow for classwide arbitration or they are unconscionable and unenforceable—directly contravenes the purpose of the FAA and is therefore preempted.[13]

Ramifications

Concepcion is already being hailed by some commentators as the end of consumer class actions. While that may prove to be an overstatement, the case, at a minimum, highlights the benefits of requiring non-class arbitration in contracts for consumer products and services. Under *Concepcion*, this simple step may effectively insulate many businesses from a wide range of representative litigation, the breadth of which remains an open question.

For example, *Concepcion* applies even to contracts of adhesion. The Supreme Court rejected the significance of the adhesive nature of consumer contracts out-of-hand, stating that "the times in which consumer contracts were anything other than adhesive are long past."[14] Accordingly, it is not inconceivable that *Concepcion* could extend to transactions where there is no privity at all, such as the purchase of products, the terms of use of which contain an arbitration clause.

Contracts in other contexts will also be affected. For example, many businesses will likely modify employment contracts to specify that individual arbitration is required. *Concepcion* may even provide a roadmap for defense-minded labor lawyers to avoid the strictures of some state labor laws by, for example, inserting language waiving the right to hearings before state labor boards into provisions requiring arbitration, and then arguing that such hearings conflict with the FAA.

8 *Concepcion*, Slip. Op., at 18.

9 *Id.* at 7 (citing *Perry* v. *Thomas*, 482 U.S. 483 (1987)).

10 *Id.* at 7-8.

11 *Id.* at 9.

12 *Id.* at 11, 16.

13 *Id.* at 18.

14 *See id.* at 12.

If you have any questions about any of the topics discussed in this Advisory, please contact your Arnold & Porter attorney or any of the following attorneys:

Angel A. Garganta
+1 415.356.3041
Angel.Garganta@aporter.com

Trenton H. Norris
+1 415.356.3040
Trent.Norris@aporter.com

Eric A. Rubel
+1 202.942.5749
Eric.Rubel@aporter.com

James F. Speyer
+1 213.243.4141
James.Speyer@aporter.com

George Langendorf
+1 415.356.3005
George.Langendorf@aporter.com