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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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