

Client Alert.

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Supreme Court Turns the Tide on Class Action Waivers: *AT&T Mobility v. Concepcion*

By Rebekah Kaufman, William Stern, and Maggie Mayo

For the past few years, courts throughout the U.S. have repeatedly struck down class action waivers under state unconscionability law. In a sweeping decision yesterday, the U.S. Supreme Court reversed that trend, handing down its much-awaited decision in *AT&T Mobility v. Concepcion*, No. 09-893, 2011 U.S. LEXIS 3367 (U.S. 2011). This decision will affect the class action exposure of businesses in a wide span of industries, and once again places class action waivers on equal footing with other contractual provisions that companies include in their arbitration agreements.

THE DECISION PARSED

The arbitration provision at issue was part of a two-year AT&T service contract, requiring the Concepcions to arbitrate any disputes with AT&T and prohibiting them from adjudicating their disputes as part of a class action—commonly referred to as a “class action waiver.”

In a 5-4 decision, the Supreme Court held that AT&T’s arbitration clause was enforceable despite the class action waiver. The issue decided by the Court was whether the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (FAA) preempts California’s common law of unconscionability, pursuant to which California courts (and the Ninth Circuit, following in lockstep), have struck most class action waiver clauses in consumer contracts since 2005. See *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005).

The Supreme Court held that AT&T’s arbitration agreement was enforceable notwithstanding the class action waiver because California law conflicts with the FAA—read, is preempted—for three reasons. First, the principal advantage of arbitration—its informality—is sacrificed when class arbitration is imposed. Second, class arbitration in fact *requires* procedural formality under the AAA’s rules governing class arbitrations, which follow the rigorous Federal Rules of Civil Procedure. Third, class arbitration greatly increases risks to defendants, as arbitration is poorly suited to the higher stakes of class action litigation.

WHAT THE DECISION MEANS

The Supreme Court’s decision will have a far-reaching effect on the enforceability of arbitration agreements with class action waivers. This decision not only sweeps aside unconscionability as a basis for avoiding class action waivers, but also all other state-created doctrines based on public policy. Moreover, although the *Concepcion* opinion is silent to its application in the employment context, the holding is broad enough to encompass mandatory arbitration agreements.

Contact:

Rebekah Kaufman
(415) 268-6148
rkaufman@mofo.com

James McGuire
(415) 268-7013
jmcguire@mofo.com

William Stern
(415) 268-7637
wstern@mofo.com

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