

ALERT - U.S. Supreme Court Upholds Federal Arbitration Law Preemption of State Laws on Class Action Waiver Clauses

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The U.S. Supreme Court recently issued an important decision upholding a class action waiver in an arbitration clause of a consumer contract. While the full extent of the decision's implications will depend on many factors and lower court applications, the decision cements the enforceability of class action waivers in arbitration clauses and enhances a method for companies to protect themselves from the risk of class action (and other multi-party) litigation with persons or entities with whom they are in privity of contract.

The issue addressed in *AT&T Mobility LLC v. Concepcion*, 563 U.S. ____ (2011), arose from a complaint brought by consumers (and later consolidated with a class action) alleging that AT&T had engaged in false advertising and fraud by charging sales tax on phones advertised as "free." The contract at issue provided for the arbitration of all disputes, but required claims to be brought in an "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." The U.S. District Court for the Southern District of California denied AT&T's motion to compel arbitration, relying on the California Supreme Court's decision in *Discover Bank v. Superior Court*, 113 P.3d 1100 (2005), to find the arbitration provision unconscionable under California state law because it limited classwide proceedings. The Ninth Circuit affirmed.

In a 5-4 decision, the U.S. Supreme Court reversed and remanded, holding that the Federal Arbitration Act (FAA) preempted California's rule in *Discover Bank* because it "stands as an obstacle to the accomplishment and executions of the full purposes and objectives of Congress." In doing so, the majority compared classwide arbitration to bilateral arbitration and noted that classwide arbitration, among other things, is slower, more costly, requires additional procedural formality and greatly increases the risk to defendants. The majority wrote that "requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."

The U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion* makes clear that class action waivers in arbitration agreements are valid and not subject to state law unconscionably defenses that otherwise could invalidate the arbitration agreement. This decision also makes clear that companies who wish to avoid class action litigation

Attorneys

James Long

Nathan Buller

Practice Areas

Corporate and Business Law

Franchise Counseling

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should consider including arbitration clauses with class action waivers in their contracts. Arbitration is not always the best choice in every contract, consumer or otherwise, and thoughtful evaluation of the trade-offs it represents is usually indicated. But *AT&T Mobility LLC* provides another potential reason for including an arbitration clause in commercial contracts.