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The Supreme Court Delivers a Ringing Endorsement for Bilateral Consumer Arbitrations in *AT&T Mobility LLC v. Concepcion*

In recent years, corporate defendants facing consumer class actions in California and many other states have been unable to enforce arbitration agreements prohibiting class actions. Under the California Supreme Court's ruling in *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 162-63 (2005), class action waivers were unenforceable if the waivers were in "a consumer contract of adhesion," in disputes that "predictably involve small amounts of damages," when the "party with superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." On April 27, 2011, the U.S. Supreme Court, in a 5-4 decision in *AT&T Mobility LLC v. Concepcion* ("*Concepcion*"), No. 09-893, held that the Federal Arbitration Act ("FAA") preempted the *Discover Bank* rule. Significantly, the Supreme Court also held that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." Slip Op. at 9. This decision will significantly enhance corporate defendants' ability to enforce arbitration provisions in California and the many other states with similar limitations on class action waivers.

In 2002, Vincent and Liza Concepcion entered into a contract for cellular telephones and service with AT&T Mobility's predecessor Cingular Wireless in reliance, they claimed, on advertisements for free cellular phones. *Id.* at 1. Cingular Wireless charged the Concepcions for the sales tax based on the retail value of the phones, and the Concepions brought a class action suit under California's unfair competition law. The contract contained a mandatory arbitration clause, providing that all claims be brought in a subscriber's "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." *Id.* The arbitration clause further included special incentives to minimize a consumer's cost of arbitration and provide incentives to purse individual arbitration, such as simplified forms to commence arbitration, an agreement that the company would pay all costs for non-frivolous claims, and that arbitration would take place in the consumer's county. In addition, if a consumer received an arbitration award greater than AT&T Mobility's settlement offer, the consumer was entitled to a minimum recovery of $7,500 (or $9,000 after 2009) and double attorney's fees. Despite the mandatory terms of the arbitration agreement, the district court applied the

Discover Bank rule and denied AT&T Mobility's motion to compel arbitration. The Ninth Circuit affirmed, holding the class action waiver in the arbitration provision unconscionable under *Discover Bank*.

Justice Scalia, writing for the majority of the Court, recognized that arbitration provisions must be placed "on an equal footing with other contracts," and that under Section 2 of the FAA, an arbitration provision may be "declared unenforceable 'upon such grounds as exist at law or in equity for the revocation of any contract.'" Slip Op. at 5. The FAA accordingly permits states courts to invalidate arbitration agreements by "'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

On the other hand, California state law allows courts to refuse to enforce or "limit the application of" contracts or portions of contracts that were unconscionable when made. Cal. Civ. Code § 1670.5(a). In the case of arbitration agreements in consumer adhesion contracts, *Discover Bank* held that class action waivers were generally unconscionable. *Discover Bank*, 36 Cal. 4th at 162-63.

In finding the *Discover Bank* rule preempted by the FAA, the Court first observed that a state could not prohibit arbitration of a particular type of claim, because such a rule clearly would be "displaced" by the FAA. Slip Op. at 7. That said, "the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or . . . unconscionability, is alleged to have been applied in a fashion that *disfavors* arbitration." *Id* (emphasis added). However, "a court may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable . . . .'" *Id.* (quoting *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987)). Thus, hypothetical state rules that would deem arbitration provisions in consumer agreement unconscionable or unenforceable because, for example, the agreements "fail to provide for judicially monitored discovery," "fail to abide by the Federal Rules of Evidence, or . . . disallow an ultimate disposition by a jury" would essentially "eviscerate" arbitration agreements and be preempted by the FAA. Slip Op. at 7-8.

The Court observed that "nothing in [section 2 of the FAA] suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 9. The general rule is that "a federal statute's saving clause 'cannot . . . be construed as allowing a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself.'" *Id.* (quoting *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 227-228 (1998)). Accordingly, the Court held that by "[r]equiring the availability of classwide arbitration[,]" the *Discover Bank* rule "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." Slip Op. at 9.

Relying on prior arbitration precedent, the majority opinion recognized that the principal purpose "of the FAA is to 'ensure that private arbitration agreements are enforced according to their terms.'" *Id.* at 9-10 (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1773 (2010)). Last year, in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. at 1775-76, the Court had held that an arbitration panel could not impose class arbitration where the contract was silent as to class arbitration, based on "policy judgments," rather than contract law principles, as the "changes brought about by the shift from bilateral arbitration to class-action arbitration" are "fundamental." Building on that foundation, *Concepcion* outlined the ways class arbitration eliminates many of the built-in procedural advantages that come from individual arbitrations. Thus, the Court concluded that "California's *Discover Bank* rule . . . interferes with arbitration" because it "allows any party to a consumer contract to demand [classwide arbitration] *ex post*." Slip Op. at 12.

The *Concepcion* decision will have substantial impact in consumer product markets, enabling businesses to enforce contractual individual arbitration agreements and thereby very significantly narrow the occasions for consumer class actions. Many companies had changed their standard contracts to take the *Discover Bank* rule into account, and will now want to consider modifying those standard agreements to include class action waivers. Although the California rule was the only state law at issue, *Concepcion* likely will doom many similar state law rules that have rendered class action waivers unenforceable and that similarly created impermissible "'obstacle[s] to the accomplishment and execution of the full purposes and objectives of Congress," in enacting the FAA. *Id.* at 18 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Taken with the Supreme Court's decision in *Stolt-Nielsen*, *Concepcion* may prove to be the practical end of class arbitrations. At the same time, the favorable comments in *Concepcion* regarding

the more consumer-friendly arbitration provision used by AT&T Mobility may encourage businesses to adopt similar provisions, thus potentially benefiting individual consumers in the arbitration context.

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