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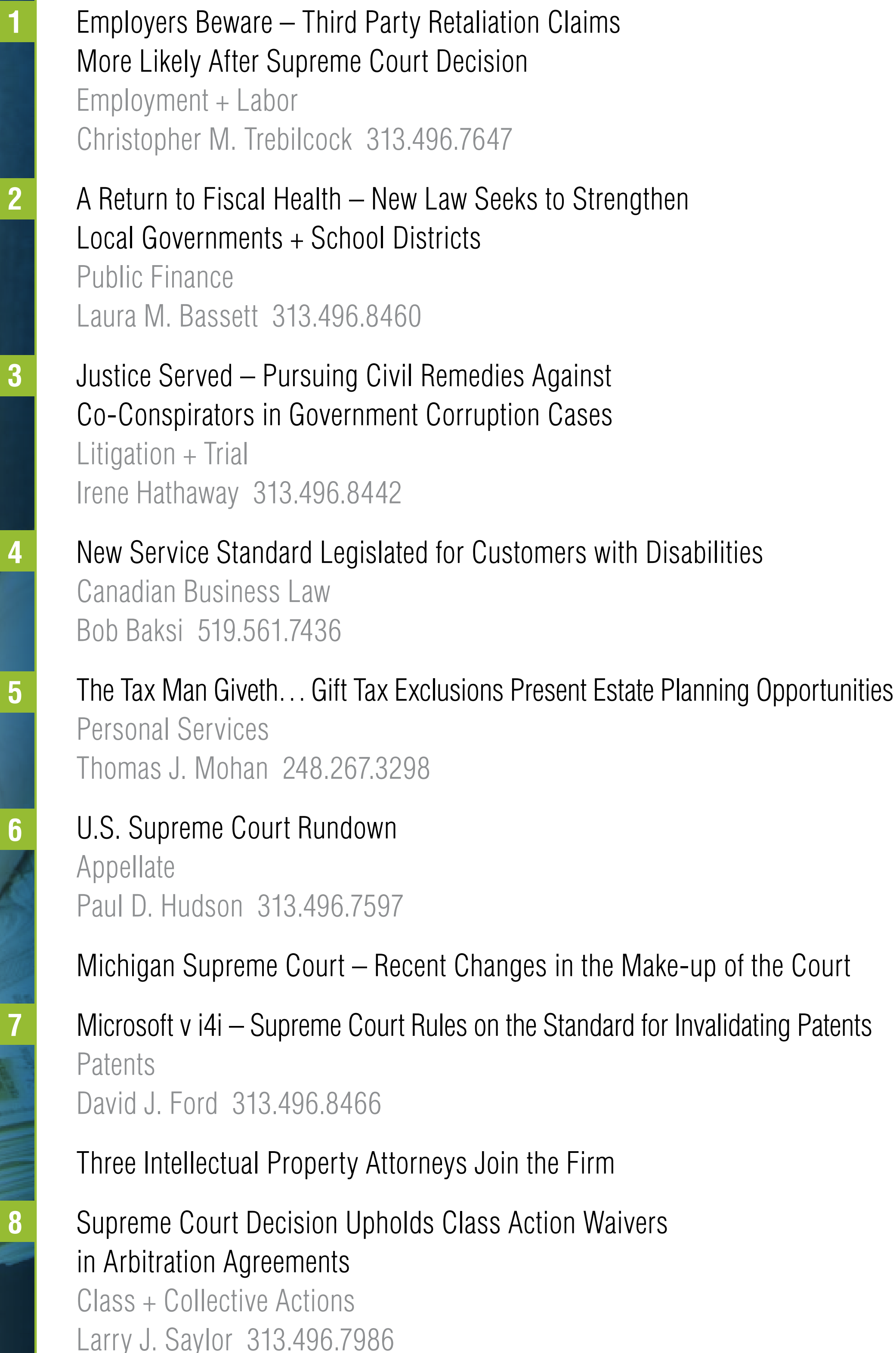

