

FINRA and Charles Schwab Battle over Class Action Waiver Clauses

February 28, 2012 by [Gregory Eisenreich](#)

Last October, [Charles Schwab & Company](#) ("Schwab") began inserting into its customer Account Agreements a class action waiver clause.

Schwab's Account Agreements require arbitration of any dispute arising out of a customer's use of Schwab's services. The waiver language that Schwab began inserting states that:

"You and Schwab agree that any actions between us and/or Related Third Parties shall be brought solely in our individual capacities. You and Schwab hereby waive any right to bring a class action, or any type of representative action against each other or any Related Third Parties in court."

Schwab's insertion of this waiver language followed the [United States Supreme Court's](#) decision in [AT&T Mobility v. Concepcion](#) in which the Supreme Court held that the [Federal Arbitration Act](#) preempted state laws that might otherwise limit the ability of companies to include a class action waiver clause in an arbitration agreement.

The *AT&T Mobility* decision invalidated a California Supreme Court decision, [Discover Bank](#), which had placed some limits on the ability to enforce class action waiver clauses in arbitration agreements. The United States Supreme Court reasoned that the Federal Arbitration Act preempted such state laws.

The [Financial Industry Regulatory Authority, Inc.](#) ("FINRA") instituted a [disciplinary proceeding against Schwab](#) taking the position that the Schwab class action waiver clause violated FINRA's rules.

It is FINRA's position that it:

"has enacted, and the SEC has approved, two applicable rules: first, that class actions cannot be arbitrated in the FINRA forum; and second, that member firms may not limit the rights of public investors to go to court for claims that cannot be arbitrated."

On the same day that FINRA instituted the disciplinary proceeding, Schwab filed a lawsuit, [Charles Schwab v. Financial Industry Regulatory Authority, Inc.](#), in [United States District Court, Northern District of California](#), seeking a declaration that FINRA may not enforce its rules to limit class action waiver clauses in arbitration agreements on the ground that such rules run afoul of the Federal Arbitration Act.

FINRA has noticed a motion to dismiss Schwab's complaint that is currently scheduled for hearing on April 3, 2012. In turn, Schwab has filed a motion for a preliminary injunction against FINRA that is also scheduled for April 3, 2012.

Error! No text of specified style in document.

Error! No text of specified style in document.

Page 2

[Barger & Wolen](#) will continue to follow this case as it can impact other financial service and insurance companies. If you have any questions, please contact [Gregory Eisenreich](#) at geisenreich@bargerwolen.com.