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U.S. SUPREME COURT UPHOLDS CLASS ACTION WAIVERS IN ARBITRATION AGREEMENTS - HOW THIS RULING MAY IMPACT ARBITRATION PROVISIONS IN YOUR EMPLOYMENT, SALES AND OTHER AGREEMENTS

On April 27, with a narrow 5-4 majority, the United States Supreme Court issued a decision in *AT&T Mobility LLC v. Concepcion* upholding the enforceability of a consumer arbitration agreement which required that claims by the contracting parties be brought in their individual capacities and “not as a plaintiff or class member in any purported class or representative proceeding.” The Court held that the rule of the California Supreme Court in *Discover Bank v. Superior Court* (holding class action waivers to be unconscionable and unenforceable in many circumstances) is preempted by the Federal Arbitration Act (“FAA”), which generally allows arbitration agreements to be enforced as written. The Supreme Court’s decision thereby opens the door for inclusion of class action waivers in arbitration agreements.

Plaintiffs purchased AT&T mobile services, which were advertised as including free phones. Although they were not charged for the phones, plaintiffs were charged \$30.22 in sales tax based on the retail value of the phones. Despite the arbitration provision in the contract, plaintiffs filed an action in the Federal District Court for the Southern District of California alleging that AT&T engaged in false advertising and fraud. The case was consolidated with a putative class action.

AT&T moved to compel arbitration. The District Court denied the motion, finding the arbitration provision unconscionable because AT&T had not demonstrated that arbitration between the parties adequately substituted for the deterrent effects of class actions. The Ninth Circuit Court of Appeals affirmed, following the rule of *Discover Bank*.

The Supreme Court reversed. Although the FAA allows arbitration agreements to be declared unenforceable on grounds that exist under state law for the revocation of any contract, such as for fraud, duress, or unconscionability, the Supreme Court made it clear that “courts must place arbitration agreements on an equal footing with other contracts.” The Court concluded that “[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”

The Supreme Court’s decision is not limited to arbitration agreements in consumer contracts and, therefore, may have significant implications for arbitration provisions in all forms of contracts, including employment and residential consumer sales. Companies should review their contracts in light of the Court’s decision to determine whether to include arbitration provisions containing class action waivers.

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