



---

# is there an end in sight to wage/hour and other class actions against employers?

---

*MSK Client Alert*

May 4, 2011

*By Steven M. Schneider*

On April 27, 2011, the U.S. Supreme Court in *AT&T Mobility v. Concepcion* held that the Federal Arbitration Act ("FAA") preempts a California Supreme Court rule frequently used by California courts to prohibit class action waivers in consumer arbitration agreements. The *AT&T Mobility* decision has many far-reaching implications, including providing legal support for upholding class action waivers in employee arbitration agreements -- which could put an end to wage/hour and other class actions against employers who require such a waiver in employee arbitration agreements.

In *AT&T Mobility*, two California consumers, Vincent and Liza Concepcion, entered into an agreement with AT&T Mobility ("AT&T") for the sale and service of cell phones. AT&T advertised that it would provide free phones to purchasers of its cellular service. While AT&T did not charge the Conceptions for their cell phones, it did charge them \$30.22 in sales tax based on the phones' retail value.

The cellular contract required customers to resolve their disputes with AT&T in individual arbitration and expressly prohibited class-wide arbitration and litigation. Despite that arbitration agreement, the Conceptions filed a federal lawsuit that was consolidated with a class action case alleging, among other things, that AT&T's offer of a "free" phone was fraudulent because of the sales tax charge.

Under California law, courts may refuse to enforce any contract found "to have been unconscionable at the time it was made" or may "limit the application of any unconscionable clause." Cal. Civil Code § 1670.5(a). A finding of unconscionability requires "a 'procedural' and a 'substantive' element, the former focusing on 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly harsh' or 'one sided' results." *Armendariz v. Foundation Health*

## **practice areas**

class action defense

employment litigation & counseling

labor & employment

labor litigation & counseling



## is there an end in sight to wage/hour and other class actions against employers?

---

*Pyschcare Servs., Inc.*, 24 Cal. 4th 83, 114 (2000).

AT&T moved to compel arbitration under the terms of its contract with the Concepcion. The federal district court denied AT&T's motion, holding that AT&T's arbitration clause was unconscionable. The district court reached this conclusion in reliance upon the California Supreme Court's decision in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), which held that a class action waiver in a consumer arbitration agreement is unconscionable if the contract is an adhesion (take it or leave it) contract, the disputes involve a small amount of money, and the party with inferior bargaining power alleges a deliberate scheme to defraud. The U.S. Court of Appeals for the Ninth Circuit affirmed the finding of unconscionability.

The U. S. Supreme Court overturned the Ninth Circuit in a 5-4 decision authored by Justice Scalia and joined by Chief Justice Roberts and Justices Alito, Kennedy, and Thomas. The Supreme Court majority concluded that the *Discover Bank* rule conditioned enforceability of certain arbitration agreements on the availability of class-wide arbitration and held that the FAA preempts such a rule because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

The Supreme Court majority noted that California strikes down arbitration agreements more than other contracts and has frequently used the *Discover Bank* rule to find arbitration agreements unconscionable. Also, by effectively requiring class-wide arbitration, the *Discover Bank* rule increases the complexity of arbitration and discourages parties from entering into agreements to arbitrate. That rule accordingly discriminates in practice against arbitration, and so undermines the intent of the FAA, which is "to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of class-wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."

Justice Stephen Breyer dissented, joined by Justices Ginsburg, Sotomayor, and Kagan. Justice Breyer argued that the *Discover Bank* rule is not preempted by the FAA because it is merely the result of applying the principle of unconscionability, which also applies to contracts other than arbitration agreements, and because it does not create a "blanket policy in California against class action waivers in the consumer context" - only some, but not all, class action waivers in consumer contracts are unconscionable under the *Discover Bank* rule.

The principles set forth in the *AT&T* ruling are generally applicable in the employment arbitration context. For example, the California Supreme Court in *Gentry v. Circuit City* relied on *Discover Bank* to find a class action waiver in an employment arbitration agreement unconscionable. It is difficult to discern how the *Gentry* decision can continue as precedent after the Supreme Court's decision in *AT&T*.

The U.S. Supreme Court has now issued decisions in two successive years that indicate it is likely to interpret the FAA in favor of bilateral arbitration per the express provisions of the parties' arbitration agreement, and disfavor class-wide arbitration. In its earlier decision in *Stolt-Nielson v. Animalfeeds International Corp.*, 130 S. Ct. 1758 (2010), the Supreme Court held that under the FAA an arbitrator cannot impose class-wide arbitration when the arbitration agreement is silent on that issue.



## is there an end in sight to wage/hour and other class actions against employers?

---

### ASK MSK - Q&A Section

**Q:** How should California employers react to the AT&T ruling?

**A:** As a result of the AT&T decision, employers who have employee arbitration agreements should consider inserting express class action waivers or revising existing language regarding class-wide claims. Moreover, employers should consider adding language making clear that its arbitration agreements are governed by the FAA. Employers who in the past decided against employee arbitration agreements should reconsider, especially in light of the high cost of class actions in any forum, the threat of extremely broad class actions unless the Supreme Court limits them in its review of *Dukes v. Walmart*, 605 F. 3d 571 (9th Cir. 2010), and the continued proliferation of wage and hour and other class actions against California employers.

**Q:** If an employer adds a class action waiver to its employee arbitration agreements, how likely is it that a California court will enforce that waiver given California precedent finding class action waivers unconscionable?

**A:** California courts are supposed to follow the AT&T decision, but at least some California courts might attempt to distinguish AT&T when considering class action waivers in the employment context, which could lead to another U.S. Supreme Court decision. However, it seems prudent to include a class action waiver in employee arbitration agreements now rather than waiting for the issue to play out in the courts, which could take years. Including a class action waiver now at a minimum should provide increased bargaining leverage in settlement discussions, and many lower courts presumably will uphold such waivers in compliance with the AT&T decision.

MSK's Labor and Employment Law Group is ready to assist employers who want to include class action waivers in employee arbitration agreements.