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## Supreme Court to Consider Whether Federal Arbitration Act Preempts State Law Limitations on Arbitration Agreements

On May 24, 2010, the U.S. Supreme Court granted certiorari in *Mobility LLC v. Concepcion*, No. 09-893, to address the question of whether the Federal Arbitration Act (FAA) preempts state law rules limiting the enforceability of arbitration agreements. In *Concepcion*, the Supreme Court will consider whether the FAA preempts California state court decisions that class action waivers are unconscionable in consumer arbitration agreements as a matter of public policy. Because courts in many states have held that class action waivers may be found unconscionable under state contract law principles, the Supreme Court's decision has the potential to mark a significant shift in consumer arbitration, as well as arbitration in similar contexts such as employment.

In *Concepcion*, two customers filed a class action against AT&T Mobility LLC (AT&T) alleging various violations of consumer protection statutes. AT&T moved to compel individual arbitration pursuant to an arbitration agreement which contained an express class action waiver. 407 F. Supp. 2d 1181 (S.D. Cal. 2005). The U.S. District Court for the Southern District of California denied the motion, holding that the arbitration agreement was unconscionable under California law because it contained a class action waiver. On appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed, holding that the class action waiver was unconscionable because (1) it was contained within a contract of adhesion, (2) the dispute involved small amounts of damages, and (3) the plaintiffs alleged a scheme to deliberately cheat large numbers of consumers out of small amounts of money. *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 854-55 (9th Cir. 2009). Like the district court, the Ninth Circuit held that "[t]he FAA does not bar federal or state courts from applying generally applicable state contract law principles and refusing to enforce an unconscionable class action waiver in an arbitration clause." *Id.* at 856-57 (internal quotation omitted). The Supreme Court granted certiorari to determine whether the FAA preempts state law unconscionability standards.

The Supreme Court's decision to hear *Concepcion* comes at a time when the Court is hearing a series of cases regarding the enforceability of arbitration agreements and class action waivers. Recently, on April 27, 2010, the Supreme Court held in *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, No. 08-1198 that class arbitration cannot be imposed on parties whose arbitration agreement is silent on the issue. Also on April 27, 2010, the Court heard oral argument in *Rent-A-Center, West Inc. v. Jackson*, No. 09-497, which may resolve whether an arbitrator has authority to determine whether an arbitration agreement is unconscionable. On May 3, 2010, the Supreme Court granted a writ of certiorari, vacated, and remanded *American Express Company v. Italian Colors Restaurant*, No. 08-1473, asking the U.S. Court of Appeals for the Second Circuit to reconsider its decision that an arbitration agreement was unenforceable due to the inclusion of a class action waiver. This series of cases has the potential to change the landscape in consumer arbitration, as well as in related areas such as employment arbitration. The Court's decisions also may spur activity in Congress on the proposed bills that would limit arbitration in consumer and other cases.

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