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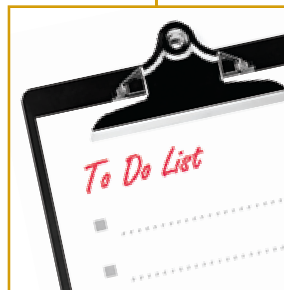
EMPLOYERS BEWARE

Third Party Retaliation Claims More Likely After Supreme Court Decision

Add another item to an employer's "to do" list when terminating or disciplining an employee. Employers must now take into account whether they may be subject to retaliation claims by third parties.

Title VII of the 1964 Civil Rights Act prohibits discrimination, harassment, and retaliation in the workplace based on an individual's race, color, religion, sex, or national origin. Historically, courts have found that Title VII's "anti-retaliation" provision only protected individuals who actually made complaints of discrimination or harassment. A unanimous decision by the U.S. Supreme Court, however, expands Title VII's anti-retaliation provision to cover claims brought by third parties who never complained of discrimination or harassment.

In *Thompson v North American Stainless, LP*, North American Stainless fired Thompson three weeks after learning that Thompson's fiancé filed a sex discrimination charge against the company. Thompson then sued the company, alleging his termination was in retaliation for his fiancé's sex discrimination charge.



Reversing the Sixth Circuit Court of Appeals, the Supreme Court held that the company's firing of Thompson violated Title VII's anti-retaliation provision. The Supreme Court found that, "it [is] obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired."

Not only did the Supreme Court determine that the firing constituted unlawful retaliation, but it also held that Thompson himself may sue. Title VII grants a right to sue to "the person claiming to be aggrieved." The Supreme Court found that Thompson was an "aggrieved" party by adopting a "zone of interest" test from another area of law. Thus, the Court found that Thompson – an employee who was fired as a means to harm his fiancé – was within the "zone of interest" that Title VII was intended to protect.

GUIDANCE FOR EMPLOYERS

The Supreme Court's unanimous decision significantly extends Title VII's already broad anti-retaliation provision. Although the Supreme Court did not create a clear standard regarding when third-party retaliation claims are permissible, employers taking adverse action will now need to evaluate whether the action might be construed as a response to conduct by someone related or closely associated with the affected employee. Since the *Thompson* ruling, at least two federal courts have permitted a third-party retaliation claim involving married couples working for the same company. Employers should also be aware that a federal court in Florida declined to dismiss a third-party retaliation claim even though the plaintiff's wife – who was the subject of the original adverse action – was employed by a sub-contractor of his company. As these cases continue to define the scope of the *Thompson* holding, Miller Canfield will keep you advised. For more information on this issue contact the author or David G. King at 313.496.7585.

Employment + Labor
Christopher M. Trebilcock 313.496.7647

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A return to FISCAL HEALTH

New Law Seeks to Strengthen Local Governments + School Districts

As the State of Michigan and local government units continue to grapple with budgetary challenges, Governor Snyder has pushed a number of proposals to reform and reshape state government.

Of these, one of the most intensely debated and closely scrutinized has been the recently enacted Local Government and School District Fiscal Accountability Act, Public Act 4 of 2011 (Public Act 4).

Public Act 4, signed into law on March 16, 2011, replaces Public Act 72 of 1990, under which emergency financial managers have been appointed to oversee the financial operations of distressed municipalities and school districts. Public Act 4 retains many of the provisions of Public Act 72, while introducing significant new provisions aimed at strengthening the financial and operational viability of municipalities and school districts across the State of Michigan.

While much of the debate and media scrutiny regarding the new law has focused on the power to appoint an emergency manager, Public Act 4 provides tools that local units can use to address fiscal stress before reaching a financial emergency.

CONSENT AGREEMENT

A common approach is to negotiate a consent agreement with the state that can include either a continuing operations plan developed and implemented by the local unit or a recovery plan developed and imposed by the state for implementation by the local unit.

