

ALERTS AND UPDATES

Appeals Court Distinguishes Supreme Court Ruling on Arbitration Clauses Barring Class-action Suits

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The New Jersey Appellate Division ruled—despite the recent U.S. Supreme Court decision in *AT&T Mobility LLC v. Concepcion*—that binding arbitration clauses in consumer contracts that bar class-action suits still may be subject to challenge if they are poorly worded and contain contradictory language.

In *Concepcion*, the U.S. Supreme Court ruled that the Federal Arbitration Act (FAA) preempts state laws that nullify class-action waivers on public policy grounds. On August 2, 2011, the New Jersey Appellate Division in *NAACP of Camden County East v. Foulke Management Corp.*, A-1230-09, distinguished *Concepcion* by stating that "the disparate arbitration provisions in this case were too confusing, too vague, and too inconsistent to be enforced." Thus, *Foulke Management* signifies that a putative class-action may proceed against the operator of a string of car dealerships whose sales contracts require buyers to waive their right to sue.

In *Foulke Management*, plaintiff Geraldine Thomas purchased a vehicle from the defendant dealership. The plaintiff signed a sales contract that contained a clause acknowledging that she read approximately 44 pages of documents. Those documents contained clauses in which the plaintiff agreed to waive her right to participate in any class action against the dealership and have any disputes resolved through binding arbitration. The plaintiff later discovered that the dealership charged her incorrect fees.

The plaintiff filed this class action with the help of NAACP of Camden County East, asserting consumer fraud claims. The trial court dismissed the lawsuit on summary judgment because it found the arbitration language in the contract was clear and the FAA should be liberally interpreted to favor arbitration over litigation. The plaintiff appealed. While the appeal was pending, the U.S. Supreme Court issued the *Concepcion* ruling.

The Appellate Division noted that Justice Clarence Thomas, in a concurring opinion, stated that arbitration clauses could be declared invalid under a challenge to the "formation" of the contract and a showing that it was signed under fraud or duress. Thus, the Appellate Division analyzed whether the plaintiff's contract was signed with mutual assent and analyzed all of the documents she signed. The Appellate Division found inconsistencies and ambiguities in the documents regarding which arbitration rules should apply, what forum would be used, what statutes of limitations should apply, whether attorneys or retired judges would be used as arbitrators, and what fees and costs should be awarded to the prevailing party. Thus, the Appellate Division found that when the arbitration provisions are viewed in their totality, they are confusing and inconsistent and, thus, fail to put a reasonable consumer on fair notice of the intended meaning.

What This Means for Companies

Companies should consider reviewing all documents that are provided to a consumer to ensure that arbitration clauses are consistent in all of the documents and are plainly drafted.

For Further Information

If you have any questions about this *Alert*, please contact [Sheila Raftery Wiggins](#), any [member](#) of the [Trial Practice Group](#), or the attorney in the firm with whom you are regularly in contact.

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