

High court case could eviscerate consumer class actions

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By Dolan Media Newswire

Class action lawyers who represent consumers and employees are bracing themselves for the possible end of practice as they know it.

The cause of their anxiety: a Supreme Court case that has garnered little attention but could wipe out class actions involving consumer contracts or employment agreements that contain arbitration provisions.

The court agreed to decide whether the Federal Arbitration Act pre-empts state laws on the unconscionability of class action waivers in reviewing the 9th Circuit's decision in *AT&T Mobility v. Concepcion*.

"I think that there are sort of three broad types of potential outcomes: consumers will win the case outright; consumers will lose in a very small way; or consumers will lose in a huge way," said **F. Paul Bland Jr., a senior attorney at Public Justice in Washington, D.C.**, who litigates consumer class actions.

"Many business lawyers I know think consumers are going to lose in a huge way and it will wipe away consumer class actions across the country, but I think it could easily come out in a much more pro-consumer way," Bland said.

At risk are consumer claims against banks and credit card, telecom and other companies, as well as wage and hour disputes whose small individual values make them practical only if brought as class actions.

Michael Donovan, a class action plaintiffs' attorney with Donovan Searles in Philadelphia, filed an amicus brief in the case. He said that a defense win would "effectively destroy consumer remedies across 50 states."

Bland, who is licensed in Maryland, agreed that such a ruling would be "incredibly harmful to consumers and employees around the country." But, he says, "*Concepcion* will not matter as much in Maryland as it will in the rest of the country" because the Court of Appeals, in *Walther v. Sovereign Bank*, applied state law in holding that class action bans are enforceable.

"Maryland is one of the states with the weakest civil rights and consumer rights in the nation," Bland explained. "In any contract with an arbitration clause, class action bans are just automatically enforced. Right now, there are tons of Maryland consumers who come in with all sorts of ugly scams by cell phone companies, car dealerships and predatory lenders" — cases that Bland says he is forced to turn down.

According to Bland, Maryland is one of only four states to hold that class action bans are always enforceable. He thinks *Concepcion* is an "effort to put a lid on" the recent rash of pro-consumer cases in other states.

Brian Wolfman, a visiting professor at Georgetown University Law Center, expressed a similar view.

“Sometimes when lots of litigation is percolating,” Wolfman said, “the court for whatever reason wants to jump in rather early and put a halt to something.”

Concepcion is “the other shoe waiting to drop” after last term’s ruling in *Stolt-Nielson v. AnimalFeed International Corp.*, said Michael Rubin, an employment lawyer with Alschuler Berzon in San Francisco. In that case, the court held that classwide arbitration was inconsistent with the Federal Arbitration Act unless the parties expressly agreed to class actions in the arbitration agreement.

‘Free’ phone

So far, the consumers have prevailed in *Concepcion*, in which AT&T customers alleged that an offer to receive a “free” phone if they signed up for wireless service was fraudulent because the company then charged sales tax on the retail value of the phone.

AT&T sought to enforce a mandatory arbitration provision that barred class actions.

The trial court found the class action waiver was unconscionable under state law, and that the Federal Arbitration Act did not pre-empt state law.

The 9th Circuit agreed.

The Supreme Court will hear argument in the case in November.

How worried should plaintiffs’ class action lawyers be?

“Terrified,” Rubin said.

Not so, said Andrew Trask, a class action defense lawyer with McGuire Woods in McLean, Va.

Even if the Supreme Court finds that state law is pre-empted, Trask said, savvy plaintiffs’ lawyers can still look to the federal common law on unconscionability, however sparse, in their efforts to have class action waivers stricken.

Wolfman, who defeated a pre-emption claim and went on to win for the consumer in *Wyeth v. Levine*, declined to make any predictions.

“We’re going to know next spring,” he said. “I’m a litigator, not a bookmaker.”

Daily Record Assistant Legal Editor Erin Drenning contributed to this article.