A consent agreement may also empower an officer or the local governing body with one or more powers provided to emergency managers, but may not include the power available to emergency managers to modify, terminate, or renegotiate existing collective bargaining agreements. Unless the state determines otherwise, the local government operating under a consent agreement is exempt from collective bargaining requirements under the Public Employment Relations Act for the term of the consent agreement. By entering into and complying with the terms of a consent agreement, a local unit experiencing severe financial stress can avoid the appointment of an emergency manager.

EMERGENCY MANAGER

A local unit facing a financial emergency may be placed into receivership under the control of an emergency manager. The emergency manager has broad powers to operate and restructure nearly all aspects of the local unit, including:

- Entering into agreements to consolidate services with other local governments
- Authorizing debt and bond and millage elections
- Developing and implementing an academic plan for a school district
- Modifying, terminating, or renegotiating contracts, including collective bargaining agreements, if certain conditions are met. The local unit is also exempt from collective bargaining requirements for the earlier of five years or the end of the receivership
- If no reasonable alternative exists, with state approval, the emergency manager may proceed under federal bankruptcy laws

As always, Miller Canfield will remain on top of any legal developments related to the provisions of Public Act 4, as well as other issues of interest to our clients. Call us if you'd like more information.

Public Finance
Laura M. Bassett 313.496.8460

JUSTICE SERVED

Pursuing Civil Remedies Against Co-Conspirators in Government Corruption Cases

In recent years, state and federal prosecutors have aggressively pursued public corruption claims against public officials, as well as the people and companies with whom they did "business." Public corruption can take many forms, including bribery, extortion, embezzlement, illegal kickbacks, tax evasion, and money laundering.

While these criminal matters often seek punishment for the wrongdoers, and restitution for the victims, payments from convicted defendants often do not make the victims whole. Indeed, by the time criminal defendants are subject to restitution orders – despite having received large kickbacks – the money is often long gone.

In addition, not every party involved in a kickback, bribery, or similar scheme is charged criminally. Recently, U.S. Attorney Barbara McQuade told the *Detroit Free Press* "Sometimes it's hard for us to assess – when you've got these companies who are involved in bribes and extortions – where they fall on the spectrum of victim to co-conspirator." Thus, in some cases, prosecutors cannot – or will not – charge parties who paid bribes with a crime.

Nevertheless, governmental units victimized by kickback schemes are seldom satisfied until they have recovered all of their damages. Fortunately, there is a way to recover additional funds from parties involved in a corruption matter, even if such parties are not charged criminally. The non-indicted co-conspirators can be held *civilly* liable for their part in a criminal conspiracy. Civil litigation, with its different statutes and lower standard of proof, can often reach into the deep pockets of those who paid kickbacks.

Unindicted co-conspirators can, under the right circumstances, be pursued civilly through sophisticated theories, including unjust enrichment, aiding and abetting, conspiracy, and civil RICO. Through these approaches, public coffers can be replenished with funds from the co-conspirators and their insurance carriers.

If you'd like to learn more about recovering damages from those who conspired to pay bribes, please call our office.

Litigation + Trial
Irene Hathaway 313.496.8442

$$$$$$ FACTOID $$$$$$

The United States Attorney's office in Detroit reported to *Crain's Detroit Business* that it collected approximately $46.2 million in fines and restitution from criminal defendants this past year.

Hot Points is published as a free service to Miller Canfield clients and friends.

The articles in *Hot Points* are for general information only and should not be used as a basis for specific action without obtaining legal advice.

If you would like your name added to our mailing list, please call Heather Willis at 313.496.7902.

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NEW Service Standard Legislated for Customers with Disabilities

Businesses operating in Ontario, Canada need to be aware of important rules and regulations for service to customers with disabilities.

