

U.S. Supreme Court Further Limits Class Action Arbitration

On April 27, 2011, the Supreme Court issued *AT&T Mobility LLC v. Concepcion*, in which the Court in a 5-4 opinion divided along ideological lines and delivered by Justice Scalia upheld class action waivers in arbitration clauses. The Court thus reversed the Ninth Circuit's decision holding such waivers unconscionable as a matter of California state law.¹

I. Background to *AT&T v. Concepcion*

The litigation was commenced by plaintiffs Vincent and Liza Concepcion in the District Court for the Southern District of California. The Conceptions alleged that AT&T violated California's unfair competition and false advertising laws when it promised a free AT&T cell phone, even though the Conceptions were ultimately required to pay sales tax on the full retail value of the phone.

In the District Court, AT&T moved to compel arbitration pursuant to the arbitration clause contained in the plaintiffs' service agreement. That clause expressly prohibited the use of class action arbitration. Plaintiffs countered that such prohibition was unconscionable as a matter of California law, relying on the California Supreme Court decision in *Discover Bank v. Superior Court*.² The District Court agreed with plaintiffs, and concluded that because the *Discover Bank* rule applied equally to arbitration and litigation, it was not preempted by § 2 of the Federal Arbitration Act (the "FAA"), which provides that an agreement to arbitrate is "valid, irrevocable, and enforceable . . . save upon such grounds as exist at law or in equity for the revocation of any contract."³ The Ninth Circuit affirmed.⁴

II. The Supreme Court's Decision

The Supreme Court reversed, holding that the application of the *Discover Bank* rule to arbitration clauses "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."

¹ *AT&T Mobility LLC v. Concepcion*, Docket No. 09-893, 560 U.S. ____ (2011) (available at <http://www.supremecourt.gov/opinions/10pdf/09-893.pdf>).

² 36 Cal. 4th 148 (2005).

³ *Laster v. AT&T Mobility LLC*, No. 05-1167, 2008 WL 5216255, **11-12 (S.D. Cal., Aug. 11, 2008).

⁴ *Laster v. ATT&T Mobility LLC*, 584 F. 3d 849, 855 (9th Cir. 2009).

The Court rejected plaintiffs' argument that because the *Discover Bank* rule was grounded in California's unconscionability doctrine and applied equally to litigation and arbitration, it is a ground that "exist[s] at law or equity for the revocation of any contract" and is permitted under FAA § 2. The Court noted that while § 2 preserves generally applicable contract defenses, it will not preserve "state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives" – that is, the liberal policy promoting arbitration – even if the state rule, by its terms, place arbitration and litigation on an equal footing.

Expounding on its decision last year in *Stolt-Nielsen*,⁵ the Court reiterated its view that permitting classwide arbitration threatens to fundamentally undermine the advantages of arbitration, which allow for a more expeditious dispute resolution process. The Court also agreed with AT&T that class action arbitration greatly increases the risk to defendants of large awards that could be "appealed" only on the limited grounds provided by the FAA for challenging an arbitration award. Faced with such disadvantages, the Court found that any rule requiring access to class action arbitration conflicts with the FAA's goal of promoting arbitration, and is thus preempted by the FAA.

The Court also disagreed with the policy concerns expressed by Justice Breyer's dissent – namely, the dissent's position that a class mechanism was necessary to permit the prosecution of small dollar claims that would otherwise slip through the legal system. The Court noted the consumer-friendly aspects of the arbitration clause at issue, which required AT&T to pay all costs on non-frivolous claims and to pay the consumer at least \$7,500 and twice the amount of the claimant's attorneys' fees if the claimant received an award greater than AT&T's last settlement offer. In the Court's view, these provisions meant that claims were in fact "most unlikely to go unresolved."

III. Conclusion

The Supreme Court's decision in *Concepcion* puts another nail in the coffin of class action arbitration in circumstances where the parties themselves did not expressly provide for class action arbitration in the arbitration agreement. It is now clear that a state rule requiring access to a class action mechanism cannot survive in the face of the liberal policy favoring arbitration contained in the Federal Arbitration Act.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

⁵ In *Stolt-Nielsen S.A. v. Animal Feeds International Corporation*, Docket No. 08-1198, 599 U.S. ____ (2010), the Court held that imposing class action arbitration on parties that had not expressly agreed to it is inconsistent with the FAA. See Cleary Gottlieb Alert Memo No. 34-2010, dated April 28, 2010.

New York

One Liberty Plaza
New York, NY 10006-1470
1 212 225 2000
1 212 225 3999 Fax

Washington

2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
1 202 974 1500
1 202 974 1999 Fax

Paris

12, rue de Tilsitt
75008 Paris, France
33 1 40 74 68 00
33 1 40 74 68 88 Fax

Brussels

Rue de la Loi 57
1040 Brussels, Belgium
32 2 287 2000
32 2 231 1661 Fax

London

City Place House
55 Basinghall Street
London EC2V 5EH, England
44 20 7614 2200
44 20 7600 1698 Fax

Moscow

Cleary Gottlieb Steen & Hamilton LLC*
Paveletskaya Square 2/3
Moscow, Russia 115054
7 495 660 8500
7 495 660 8505 Fax
* an affiliate of Cleary Gottlieb Steen & Hamilton LLP

Frankfurt

Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
49 69 97103 0
49 69 97103 199 Fax

Cologne

Theodor-Heuss-Ring 9
50688 Cologne, Germany
49 221 80040 0
49 221 80040 199 Fax

Rome

Piazza di Spagna 15
00187 Rome, Italy
39 06 69 52 21
39 06 69 20 06 65 Fax

Milan

Via San Paolo 7
20121 Milan, Italy
39 02 72 60 81
39 02 86 98 44 40 Fax

Hong Kong

Bank of China Tower
One Garden Road
Hong Kong
852 2521 4122
852 2845 9026 Fax

Beijing

Twin Towers – West
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
86 10 5920 1000
86 10 5879 3902 Fax

Buenos Aires

CGSH International Legal
Services, LLP-
Sucursal Argentina
Avda. Quintana 529, 4to piso
1129 Ciudad Autonoma de Buenos Aires
Argentina
54 11 5556 8900
54 11 5556 8999 Fax