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# Class Actions Are Dead. Long Live Class Actions?: The Implications of *AT&T Mobility LLC v. Concepcion* for Employers

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As our colleagues who litigate consumer class actions reported in last week's client alert, the United States Supreme Court handed businesses a major victory last Wednesday, overturning California law to uphold a mandatory arbitration agreement that included a class action waiver. We take a more in-depth look at the decision with an eye toward what it means for employers.

## THE SUPREME COURT DECISION

In *AT&T Mobility LLC v. Concepcion*,[1] the arbitration provision at issue was part of a two-year AT&T service contract, requiring California residents Mr. and Mrs. Concepcion to arbitrate any disputes with AT&T and prohibiting them from adjudicating their disputes as part of a class action—commonly referred to as a "class action waiver."

The Concepcions challenged the arbitration agreement because of the class action waiver. The trial and appellate courts sided with the Concepcions and struck down the AT&T arbitration agreement based upon a rule established by the California Supreme Court in a 2005 case called *Discover Bank v. Superior Court*.[2] The *Discover Bank* rule holds:

> [W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' Under these circumstances, such waivers are unconscionable under California law and should not be enforced.[3]

In establishing the *Discover Bank* rule, the California Supreme Court considered the fact that lawyers and consumers were not likely to pursue individual claims where the potential damages are very small. In those situations, the reasoning goes, absent class actions, businesses could cheat consumers unchecked. A class action waiver would have the effect of insulating businesses from liability for illegal conduct and that would be unconscionable.

In *Concepcion*, a 5-4 decision authored by Justice Antonin Scalia, the Court declared there is a policy more important than California's public policy announced in *Discover Bank*: the liberal federal policy embodied in the Federal Arbitration

[1] No. 09-893, 2011 U.S. LEXIS 3367 (U.S. April 27, 2011).

[2] 36 Cal. 4th 148, 113 P.3d 1100 (2005).

[3] *Id.* at 162-63 (citation omitted).

Act (FAA)[4] that favors arbitration. Thus, the Court held that even though arbitration agreements are a matter of contract—subject to usual contract defenses such as unconscionability—where a state policy or defense is inconsistent with the purposes and policies of the FAA, the state policy is preempted by the FAA. In short, if the law were a game of Rock/Paper/Scissors, unconscionability would be paper and the *Discover Bank* rule scissors, but the FAA is rock. End of game.[5]

## THE IMPLICATIONS OF *CONCEPCION* FOR EMPLOYERS

*Concepcion* may bring sweeping changes for the employment class action landscape in the long term and it will certainly generate litigation regarding its scope in the short term. Although the case arose in the context of a consumer class action, the Supreme Court's ruling is broad and should apply to employer-employee arbitration agreements as well. This means that employers with mandatory arbitration agreements containing class action waivers may be able to protect themselves from class actions. The road away from class actions may, however, be paved with some bumps:

**Implementing an Arbitration Agreement with a Class Action Waiver May Sound Easier than It Is**

Before an employer can take advantage of *Concepcion*, it must have in place with its employees a valid arbitration agreement with a class action waiver. Because of *Discover Bank* and similar rules in other states, mandatory employment arbitration agreements until now typically did not contain class action waivers. Employers who have not previously adopted mandatory arbitration agreements or whose agreements do not address class actions will need to adopt agreements with waivers to benefit from *Concepcion*.[6]

Simply drafting an agreement with a waiver may not, however, be enough. The *Concepcion* Court relied in part upon some very proconsumer protections in the AT&T arbitration agreement in finding that consumers would be better off with individual arbitration than a class action. These protections included:

- AT&T must pay all costs for nonfrivolous claims;
- arbitration must take place in the county in which the customer is billed;
- for claims of $10,000 or less, the customer may choose whether the arbitration proceeds in person, by telephone, or based only on submissions;
- either party may bring a claim in small claims court in lieu of arbitration;
- the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages;
- AT&T has no ability to seek reimbursement of its attorney's fees; and

[4] 9 U.S.C. § 1 *et seq.*

[5] We are aware that the strict constructionists among you may bombard us with emails reminding us that paper beats rock. We plead poetic license.