The Ontario Ministry of Community and Social Services is responsible for developing accessibility standards for people with disabilities in accordance with the Accessibility for Ontarians with Disabilities Act (AODA) in the following five areas: customer service, employment, information and communications, transportation, and built environment.

Effective January 1, 2012, Ontario businesses will be required to have developed and implemented a Customer Service Standard (CSS) for persons with disabilities under the AODA. The CSS must addresses the following issues:

- The use of assistive devices (e.g., cane, wheelchair, oxygen tank, etc.) by people with disabilities
- The use of a guide dog or service animal in areas of a business that are open to the public
- Permitting support persons to accompany and assist those with disabilities
- Posting what, if any, admission will be charged for a support person if a business charges an admission fee
- Informing the public when facilities or services (such as an elevator) utilized by persons with disabilities are not available
- Use of reasonable efforts to ensure that policies and procedures are consistent with the principles of independence, dignity, integration, and equality of opportunity
- Training staff, volunteers, and contractors to serve customers with disabilities. *Note: ensure your timetable allows for the training program to be completed by January 1, 2012*
- Establishing a feedback process and taking action on complaints

If a business employs 20 or more persons, taking into account all seasonal, contract, part time, and full time employees, it must also comply with additional AODA requirements, including:

- Notifying customers that documents required under the CSS are available upon request
- When giving documents required under the CSS to a person with a disability, providing the information in a format that takes into account the person's disability
- Documenting in writing all policies, practices, and procedures for providing accessible customer service and describing the feedback process

As could be expected, failure to comply with CSS requirements may result in monetary penalties. We recommend documenting the preparation and implementation of training programs, as the documentation may someday be critical in proving "due diligence."

For more information about AODA and ensuring legal compliance with the CSS, please contact the author or Jennifer Shilson at 519.561.7414.

Canadian Business Law
Bob Baksi 519.561.7436

PRACTICAL COMPLIANCE EXAMPLES

On its website, the Ontario Ministry of Community and Social Services cites the following as examples of steps businesses can take to comply with CSS:

- A coffee shop might have a policy which states that wait staff should read the bill to a customer who is blind or has low-vision
- A florist shop could provide notepads and pens by the cash register for customers who are hearing impaired to write notes
- A dinner theater might post a notice on its website and at its ticket window indicating that support persons will not be charged if they are not consuming food during the show

The Tax Man Giveth...

– Gift Tax Exclusions Present –

ESTATE PLANNING OPPORTUNITIES

On December 17, 2010, President Barack Obama signed the "Tax Relief Unemployment Insurance Reauthorization and Job Creation Act of 2010" (the Act). The Act creates significant planning opportunities for individuals who are interested in transferring wealth and avoiding taxes through strategic lifetime giving. Because the provisions of the Act are scheduled to "sunset" after December 31, 2012, those who wish to take the fullest advantage of its generous provisions should act promptly.

The use of lifetime gifting has long been a mainstay of passing wealth to future generations in the most tax efficient manner possible. Individuals may make annual gifts of $13,000 per recipient without gift tax consequences. In addition, tax free gifts may be made through use of the lifetime exclusion. The gift tax exclusion was increased to $5,000,000 through December 31, 2012, but is scheduled to sunset back to $1,000,000 in 2013. For a married couple, the combined gift tax exclusion is $10,000,000 through December 31, 2012.

Gifting through use of the lifetime exclusion typically is much more effective than using the estate tax for several reasons. Strategic lifetime gifts will frequently take advantage of recognized discounting techniques, which often employ the use of special trusts or business designs which will result in the donor conveying less than full control or assets with a limited marketability. The result is that the size of the gift may be legally reported to the IRS at a reduced value, thus expanding the tax efficiency of the transfer.

As gifted assets grow in value over time, that growth will be outside the donor's taxable estate, further expanding the amount of wealth that will pass between generations tax free. In today's economy, where business and real estate assets have a depressed value, the potential for future growth creates an ideal environment for those prepared to make strategic lifetime gifts.

