

# Supreme Court

## Consumer

### Hanging in the Balance: SCOTUS Will Decide If Class Action Bans Are Enforceable

As the Supreme Court oral argument approaches in the hotly contested case *AT&T Mobility v. Concepcion*, advocates on both sides tell BNA they can agree on one thing: The stakes in this case are enormous and a decision for either side will fundamentally reshape the arbitration landscape in consumer, employment and civil rights class actions.

The case, scheduled to be argued in the high court Nov. 9, involves AT&T Mobility customers Vincent and Liza Concepcion, who seek to recoup \$30 in sales taxes they claim they were unfairly charged for phones advertised as free.

The Concepcions' service agreement with AT&T included an arbitration provision waiving the right to proceed as a class action. The Concepcions argued successfully to the Ninth Circuit that the class action waiver is unconscionable and unenforceable under California law, and AT&T appealed to the Supreme Court.

The high court is now being asked to decide whether the Federal Arbitration Act preempts states from imposing conditions, such as the availability of class arbitration, on the enforceability of an arbitration agreement.

The case pits the business community—that views bilateral (individual) arbitration as an efficient and fair tool for vindicating individual rights—against consumer advocates who see class actions, or in this case, class-wide arbitration, as a vastly superior alternative that benefits more people and deters wrongful conduct by corporations.

**The Stakes.** In a series of interviews, attorneys and law professors told BNA that a sweeping decision in favor of AT&T could short circuit the lion's share of consumer, civil rights and employment class actions. On the other hand, attorneys say that an opinion favoring the Concepcions will severely hinder the use of arbitration in states that have refused to enforce class arbitration waivers.

"It is a crossroads for the FAA," one attorney said about the case. "It's going to determine as a practical matter whether there is going to be consumer class arbitration in the future."

Jean R. Sternlight, Saltman Professor at the UNLV Boyd School of Law who has written extensively on arbitration issues said, "This is a huge case because it puts in jeopardy the major tool courts have used to police egregiously unfair arbitration clauses. Some companies are using small print provisions to impose arbitration on their customers and employees primarily as a tool to protect the companies against the threat of class actions."

Sternlight said that if the Supreme Court agrees with AT&T's preemption argument, then all lower court unconscionability findings in arbitration cases will be subject to preemption arguments. This will create a great deal of uncertainty, and add lots of expense and delay to litigation over class action exclusions, she said.

Alan S. Kaplinsky, a partner at Ballard Spahr LLP in Philadelphia who pioneered the use of pre-dispute arbitration provisions in consumer contracts described the stakes in different terms. "The impact of the opinion will be huge, regardless of what the Court does."

A decision in favor of the Concepcions "will cripple—but not kill—consumer and employment arbitration in the several states whose courts have already invalidated class action waivers," Kaplinsky said; conversely, a decision for AT&T "will open the door to arbitration in the states like California that have been hostile to it, with the only question being whether a company must copy the AT&T [arbitration] provision."

Roy T. Englert Jr., counsel of record on the amicus curiae brief filed by the Chamber of Commerce in support of AT&T and partner at Robbins Russell Englert Orseck Untereiner & Sauber LLP in Washington D.C., said, "This really is almost the beginning and end of arbitration in California."

Englert said that businesses generally have no interest in arbitration if it requires class treatment because of the limited standard of review for arbitration. Because this is a Supreme Court case and other states could follow California's lead, it could have a major effect on the availability of arbitration nationwide, Englert posited.

The Supreme Court's grant of certiorari is already impacting class actions that are in progress. In some cases, defendants are retracting offers and walking away from the settlement table while this case is pending. F. Paul Bland Jr., attorney for amicus curiae Marygrace Coneff in support of the Concepcions and staff attorney at the public interest law firm Public Justice, said.

**Follow up to *Stolt-Nielsen*?** Some see the case as the logical follow up to the court's decision last term in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* (U.S. April 27, 2010), (11 CLASS 432, 5/14/10) which dealt an initial blow to class arbitration by holding that it cannot be imposed without the affirmative consent of the parties involved.

In that case, Justice Samuel A. Alito Jr. wrote that the decision to arbitrate a dispute on a class-wide basis is not simply a procedural matter best left to the discretion of an arbitrator. Rather, he said that "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator."

Alito wrote that when an arbitration agreement is silent, an implicit agreement to authorize class arbitra-

tion is not a term that arbitrators may infer solely from the fact of an agreement to arbitrate.

*Concepcion*, on the other hand, brings into play Section 2 of the FAA, 9 U.S.C. § 2, which states that an arbitration agreement “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”

The question for the court is whether, by applying California’s rule regarding unconscionability, the lower court was relying on a ground “for the revocation of any contract” when it voided a class arbitration waiver contained in the parties’ arbitration agreement, or whether the state rule itself impermissibly singles out arbitration agreements for harsher treatment.

