# AT&T v. Concepcion in Drug/Device Cases?

**Friday, May 20, 2011**

Like everybody else we took a look at the Supreme Court's decision in AT&T Mobility LLC v. Concepcion, slip op., 131 S. Ct. 1740 (U.S. 2011), on the Federal Arbitration Act's preemption of state law limiting the enforceability of class action waivers. However, just as the Capitol Steps' first reaction to a political scandal is "what rhymes with it?" our first reaction to major new precedent is "is it useful in drug/device litigation."

Our reaction to AT&T Mobility is "maybe." Reading the case, we don't think that it's possible to restrict it's scope just to class-action-based arbitrations, which is it's precise factual context. Rather, since the motivating force behind FAA preemption is the "liberal federal policy favoring arbitration," 131 S. Ct. at 1745, we'd have to say that state law purporting to invalidate limitations on **non-arbitration** class actions is *a fortiori* preempted. By that we mean that, if contractual limits on class actions **in** arbitration are enforceable under the FAA, given its arbitration-friendly policy, then contractual limits on class actions **outside of** arbitration are even more favored, since litigated class actions are even more invasive of arbitration rights.

So we think that AT&T Mobility invalidates all state law attempts to obstruct arbitration waivers involving class actions, whether the state is attempting to preserve class action in or out of arbitration.

However, drug and medical device manufacturers don't enter into contracts with patients. Also, personal injury class actions have all but disappeared in drug/device litigation. Thus it's unlikely that AT&T Mobility will have much effect on class actions involving end users of our client's products.

But that's not necessarily the end of it. Recently drug and device manufacturers have seen an onslaught of suits (most of which have been dismissed for one reason or another) brought by third-party payers. A fair number – enough to be more than just annoying – of them are brought as class actions. See Kinetic Co. v. Medtronic, Inc., 2011 WL 1485601 (D. Minn. April 19, 2011) (most of TPP class action dismissed on preemption grounds); In re Actiq Sales & Marketing Practices Litigation, 2011 WL 1103796 (E.D. Pa. March 23, 2011) (denying summary judgment on substantive grounds in TPP class action); District 1199P Health and Welfare Plan v. Janssen, L.P., ___ F. Supp.2d ___, 2011 WL 1086004 (D.N.J. March 21, 2011) (granting motion to dismiss against TPP class action); In re McKesson Governmental Entities Average Wholesale Price Litigation, ___ F. Supp.2d ___, 2011 WL 758858 (D. Mass. March 4, 2011) (partially granting certification motion in TPP average wholesale price litigation); Sergeants Benevolent Ass'n Health & Welfare Fund v. Sanofi-Aventis U.S. LLP, 2011 WL 824607 (Mag. E.D.N.Y. Feb. 16, 2011), adopted, 2011 WL 1326365 (E.D.N.Y. Mar 30, 2011) (denying class certification of TPP class action).

Well, TPPs often do enter into contracts directly with drug and device manufacturers. We think that, in the context of TPP litigation, AT&T Mobility would support arbitration provisions

precluding class actions and other representative litigation – at least as to state-law based claims. While the preemption analysis would not extend to federal statutory claims such as RICO, our impression is that the kind of state-law obstructionism that led to AT&T Mobility is not widespread with respect to federal question causes of actions.

So we'd recommend that drug/device manufacturers consider the value of arbitration clauses in their dealings with TPPs, with particular emphasis on the threat of TPP class actions.