An important consideration for Michigan residents is maximizing the use of the generation-skipping tax exemption (GST) which was also increased to $5,000,000 ($10,000,000 for a couple) through December 31, 2012. For most assets, Michigan has eliminated the "Rule against Perpetuities" – a law that required trusts to end after a finite period of time. Therefore, trusts may now be established in Michigan which will pass from children to grandchildren and beyond to their future children indefinitely without the imposition of the estate tax. These trusts, often referred to as "Dynasty Trusts," can be designed to protect against the creditors and predators of the heirs.

Dynasty Trusts were recently addressed in President Obama's 2012 budget proposal, which would limit the duration of Dynasty Trusts to 90 years. The longer these trusts continue the more tax efficient they become. Gifts made through the use of Dynasty Trusts in advance of any law change would be, as currently proposed, grandfathered in. Therefore, those seeking to take full advantage of inter-generational lifetime gifting should implement strategic gift planning now.

Please give our office a call to schedule a session with an estate planning attorney to make sure that your objectives and planning goals are accomplished.

Personal Services
Thomas J. Mohan 248.267.3298

U.S. Supreme Court RUNDOWN

This year's U.S. Supreme Court term has been significant for business. The Court has issued opinions expanding public access to potentially sensitive company documents, expanding manufacturers' liability in product-liability suits, changing the landscape of employer liability in employee discrimination suits, and narrowing the field of potential defendants in securities suits.

6 RECENT DECISIONS THAT COULD AFFECT YOUR BUSINESS

PRIVACY In *FCC v AT&T*, the Court held that a corporation does not have a right of "personal" privacy such that it can object to a Freedom of Information Act (FOIA) request on the ground that the request seeks documents obtained by a government agency that are embarrassing or sensitive to the corporation. The case eliminates a protection for companies following a government investigation – sensitive internal emails, for example, now may be fair game to the public with a simple FOIA request.

REGULATORY In *Williamson v Mazda Motor*, the Court revived an accident victim's suit against Mazda for failing to install lap-and-shoulder seatbelts – as opposed to lap belts only – in the middle seats of its minivans. Mazda's lap belts fully complied with federal safety standards, but the Court nonetheless held that those standards did not preempt state tort suits like the accident-victim plaintiff's. The case has potentially significant implications for automobile manufacturers and suppliers and for companies in other heavily regulated industries. Even full compliance with federal regulations may not protect a company from suit.

EMPLOYMENT In *Wal-Mart v Dukes*, the Court held "in one of the most expansive class actions ever" that a class of approximately 1.5 million current and former female Wal-Mart employees could not collectively sue the company for alleged gender discrimination. The Court held that the various individuals in the class could not show that their claims involved sufficiently common elements of law or fact to bring a single class action against the company. The case is a significant victory for employers nationwide, who otherwise might have faced similar mass discrimination suits in the future.

The Court held in *Staub v Proctor Hospital* that an employer can be held liable for employment discrimination based on the discriminatory motives of a supervisor who influenced, but did not make, the decision to terminate an employee. The case is significant for employers because some courts had previously held that to prove discrimination an employee generally had to show animus on the part of the supervisor who made the ultimate termination decision. The case therefore potentially expands liability for employers based on the actions of lower-level managers and supervisors.

In *Kasten v Saint-Gobain*, the Court held that an employee who was retaliated against for making workplace-safety complaints may sue even where the employee did not make the complaints in writing. The case is significant for employers because it will likely expand the number of retaliation suits. Under *Kasten*, a disgruntled terminated employee could claim after the fact that he or she made an oral complaint to a supervisor prior to termination.

