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Class Action Waivers in Commercial and Consumer Arbitration Agreements After *Concepcion*

Concepcion

In *AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740 (2011), the Supreme Court struck down a California rule that invalidated most class action waivers in consumer contracts. Many have hailed (or railed against) *Concepcion* as the death knell for class actions. The reality is not so simple. *Concepcion* was a close case, and the result relied on the finding that AT&T Mobility's arbitration program offered customers a realistic way to pursue small individual claims. *Concepcion* has important consequences for all commercial and consumer arbitration programs that include class action waivers.

The case was brought by California customers of AT&T Mobility (formerly Cingular) who objected to paying about $31 in state sales tax on "free" cell phones. The cellular contracts contained an arbitration clause with an express class action waiver. Both the federal district court and the Ninth Circuit struck down the arbitration clause and class action waiver as contrary to California policy favoring consumer class actions, even though both courts agreed that AT&T Mobility's generous arbitration provisions offered customers a better chance of recovering their $31 claims in individual arbitration than in a class action.

The Supreme Court held in a 5-4 decision that arbitration and class actions are normally incompatible, echoing last year's decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 130 S.Ct. 1758 (2010). California's policy requiring consumer contracts to allow class actions was, in effect, a ban on pre-dispute arbitration agreements in consumer contracts. Such state anti-arbitration policies are preempted by the FAA. The four dissenting Justices argued that allowing class action waivers in standard arbitration contracts will give a green light for sellers to exploit their customers, who could not afford to bring small claims as individuals. The majority responded by pointing out the findings of the lower courts that the Concepcions would actually have a better chance of recovering their individual $31 claim in arbitration than in a class action.

What *Concepcion* means for commercial and consumer arbitration programs

It remains to be seen how lower courts will apply the new ruling, but some general points seem clear:

- **Sellers of commercial and consumer products can include class action waivers in arbitration clauses in their standard contracts.** *Concepcion* and *Stolt-Nielsen* make clear that class actions are purely a procedural device, not a substantive right, and that classwide procedures are normally inappropriate for arbitration. State laws that broadly prohibit class action waivers in arbitration agreements are preempted by the FAA.

- **To be enforceable, class action waivers and arbitration clauses should enable customers to pursue small claims individually.** This requires careful analysis of the types of claims likely to arise. Before *Concepcion,* some lower courts struck down class action waivers on the theory that individual small claimants cannot afford lawyers unless they join a class action. *Concepcion* torpedoes that general rule. After all, no one could afford a lawyer to pursue a $31 claim like the one in *Concepcion.* But the result depends at least in part on factual findings that AT&T Mobility's arbitration program gave the plaintiffs an adequate remedy for their individual claim. That program required AT&T Mobility, among other things, to provide a simple one-page complaint form, pay all the arbitration fees, and under some circumstances pay a premium of $7,500 plus twice the claimant's legal fees.

- **Should all sellers copy AT&T Mobility's arbitration program?** *Certainly not.* An arbitration program that works well for financial institution customers will be different from one suited to franchisees, which in turn will differ from one suited to employees, which in turn will differ from one designed for cell phone customers. But the concept is the same. Arbitration should provide an affordable, fair, efficient alternative to class actions.

- **The contract should explicitly require the arbitrator to rule on challenges to the arbitration agreement.** Last year the Supreme Court held in *Rent-a-Center West, Inc. v. Jackson,* 130 S.Ct. 2772 (2010) that if a contract contains a "delegation provision" assigning the arbitrator to rule on challenges to the arbitration agreement, courts must defer to the arbitrator. Without a delegation provision, challenges to arbitration agreements will be decided in the courts. Some lower courts are strongly biased against arbitration. Arbitrators, on the other hand, should have no bias against reasonable arbitration agreements and no bias in favor of arbitration agreements that make it impossible to resolve small individual claims. A delegation provision can help ensure that your arbitration program is judged fairly.

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