May 2, 2011

Last Wednesday, the United States Supreme Court held in *AT&T Mobility LLC vs. Concepcion* that the Federal Arbitration Act ("FAA") permits companies to require customers to arbitrate their complaints individually, precluding class action claims. Specifically, the Court held that the FAA prohibits state laws that condition the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures. Consequently, companies can now require consumers to arbitrate any and all disputes and prevent the disputes from being decided on a classwide basis in arbitration.

The arbitration agreement at issue in the *AT&T* case was contained in a contract for cell phone services between AT&T and two customers (the Concepcions). Among other things, the agreement provided for arbitration of all disputes between the parties, but required that claims be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." The Concepcions sued AT&T in the United States District Court for the Southern District of California, and their complaint was consolidated with a putative class action alleging false advertising. AT&T moved to compel arbitration of the Concepcions' claims, but both the District Court, and the Ninth Circuit in a subsequent appeal from the District Court's decision, relied on the California Supreme Court's decision in *Discover Bank v. Superior Court,* 36 Cal. 4th 148 (2005), to conclude that the arbitration provision was unconscionable because it prohibited class proceedings.

The Supreme Court reversed. Emphasizing the "liberal federal policy favoring arbitration," the Court concluded that California's *Discover Bank* rule, which classified most class or collective arbitration waivers in consumer contracts as unconscionable, "stands as an obstacle" to the objectives of the FAA, and is therefore preempted.

In the wake of this decision, many companies are considering adding similar arbitration provisions to their customer agreements and employment contracts. For certain companies, these provisions may be beneficial. There are, however, a number of issues a company should consider before deciding to add such a provision, including:

- Would it actually benefit a company to face potentially numerous individual arbitrations (which may require the company to pay costs and attorneys' fees) in various locations around the United States rather than fewer class action lawsuits?
- Does the company want to draft the provision to include *all* types of claims in an arbitration provision, or only certain types?
- How should the arbitration provision be drafted to avoid being considered unenforceable for alternative reasons?
- How does a company effectively modify existing customer agreements, online terms and conditions of use, and other consumer contracts to include such a provision?

In other words, while provisions similar to that in *AT&T* might be beneficial to some companies, one size does not fit all and companies should consult legal counsel to determine whether and what type of arbitration provision is in their best interests.

Cooley LLP has considerable experience not only in successfully compelling arbitration based on binding agreements—having secured victories in both the United States and California Supreme Courts upholding arbitration of claims originally initiated as class action lawsuits—but also has extensive experience in drafting enforceable arbitration agreements. If you have any questions about arbitration clauses or this *Alert,* please contact one of the attorneys listed above.

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