SECURITIES In *Janus Capital Group, Inc. v First Derivative Traders*, the Court rejected a claim seeking to impose liability on an investment advisor that was significantly involved in preparing a mutual-fund prospectus that allegedly contained false and misleading statements. The Court held that only the "maker" of the statements, defined as the entity with "ultimate authority" over the statements, may be held primarily liable under Securities and Exchange Rule 10(b)-5. The case is significant because it potentially limits exposure for advisors and entities that contribute to statements in connection with securities transactions but do not have ultimate authority over their contents, further narrowing the field of potential defendants in a trend started with the *First Chicago* case.

Appellate
Paul D. Hudson 313.496.7597

MICHIGAN SUPREME COURT

Recent changes in the make-up of the court

The Michigan Supreme Court has undergone dramatic changes in recent times. It is important to be aware of those changes, and to craft your appeal arguments accordingly.

Over the course of his 11 years on the Michigan Supreme Court, Justice Clifford Taylor, who recently joined Miller Canfield as Of Counsel in the appellate section of the Litigation and Trial Group, was the intellectual leader of what came to be known as the "Taylor Court," one that many described as the finest Court in the country. When he left the Court in 2009, the philosophy of the Court shifted, but in 2011 it returned to a more conservative majority with the addition of Justices Mary Beth Kelly and Brian Zahra.

No one knows the personnel and philosophies on the Court better than Justice Taylor. Having participated in hundreds of Michigan Supreme Court weekly conferences and studied many years of Court of Appeals opinions, Justice Taylor has keen insight into the thinking of the Michigan Supreme Court Justices and Court of Appeals Judges on the myriad significant issues that come before those courts. Those insights will be invaluable on any appeal.

Microsoft v i4i

Supreme Court Rules on the Standard for Invalidating Patents

Under federal law, inventors can be granted a patent after disclosing their inventions in exchange for a period of exclusivity. A party can challenge the validity of a patent, but there has been disagreement as to the appropriate legal standard for invalidating the patent. The U.S. Supreme Court recently heard oral arguments and is in *unanimous agreement* on this issue.

FACTS OF THE CASE

(1) i4i Limited Partnership (i4i), a Canadian software company, brought suit against Microsoft Corporation (Microsoft) in Federal District Court alleging that certain versions of Microsoft Word infringed one of i4i's patents relating to software technology. Microsoft argued that i4i's patent was invalid under the "on-sale bar" defense of the Patent Act, alleging that the technology that i4i sought to patent was part of a software program developed and distributed by i4i in the U.S. more than one year before i4i's patent application was filed with the Patent and Trademark Office (PTO). i4i presented evidence that the earlier software program did not practice the key invention disclosed in the patent. The jury found in favor of i4i and awarded $250+ million in damages. The District Court also entered a permanent injunction barring further sales of Microsoft Word (as it then existed). After the Federal Circuit Court affirmed the decision and the injunction of the District Court, Microsoft appealed to the Supreme Court.

(2) In April, the Supreme Court heard oral arguments to decide whether the invalidity defense must be proved by "clear and convincing evidence." The Patent Act itself is silent as to the evidentiary standard required to overcome the presumption of validity and 35 U.S.C. § 282 merely states that patents are "presumed valid." The Federal Circuit Court, which has long had a monopoly on patent appeal cases, has consistently taken the position that a challenger must establish that the patent is invalid by clear and convincing evidence.

(3) Microsoft argued that a lower "preponderance of the evidence" standard should be used and also contends that the lower standard must at least apply in this instance because the PTO did not consider the earlier software program when it issued the i4i patent. In support of its argument, Microsoft relied on the Supreme Court's 2007 statement in *KSR International Co. v Teleflex Inc.* that the rationale underlying the presumption of validity – that the PTO, in its expertise, has approved the patent – "seems much diminished" when prior art exists that the PTO never considered.

