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Class Dismissed? — Not So Fast

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On August 2, 2011, the New Jersey Appellate Division, in *NAACP of Camden County East v. Foulke Management Corp.*, ruled that binding arbitration clauses in consumer contracts which bar class-action suits may be challenged and invalidated if those clauses are too vague, inconsistent or confusing. The holding comes just over three months after the United States Supreme Court ruled that the Federal Arbitration Act (FAA) preempts state laws that void class-action waiver provisions on public policy grounds in *AT&T Mobility LLC v. Concepcion*, 563 U.S. ___, 131 S. Ct. 1740 (2011).

In *Foulke Management*, plaintiff Geraldine Thomas purchased a Kia Sportage from defendant's Kia dealership. Ms. Thomas signed a 44-page sales contract containing a clause acknowledging that she had read the entire contract cover-to-cover. Also in the contract were several sections disclaiming Ms. Thomas' right to participate in any class action against the dealership and a binding arbitration clause.

Upon finding out that the defendant's dealership charged her incorrect fees, Ms. Thomas (with assistance from the NAACP) filed a class action suit alleging consumer fraud claims. The trial court dismissed the complaint citing to the arbitration clause and the FAA's policy of favoring arbitration over litigation. Ms. Thomas appealed and while that appeal was pending, the Supreme Court decided *Concepcion*.

In *Concepcion*, the Supreme Court held that states must enforce arbitration agreements even where the agreement bars prospective class-action suits. In a 5-4 ruling reversing the Ninth Circuit, Justice Scalia wrote that state laws nullifying arbitration clauses that bar class-action suits are an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, as set forth in the FAA. In his concurrence, however, Justice Thomas noted that the arbitration clauses at issue could still be invalidated on contract formation grounds, *e.g.*, fraud or duress at signing.

Seizing on Justice Thomas' language, the New Jersey Appellate Division emphasized that the mutual assent of both parties is required to create an enforceable arbitration agreement. The court analyzed every document that the plaintiff had signed, looking for whether mutual assent between

the two parties was possible at the time of formation. The court found many key concepts relating to the arbitration clause unclear: (1) which arbitration rules apply; (2) what forum should be used; (3) what statute of limitations would apply; (4) whether attorneys or retired judges would arbitrate; and (5) what fees or costs should be awarded to the prevailing party.

The court also noted that, although "an especially prudent purchaser who takes the time to read these documents…would likely obtain a generalized sense that a post-sale dispute would be handled through some kind of arbitration," the average consumer could not manifest assent to the arbitration clause because "the assorted documents do not plainly convey — with precision and consistency — what the exact terms and conditions of that arbitration process would be." Thus, viewed in their totality, the arbitration provisions were deemed unenforceably confusing, inconsistent and ambiguous.

Conclusion

Subject to the Supreme Court of New Jersey jumping into the fray, the lesson for New Jersey businesses to learn from *Foulke Management* is clear. Binding arbitration clauses that bar class-action suits are not *per se* void as against public policy. Rather, those clauses must be well-written, clear and consistent to fall under the protections of *Concepcion*.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact one of Locke Lord's Labor & Employment Practice attorneys.