[6] Last year, in *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), the U.S. Supreme Court held that parties to an arbitration agreement that does not affirmatively permit class arbitration cannot be compelled to arbitrate class claims (*see* our October 2010 *Employment Law Commentary*). Thus, an employee who is compelled to arbitrate claims against his or her employer under an arbitration agreement that is entirely silent as to class actions is also precluded from pursuing class claims in arbitration. In light of *Concepcion*'s express approval of class action waivers, rather than simply relying upon the rule in *Stolt-Nielsen*, employers who want to avoid class actions would be prudent to include in their arbitration agreements explicit class action waivers and to state explicitly, as the AT&T agreement did, that the arbitrator has no power to adjudicate class claims.

- in the event that a customer receives an arbitration award greater than AT&T's last written settlement offer, AT&T must pay a $7,500 minimum recovery and twice the amount of the claimant's attorney's fees.[7]

It is not clear whether an arbitration agreement with a class action waiver must contain each of these protections to be valid. The Court also left open the possibility that the states may apply state contract law to arbitration agreements with class action waivers to ensure the agreements are not otherwise unconscionable. The Court stated:

> Of course States remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class-action waiver provisions in adhesive arbitration agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms.[8]

The lower courts will presumably flesh out the necessary contours of an enforceable arbitration agreement with a class action waiver in the months and years to come. In the meantime, prudence dictates that agreements with class action waivers should track the provisions of the AT&T agreement as closely as possible.

Once an employer rolls out a new agreement, existing employees may challenge whether employers can require current employees to sign them. Employees with term employment agreements may be in a position to refuse changes to the contract during the term. At-will employees may resist efforts to impose new agreements by arguing that there is insufficient consideration to support the new agreement. And what if an employer terminates an existing employee who refuses to sign an agreement with a class action waiver? While the waiver is valid under the FAA, it is arguably still contrary to the public policy of California. Would a termination give rise to a claim for wrongful termination in violation of public policy? Only time will tell.

**Government Agencies that Enforce Labor and Employment Laws Are Not Likely to Take *Concepcion* Lying Down**

***The NLRB***

Section 7 of the National Labor Relations Act (the "Act") gives all employees, not just those who are represented by a union, the right to engage in "concerted activities." That right includes the right of employees to seek to improve their working conditions by turning to the courts for help.

A number of cases filed with the National Labor Relations Board ("NLRB") raise the issue of whether there is a conflict between the Act, which guarantees employees the right to seek the help of the courts, and general legal principles that uphold employee arbitration agreements, including those agreements that prohibit arbitrators from hearing class action claims.

So far, the NLRB has not issued a decision on this issue. However, the former NLRB general counsel, who prosecutes unfair labor practices before the Board, issued a Guideline Memorandum in June 2010, instructing NLRB regional directors on how to handle cases that raise this issue.[9] The memorandum reaches four conclusions.

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[7] *Concepcion*, 2011 U.S. LEXIS 3367, at *6-7. The Court also noted that the minimum recovery was increased to $10,000 in 2009. *Id.* at *7 n.3.

[8] *Id.* at *23 n.6.

[9] Memorandum from Ronald Meisburg, Gen. Counsel, NLRB, to All Regional Directors, Officers-in-Charge and Resident Officers, Memorandum GC 10-06 (June 16, 2010) (*available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d4580376447).

(1) Filing a class action lawsuit or arbitral claim is a protected activity and an employer that threatens, disciplines, or discharges an employee for such "concerted activity" violates Section 8(a)(1) of the Act.

(2) A mandatory arbitration agreement that could reasonably be read by an employee as prohibiting the employee from joining with other employees to file a class action lawsuit is unlawful.

(3) Employers may require individual employees to sign arbitration agreements waiving their right to file a class action, provided the wording of the agreement makes clear to employees their right to challenge the enforceability of these agreements without discipline or retaliation by the employer.

(4) An employee who has signed a class action waiver is still protected by the Act if he or she files a class action lawsuit. The employer, however, may lawfully seek to have the class action complaint dismissed by the court on the ground that the employee is bound to his or her waiver agreement.

Employers now using arbitration agreements with class action waivers, or those intending to do so, should carefully tailor the language of their agreements to meet the issues raised in the general counsel's Guideline Memorandum. Failure to do so may invalidate the entire agreement.

