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EMPLOYERS SHOULD CONSIDER WAIVERS OF CLASS CLAIMS IN LIGHT OF SUPREME COURT DECISION

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In ***AT&T Mobility LLC v. Concepcion***, a 5-4 Supreme Court struck down this week California's policy of prohibiting waivers of class claims in consumer arbitration agreements. The Court held that California's so-called "*Discover Bank* rule" conflicted with the Federal Arbitration Act. The *AT&T* decision is yet another statement of the strong federal policy favoring arbitration of disputes and may provide support to employers who want to include class waivers in employment agreements.

The FAA was enacted in 1925 in response to a widespread judicial hostility to arbitration agreements. (Sound familiar?) The FAA demands that arbitration agreements be provided the same discretion and deference as other contracts. In other words, if the arbitration agreement at issue – often, but not always, executed as part of a consumer transaction agreement – contains a dispute resolution procedure, that procedure should usually be followed. The only limitations, according to several Supreme Court decisions – are defenses typically used in all other contract disputes – fraud, duress or unconscionability.

The AT&T case was based on a consumer purchase of cellular phone service, under a contract that contained an arbitration clause. The arbitration clause provided that AT&T would pay all costs for non-frivolous claims, and would arbitrate in the county where the customer lived. On claims with a value of less than $10,000, arbitration could be conducted either in person, by telephone, or based on written submissions. The parties retained the right to go to small claims court, and the arbitrator had authority to award any relief, including injunctions and punitive damages, against AT&T. AT&T agreed that it could not seek reimbursement of attorneys' fees, and if the claimant obtained an arbitration award that exceeded AT&T's last written offer, AT&T agreed to pay a minimum of $7,500 (later increased to $10,000) and double attorneys' fees. These provisions are exceedingly fair by most standards.

However, the AT&T contract also prohibited the arbitration of class claims against AT&T.

In 2002, Vincent and Liza Concepcion purchased cellular service from AT&T, including a "free" phone, but they were charged sales tax on the retail value of the phone. Feeling duped, and after enjoying the free phone for four years, the Concepcions sued AT&T for falsely advertising the phone as "free." The Concepcions' claim was consolidated with a class action already pending in U.S. District Court for the Southern District of California.

AT&T moved to compel arbitration, but the district court denied the motion, even while finding that AT&T's arbitration clause was both fair and efficient. AT&T appealed to the U.S. Court of Appeals for the Ninth Circuit (which hears appeals from federal courts in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and Northern Mariana Islands), but the Ninth Circuit agreed with the district court.

Both the district court and the Ninth Circuit relied on a California Supreme Court decision from 2005, ***Discover Bank v. Superior Court***, which held that a class waiver in a consumer arbitration agreement is unconscionable if the agreement is considered a "contract of adhesion" (one that the other party feels he or she has no choice but to sign and no ability to negotiate), the dispute involves a small amount, and the party with inferior bargaining power alleges an intent to defraud. Known as the "*Discover Bank* rule," this holding practically eliminated any chance of avoiding a class action on an alleged mass consumer protection claim. In other words, the *Discover Bank* rule holds that arbitration agreements in these situations are *per se* unconscionable.

The 5-4 majority on the U.S. Supreme Court, however, found that the *Discover Bank* rule conflicted with the policy favoring arbitration set forth in the FAA. Justice Antonin Scalia, writing for the majority (joined by Chief Justice Roberts, and Justices Alito, Kennedy, and Thomas), noted that, no matter how generous and fair the arbitration provision may be, if the agreement prohibited class claims, California law took the draconian approach of finding the agreement unconscionable. Indeed, he noted, California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts.

Most importantly, Scalia said: "**The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.**" In this regard, Scalia said, an arbitration clause prohibiting class claims was no less valid than one providing for streamlined discovery or evidentiary procedures.

The *AT&T* decision could, and should, encourage employers to consider including waivers of class claims in employment arbitration agreements. Of course, they will want to ensure that the arbitration procedures are procedurally and substantively fair to the employees.

If you would like assistance in developing an employment arbitration agreement, or review of an existing agreement in light of the AT&T decision, please contact any member of Constangy's **California Offices**, Constangy's **Litigation Practice Group**, or the Constangy attorney of your choice.