

## High Court Upholds Class Action Waivers

---

May 6, 2011

A new Supreme Court decision allows sellers to avoid class actions by requiring disputes to be arbitrated individually. The decision applies to form consumer contracts, but may also help employers and franchisors enforce class action waivers where disputes must be arbitrated.

The facts of the case are simple. Vincent and Liza Concepcion contracted with AT&T for cell phone service. AT&T gave each of them a "free" phone, but charged \$30.22 sales tax on the phones' retail value. The form contract required any claims to be arbitrated, and provided: "YOU AND AT&T AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING." The agreement also contained a "blow up" clause avoiding arbitration if a court struck down the class action waiver.

Alleging consumer fraud, the Concepcions filed a lawsuit against AT&T in federal district court in California. The suit became part of a class action. The district court denied AT&T's motion to compel arbitration, relying on California's Discover Bank rule. In Discover Bank, the California Supreme Court held that clauses prohibiting class arbitration are "unconscionable" in consumer "contracts of adhesion" where there is no negotiation and individual damages are small. The federal court of appeals affirmed, but the U.S. Supreme Court reversed in a 5-4 decision on April 27, 2011. AT&T Mobility, LLC v. Concepcion.

The Supreme Court applied the Federal Arbitration Act (FAA), which requires courts to enforce agreements to arbitrate, and the Court's earlier decisions holding that the parties are free to agree on arbitration procedures. Because Concepcion was decided under the FAA, it applies only where a class action waiver is coupled with an agreement to arbitrate, and the contract has at least a minimal effect on interstate commerce. Courts remain free to apply state law where the FAA does not apply.

Federal and state courts in at least 20 states have held class action waivers are unconscionable, though in many states (like Michigan), the courts are divided on the issue. Some in Congress have sought to amend the FAA to exempt consumer and franchising contracts.

For more information, please contact:

Larry J. Saylor  
313.496.7986