

HEADING BACK TO CLASS

Companies that employ arbitration agreements, be these with clients, customers or employees, will be interested in a recent U.S. Supreme Court decision that makes it more likely that class action waivers in arbitration provisions will be enforced. This is big news.

In *AT&T Mobility, LLC v. Concepcion*,¹ the Supreme Court ruled that the Federal Arbitration Act (FAA), which provides for private dispute resolution through arbitration in lieu of litigation, preempted a prior California Supreme Court decision that made most class action waivers in consumer arbitration agreements unconscionable (never a good thing for the corporate defendant) and therefore unenforceable (a really bad thing for the defendant). For those interested in class actions, this discussion can also be read in tandem with last month's ER Alert on the changing rules for class action certification after the *Dukes v. Wal-Mart* decision.²

HEAD OF THE CLASS?

The case arose from a consumer products dispute. The sales agreement in place contained an arbitration provision requiring all claims to be brought individually and not as a class. Despite the arbitration requirement, suit was brought in federal court and later consolidated with a putative class action. In response, the defendant sought to compel arbitration as required in the sales agreement. The District Court denied the motion based on an earlier California Supreme Court decision³ that held that an arbitration provision was unconscionable under California law due to the fact that it barred class actions (referred to as the *Discover Bank* rule). On appeal, the Ninth Circuit agreed and affirmed, for the same reasons. The Ninth Circuit went further and held that the *Discover Bank* rule was not preempted or barred by the FAA.

By a 5-4 margin, the U.S. Supreme Court reversed the Ninth Circuit, holding that the *Discover Bank* rule is preempted by the FAA. The Court stressed that the principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their



CONTRACTS OF ADHESION:

Standardized contract forms offered to consumers of goods and services on essentially a "take it or leave it" basis without affording consumers any realistic opportunity to bargain and under such conditions that consumers cannot obtain desired products or services except by acquiescing to the contract form. A distinctive feature of adhesion contracts is that the weaker party has no realistic choice as to its terms. In recognition that these contracts are not the result of traditionally "bargained" contracts, the legal trend was to relieve parties from onerous conditions imposed by such contracts.

Black's Law Dictionary



terms; that “[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute.”

The Court held that refusing to enforce arbitration provisions which bar class actions would interfere with a fundamental attribute of arbitration and be inconsistent with the FAA and the parties’ agreement. It was not persuaded that the *Discover Bank* rule should be enforced, because the rule applies solely to contracts of adhesion. Instead the majority pragmatically stated that “the times in which consumer contracts were anything other than adhesive are long past.”⁴

THE FUTURE WILL BE SOONER THAN YOU THINK

We can expect legislative initiatives on class action waivers in arbitration agreements.⁵ While firms consider what this means for their existing arbitration provisions and corporate defense lawyers rush to shift class action plaintiffs into arbitration, the question of the hour is how this decision will apply outside the context of consumer disputes in, say, employment matters. The application of this decision in the employment law context will no doubt face a number of challenges.

This decision is **not** likely to have any impact on securities class actions and any other situation where there is no contract between the parties in which an arbitration agreement (with a class action waiver) could be inserted.⁶ It will also have no impact on areas where mandatory arbitration provisions are prohibited – such as contracts between car dealers and auto manufacturers, and residential mortgage loans.⁷ But this still leaves a lot of room for maneuvering.

LOOKING BACK TO SEE AHEAD

Federal agencies, such as the Equal Employment Opportunity Commission (EEOC), may take action to promote collective (or class) litigation against employers they deem to be violating federal law.

NOTE: The EEOC and the National Labor Relations Board (NLRB) are not themselves party to any arbitration agreements in the workplace (with or without class action waivers). So even where one’s employees may be party to and subject to an arbitration agreement and class action waiver, these governmental entities are not and may bring actions to benefit a class where they see fit.

Prior to the current decision, following a directive of the former NLRB General Counsel,⁸ the NLRB had issued complaints against companies that maintain class action waivers in pre-dispute arbitration agreements with employees on the theory that such agreements interfere with employees’ statutory right to engage in concerted activity:

Analysis of mandatory arbitration programs should be guided by the following principles:
... (2) Any mandatory arbitration agreement established by an employer may not be drafted using language so broad that a reasonable employee could read the agreement and/or related employer documents as conditioning employment on a waiver of Section 7 rights, such as joining with other employees to file a class action lawsuit to improve working conditions.⁹

Expect much more to follow in the near future.

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¹ *Discover Bank v. Superior Court*. 36 Cal. 4th 148

² http://www.willis.com/Documents/Publications/Services/Executive_Risks/2011/ER_Alert_No58_Wal_Mart_July.pdf

³ *Discover Bank v. Superior Court*.

⁴ The Court went on to observe that states are free to take steps to address concerns related to adhesion contracts by requiring class-action-waiver provisions in arbitration agreements to be highlighted, for example, but that such steps cannot conflict with the FAA or frustrate its purpose to ensure that arbitration agreements are enforced according to their terms.

⁵ Senator Franken has re-introduced the Arbitration Fairness Act, which would effectively overturn *Concepcion*.

⁶ See, "Has Scalia Killed The Class Action?" <http://blogs.forbes.com/danielfisher/2011/05/20/has-scalia-killed-the-class-action/>

⁷ *Ibid*.

⁸ MEMORANDUM GC 10-06 from the former General Counsel Meisburg on June 16, 2010.

⁹ Section 7 of the NLRA guarantees employees the right to engage in concerted activities for the purpose of mutual aid and protection.