**The Concepcions File Suit.** The Concepcions filed this lawsuit in 2006 in the U.S. District Court for the Southern District of California alleging that the practice of charging a sales tax on a phone advertised as “free” was fraudulent. Their case was consolidated with *Laster v. T-Mobile USA Inc.*, 407 F. Supp. 2d 1181 (S.D. Cal. 2005), a putative class action that raised the same issues.

The district court denied AT&T’s motion to compel arbitration, finding that the class waiver provision of the parties’ arbitration clause was unconscionable and therefore unenforceable under California law, and that California unconscionability law was not preempted by the FAA.

**The Ninth Circuit’s Decision and *Discover Bank*.** On appeal, the Ninth Circuit affirmed that the class action waiver was unconscionable under California law (10 CLASS 1008, 11/13/09).

The Ninth Circuit applied the California Supreme Court’s three-part test articulated in *Discover Bank v. Sup. Ct.*, 113 P.3d 1100 (Cal. 2005) (6 CLASS 472, 7/8/05), for determining whether a class action waiver in a consumer contract is unconscionable.

The *Discover Bank* test finds that class action waivers act as exculpatory clauses and should not be enforceable when (1) the waiver is found in a consumer contract of adhesion (2) in a setting in which disputes between the contracting parties predictably involve small amounts of damages; and (3) when it is alleged that the party with superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.

The Ninth Circuit found that all three prongs applied to the arbitration agreement between AT&T and the Concepcions, and that a premium payment provision in the agreement could not save it from unconscionability.

AT&T’s “premium” or “bump-up” provision provides for a payment of \$7500 if a customer receives an arbitration award greater than the amount of AT&T’s last written settlement offer provided before an arbitrator is chosen.

The Ninth Circuit said that this bump-up provision means that AT&T will predictably pay the face value of the claim, but the problem is that not every aggrieved customer will file a claim. AT&T will greatly reduce its aggregate liability for “allegedly mulcting small sums of money from many customers,” the appeals court said.

“AT&T’s class action waiver is in effect an exculpatory clause, hence substantively unconscionable,” the court wrote.

### States That Have Invalidated Class Waivers

#### High Courts:

Alabama, California, Illinois, Massachusetts, Missouri, New Jersey, New Mexico, North Carolina, South Carolina, West Virginia, and Washington

#### Other Courts:

Arizona, Delaware, Florida, Georgia, Michigan, Ohio, Oregon, Pennsylvania, and Wisconsin

—from *Brief for Respondent, Appendix*

**Preemption and FAA’s ‘Savings Clause.’** The Ninth Circuit also held that the Federal Arbitration Act does not expressly or impliedly preempt California law regarding the unconscionability of class action waivers in consumer contracts.

Section 2 of the FAA provides that arbitration clauses “shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract.” This “savings clause” has been interpreted to mean that a state law ground used to revoke an arbitration provision will be preempted by the FAA if that same ground is not also available to revoke a contract in general.

AT&T argued that the *Discover Bank* rule abandons California’s generally applicable sliding-scale approach to unconscionability, where substantive and procedural unconscionability, while both required, do not need to be present to the same degree.

The *Discover Bank* rule is a new rule only applicable to arbitration agreements and therefore unenforceable under Section 2’s savings clause, AT&T argued. The Ninth Circuit disagreed, saying that the *Discover Bank* rule is “simply a refinement of the unconscionability analysis applicable to contracts generally in California.”

AT&T appealed to the U.S. Supreme Court, and the Court granted certiorari in the case on May 24 (11 CLASS 480, 5/28/10).

**AT&T’s Brief.** In its brief, petitioner AT&T reprised its argument that California’s *Discover Bank* unconscionability test does not apply equally to all contracts and is arbitration-specific in violation of Section 2 of the FAA.

In other contexts, AT&T contends, California equates unconscionability with “terms that are shocking to the conscience—terms to which only a person under delusion would agree.” But the lower courts invalidated AT&T’s arbitration provision even while recognizing that a customer is likely to get full relief under the agreement and a reasonable person may prefer individual dispute resolution to participating in a class action.

California’s generally applicable unconscionability doctrine turns on the substantive unfairness of the contract provision at issue, but California’s *Discover Bank* rule, AT&T asserts, “turns on social policy concerns relating to deterrence, not substantive unfairness.”

AT&T also argues that the FAA’s core purpose is to ensure enforcement of arbitration agreements according to their terms, and that California’s refusal to en-

