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United States Supreme Court Decides Significant Arbitration And Class Action Case

This morning, the United States Supreme Court decided *AT&T Mobility LLC v. Concepcion*. Although factually, the case involved consumer products and arbitration agreements, the decision may have a significant impact on employers and employees who enter into arbitration agreements, as well as class action practice.

By way of background, California courts had previously ruled that when a consumer contract of adhesion purports to require individual arbitration of consumer disputes with the vendor, essentially any alleged ban on class arbitration is unenforceable. This was the so-called "Discover Bank rule". California courts had applied this rule even if the consumer contract contained provisions making it worthwhile for an individual consumer to challenge a small dispute (e.g., an improper charge on a phone bill). In AT&T's case, the contract provided that AT&T would pay the all the forum costs except in cases deemed frivolous and that the consumer could elect whether arbitration would be in person, by telephone, or based just on documents. Furthermore, if the consumer did better than AT&T's last offer to settle, the consumer would be guaranteed a recovery of at least \$7,500, plus attorney's fees. However, the agreement did not allow for class arbitration.

In the AT&T case, the lower courts had recognized that AT&T's procedures provided a speedy, non-burdensome method for individual consumers to obtain redress. Nonetheless, the lower courts invalidated the class action waiver requirement on the ground that under Discover Bank, any class action waiver is unconscionable unless the arbitration procedure "adequately substituted for the deterrent effects of class actions," a test that is essentially unattainable.

Finally, the lower courts ruled that the Federal Arbitration Act ("FAA") did not preempt or overrule the Discover Bank rule. On this point, the United States Supreme Court disagreed. Writing for the 5-4 majority, the high court set aside the Discover Bank rule barring class action waivers, reasoning that the rule frustrated the FAA's central purpose of enforcing parties' contractual agreements to resolve disputes through speedier, less formal procedures than litigation in court. Justice Scalia noted that courts had a history prior to the FAA of using "a great variety of devices and formulas" to invalidate arbitration agreements, and even today "California courts have been more likely to hold contracts to arbitrate unconscionable than other kinds of contracts."

The Supreme Court had to address the question of whether requiring any arbitration agreement to also provide for class actions in effect frustrates the purpose of agreeing to arbitration in the first place. In other words, does the Discover Bank rule effectively discourage companies from agreeing to arbitration because the risks of class arbitration outweigh any benefits to the company from arbitration. The Court found that the rule indeed had that effect, explaining:

(1) Arbitrators tend to lack expertise in the complex procedural arguments that are often at the center of class certification determinations. As a result, companies will be more reluctant to trust arbitrators with these issues.

(2) Because of the lack of meaningful judicial review on the merits in arbitrations (when compared to court cases), companies would face great risk of massive judgments that they could not appeal. This is much less of a concern in individual arbitrations.

(3) While arbitration is supposed to allow flexibility in procedures, class arbitration effectively requires the incorporation of stricter legal requirements into the case, because a failure of an arbitrator to follow them will prevent enforcement of the class judgment against absent class members.

It remains to be seen whether courts will apply this new AT&T decision in the employment context. It also remains to be seen what impact the Supreme Court's holding today will have on other prior decisions from the California courts ---- such as the judicial rule that class action arbitration waivers in employment contracts are almost always unconscionable; or the judicially created rules for enforceability of employment arbitration agreements (such as requiring the employer to pay all the forum costs in excess of those that a plaintiff would be forced to face in court).

Arbitration can be an a faster and more cost effective method for employers and employees to resolve disputes. In this case, the Court spent some time talking about how AT&T bent over backwards to create a fair procedure that allowed redress of disputes. Therefore, prudent employers will ensure that their arbitration provisions are fair and that employees' rights are not severely restricted. By doing so, employers will maximize the odds that the courts will uphold their arbitration agreements and class action waivers.

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