The Impact of *AT&T Mobility v. Concepcion* on Financial Services Companies: Inclusion of Arbitration Clauses in Customer Contracts and the Impact of Dodd-Frank

May 24, 2011

On April 27, 2011, the U.S. Supreme Court held in a 5-4 decision that the Federal Arbitration Act (FAA) preempted California's *Discover Bank* rule, which deemed unenforceable most mandatory consumer arbitration agreements that include class-action waivers. The decision is seen by many as a victory for companies, especially those that rely on standardized contracts, and paves the way for the use of arbitration clauses as a means of avoiding class litigation. However, questions remain as to how the newly formed Consumer Financial Protection Bureau (CFPB) may attempt to regulate the use of arbitration clauses in consumer contracts and whether this may have the effect of limiting the impact of the *Concepcion* decision. Given the CFPB's focus on consumer contracts, commercial contracts face less uncertainty, making adoption of arbitration agreements with express class-action waivers worthy of consideration by providers of business services.

AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), involved a California couple who sued AT&T after they were charged $30 in sales tax on phones that AT&T had advertised as free. The Concepcions' complaint was consolidated with a class action that alleged, among other things, claims for fraud and false advertising based on the same facts. AT&T moved to compel individual arbitration with the Concepcions based on their contract's arbitration agreement, which included an express class-action waiver. The California courts found the class-action waiver unconscionable under the *Discover Bank* rule. The Supreme Court reversed on FAA preemption grounds because "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id*. at 1748.

While *Concepcion* does seem to expand significantly the enforceability of arbitration agreements and class-action waivers, financial services companies should consider the impact of possible rulemaking by the CFPB before engaging in wholesale amendments of their standard consumer contracts to include arbitration agreements and class-action waivers. The CFPB, created under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), has the authority to impose limitations on the use of mandatory arbitration agreements and prohibit their use entirely if it finds that it is "in the public interest and for the protection of consumers" to do so. Pub. Law 111-203 § 1028(b). Before taking any action, the CFPB is required to conduct a study on the use of mandatory arbitration agreements in connection with consumer financial products and services, and must present its findings to Congress before it can impose limitations or prohibitions on their use. *Id.* § 1028(a). The Dodd-Frank Act does not state a deadline by which the study must be conducted. Yet, in the wake of the Supreme Court's ruling in *Concepcion*, it appears likely that consumer advocates will pressure the CFPB to conduct the study sooner rather than later. Any regulation ultimately adopted will apply only to agreements entered into starting 180 days after the regulation's effective date. *Id*. § 1028(d). Companies that wish to amend their financial services contracts in light of *Concepcion* should also take note of this grace period.

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If and when it decides to act, the CFPB's authority extends only to arbitration agreements between offerors or providers of consumer financial products and services (and certain of their affiliates) and consumers. *Id.; see also id.* § 1002(6). The CFPB does not have the authority to regulate mandatory arbitration agreements in financial services contracts entered into between and among business entities. *See id*. § 1028(b); *see also id*. § 1002(4) (defining consumer as "an individual or an agent, trustee, or representative acting on behalf of an individual"). It also cannot prohibit or restrict the use of voluntary arbitration agreements entered into after a dispute has arisen. *Id*. § 1028(c).

Concepcion emphasizes that Section 2 of the FAA reflects a "liberal policy favoring arbitration" and notes that "[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute." 131 S. Ct. at 1749. A 2010 Supreme Court decision involving the FAA previously highlighted the Supreme Court's emphasis on freedom of contract with respect to arbitration agreements. In *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), the Court held that class arbitration cannot be imposed on parties whose contracts are silent on the issue. Given the Supreme Court's continued emphasis on freedom of contract in *Concepcion*, and the fact that the CFPB's authority does not extend to business-to-business contracts, financial services companies may find it appealing to amend their standard agreements for commercial customers to eliminate the possibility of becoming embroiled in class litigation, even if they decide to take a wait-and-see approach with respect to consumer contracts. Where a financial services company executes large numbers of non-negotiated form contracts with its commercial customers, inclusion of an arbitration agreement with an express class-action waiver should, in the wake of *Concepcion*, provide an effective tool for reducing, and possibly eliminating, any potential class litigation exposure.

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