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PRESS RELEASE

Wiley Rein *Amicus* Brief on Behalf of Law Professors Helps Secure Important Consumer Arbitration Clause Victory at the U.S. Supreme Court

April 29, 2011

On April 27, the Supreme Court held in *AT&T v Concepcion*, No. 09-893, that the Federal Arbitration Act (FAA) preempted a California ruling that conditioned the enforceability of arbitration agreements on the availability of classwide arbitration procedures. In *Discover Bank,* the California Supreme Court held that agreements that required bilateral arbitration and did not allow for class treatment or representative actions were unconscionable and contrary to public policy and therefore unenforceable in California. New Jersey and several other states had also invalidated class action waivers in arbitration clauses for similar reasons.

The Supreme Court, in a 5-4 decision, held that the FAA, 9 U.S.C. § 1 et seq. preempted state law in these circumstances and that class action waivers in arbitration clauses are fully enforceable. In an opinion written by Justice Scalia, the Court reaffirmed that, "[a] rbitration is a matter of contract, and the FAA requires courts to honor parties' expectations." Op. at 17. Class arbitration thus cannot be imposed without the parties' consent. In this case, California's rule requiring the availability of classwide arbitration was preempted because the rule "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." Op. at 9.

Justice Thomas provided the fifth vote for preemption based on a statutory theory of express preemption put forward in an *amicus* brief filed with the Court by Wiley Rein on behalf of a group of distinguished law professors. Justice Thomas found in his concurrence

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that the text of Sections 2 and 4 of the FAA require "that an agreement to arbitrate be enforced unless a party successfully challenges the formation of the arbitration agreement, such as by proving fraud or duress." Concurrence at 1-2. Justice Thomas concluded that "[c]ontract defenses unrelated to the making of the agreement-such as public policy-could not be the basis for declining to enforce an arbitration clause." Concurrence at 4. Thus, it appears that the theory put forth in the Wiley Rein brief helped secure the crucial fifth vote for preemption in *Concepcion*.

Concepcion is undoubtedly the most important preemption case of this Term. It may be the most important class action case in decades and, along with the still pending case of *Wal-Mart v. Dukes*, No. 10-277 (argued Mar. 29, 2011), could completely change the playing field in the area of consumer class actions. Wiley Rein has extensive experience in drafting and defending consumer arbitration agreements in state and federal courts across the country and can assist any retail-facing business in taking full advantage of the ruling in *Concepcion.*

The Wiley Rein *amicus* brief was authored by Andrew G. McBride, Thomas R. McCarthy and Michael Connolly.