(4) On June 9th, the Court *unanimously* rejected Microsoft's argument and affirmed that an invalidity defense be proved by clear and convincing evidence. The Court determined that when Congress enacted section 282 it intended to codify the common-law holding set forth in *Radio Corp. of America v Radio Engineering Laboratories, Inc.*, which stated that "there is a presumption of [patent] validity [that is] not to be overthrown except by clear and cogent evidence." The Court also rejected Microsoft's contention that *KSR* endorsed a fluctuating standard of proof dependent on the facts of a particular case. Rather, the Court clarified that "if the PTO did not have all material facts before it, its considered judgment may lose significant force. And, concomitantly, the challenger's burden to persuade the jury of its invalidity defense by clear and convincing evidence may be easier to sustain."

To learn more about this case, as well as other intellectual property issues, please call our office.

Patents
David J. Ford 313.496.8466

Three Intellectual Property Attorneys JOIN THE FIRM

Robin W. Asher – Robin joins Miller Canfield as a principal in the Detroit office. His IP experience includes administration, management, and prosecution of patent portfolios for several Fortune 500 companies, including automotive manufacturers, and suppliers. » **313.496.8445**

David J. Ford – David joins as an associate in the Detroit office. He brings his automotive industry work experience and a range of IP experience including prosecution of domestic and foreign patents and trademarks; patentability, validity, and infringement opinions; trademark oppositions; technology transfers; copyrights; and domain name disputes. » **313.496.8466**

Mark L. Maki – Mark joins Miller Canfield as a principal in the Kalamazoo office. He has extensive experience in the worldwide protection of intellectual property including patents, trademarks, and copyrights. He represents various domestic and multinational corporations and has coordinated IP protection for clients' global operations in the U.S., Canada, Mexico, Europe, and Asia Pacific. » **269.383.5892**

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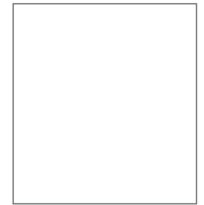

SUPREME COURT DECISION UPHOLDS CLASS ACTION WAIVERS IN ARBITRATION AGREEMENTS

A new decision of the U.S. Supreme court allows sellers of consumer goods and services to avoid class actions by requiring customers to arbitrate their disputes individually. The decision may also help employers and franchisors to enforce class action waivers.

In *AT&T Mobility, LLC v Concepcion*, the Supreme Court ruled that the Federal Arbitration Act (FAA) preempts a California Supreme Court decision holding most class action waivers in form consumer contracts unconscionable and therefore unenforceable.

Vincent and Liza Concepcion contracted with AT&T for cell phone service. AT&T gave each of them a "free" phone, but charged $30.22 sales tax on the phones' retail value. The form contract required any claims to be arbitrated, and provided: **"You and AT&T agree that each may bring claims against the other only in your or its individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding."** The agreement also contained a "blow up" clause avoiding arbitration if a court struck down the class action waiver.

Alleging consumer fraud, the Concepcions filed a lawsuit against AT&T in federal district court in California. The suit became part of a class action. The U.S. District Court denied AT&T's motion to compel arbitration under California's *Discover Bank* rule. In *Discover Bank*, the California Supreme Court held that clauses prohibiting class arbitration are "unconscionable" in consumer "contracts of adhesion" where there is no negotiation and individual damages are small. The Court of Appeals affirmed, but the U.S. Supreme Court reversed in a 5-4 decision on April 27, 2011.

Because the *Concepcion* decision is based on the FAA, it applies only where **(1)** there is an agreement to arbitrate disputes and **(2)** there is at least a minimal effect on interstate or foreign commerce. Where these requirements are not satisfied, courts remain free to apply state law.

Federal and state courts in at least 20 states have held class action waivers unconscionable, though in many states, such as Michigan, the courts are divided on the issue. Some in Congress have sought to amend the FAA to exempt consumer and franchising contracts.

In light of the *Concepcion* decision, sellers, franchisors, and employers with form agreements that do not include an arbitration provision and a class action waiver should consider whether they wish to add such terms. Call us if you would like to learn more about this decision and how it affects your contracts.

Class + Collective Actions
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