***Employment Discrimination and the EEOC***

The Equal Employment Opportunity Commission ("EEOC") and some courts take the position that employees may not contract away their statutory rights under Title VII of the Civil Rights Act or the Age Discrimination in Employment Act. For example, the EEOC asserts that typical provisions in a separation and release agreement in which employees promise not to sue their employers on released claims cannot prevent an employee from filing a charge of discrimination with the EEOC. Employees have a statutory right to file charges, and release agreements that purport to waive that right are unenforceable.

As a possible omen of things to come, just one day after the Supreme Court decided *Concepcion*, a federal court in the Southern District of New York issued a 35-page ruling refusing a request by the defendant employer to compel arbitration of discrimination claims despite a broad arbitration agreement calling for arbitration of all "matters arising out of or relating to or concerning th[e employment] Agreement, your hire by or employment with the Firm or the termination thereof, or otherwise concerning any rights, obligations or other aspects of your employment relationship in respect of the Firm."[10]

In *Chen-Oster*, three women filed a lawsuit under Title VII alleging a pattern and practice of discrimination by their employer Goldman, Sachs. The court acknowledged that the employer could not be compelled to arbitrate class claims under the parties' agreement; at the same time, however, the court stated that agreements cannot be enforced if they preclude the vindication of substantive rights. The court noted that pattern and practice claims under Title VII can, by their nature, only be brought as class actions, and therefore concluded that enforcing the arbitration agreement would deprive the plaintiffs of their substantive rights. The court did not mention *Concepcion* in its ruling: We may never know whether the *Chen-Oster* court intended this omission or simply did not learn of the *Concepcion* decision before releasing its ruling. If the latter, query whether the outcome in *Chen-Oster* would have been different had the court applied *Concepcion* to its analysis.

[10] *Chen-Oster v. Goldman, Sachs & Co.*, No. 10 Civ. 6950 (LBS) (JCF), slip op. at 3 (S.D.N.Y. April 28, 2011).

Aside from the Court's direct holding regarding compelled arbitration and class action waiver, pundits are already speculating about how the decision in *Concepcion* bodes for the parties in *Dukes v. Wal-Mart*, a case in which the lower court certified a class of potentially more than one million people in an employment discrimination lawsuit against Wal-Mart. Pending before the Supreme Court in *Dukes* is the issue of what standards the plaintiffs must satisfy to bring large and complex class actions. The *Concepcion* decision expresses overt hostility toward the class action process. The Court stated that with the consumer protections in the AT&T agreement, customers like the Concepcions with $30 claims would be better off pursuing individual claims in arbitration than class claims, which "'could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars.'"[11] The majority also dismissed without flinching the argument of the dissent that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system," finding that the FAA trumps state procedures, even if the state procedures are "desirable for unrelated reasons."[12] If this view of class actions prevails in *Dukes*, the Court may conclude that the class action device is not well suited to resolve the claims of more than one million people. We, along with employers around the country, will have to wait and see.

***And What About Wage and Hour Class Actions?***

By its terms, *Concepcion* should operate to compel employees who have signed arbitration agreements with class action waivers to resolve wage and hour disputes via arbitrations on an individual basis. This could potentially end wage and hour class actions as we know them. Will the U.S. Department of Labor or the California Labor Commission weigh in to the contrary? Will they urge the same kinds of considerations underlying the EEOC's position? How will the plaintiffs' bar respond? Again, only time will tell.

## CONCLUSION

Are employment class actions dead? While last rites may be in order (because you can never be too careful), it may be a tad premature to write the final obituary for the class action. In addition to the considerations discussed above, Congress could step in to resuscitate class actions. Congress has stepped in to nullify Supreme Court decisions before (remember Lilly Ledbetter!). With the House of Representatives currently controlled by Republicans, Congressional intervention is not likely this term, but 2012 is just around the corner.

In the meantime, *Concepcion* is the new law of the land and employers who want to limit exposure to class actions must consider prompt implementation of a carefully drafted mandatory arbitration agreement containing a class action waiver. Morrison & Foerster's employment and labor attorneys are available to assist employers in weighing the pros and cons of adopting such agreements as well as drafting and implementing them.

[11] *Concepcion*, 2011 U.S. LEXIS 3367, at *32-33 (quoting *Laster v. T-Mobile USA, Inc.*, No. 05cv1167 DMS (AJB), 2008 U.S. Dist. LEXIS 103712, at *37 (S.D. Cal. Aug. 11, 2008)).

[12] *Id.* at *32.

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