

## Supreme Court Alert

### Supreme Court Upholds Arbitration Agreements That Preclude Class Actions

April 28, 2011

On April 27, 2011, the U.S. Supreme Court issued its [decision](#) in *AT&T Mobility CCP v. Concepcion*, ruling in favor of defendant AT&T. The Supreme Court held that the Federal Arbitration Act (FAA) preempts state laws (like California's) that ban arbitration provisions requiring arbitration to be conducted on an individual basis (i.e., agreements that include "class waiver" provisions).

In *Discover Bank v. Superior Court*,<sup>1</sup> the California Supreme Court held that (i) arbitration agreements that include class waiver provisions may be found unconscionable (and, therefore, unenforceable) under state law if the agreement is an adhesion contract, (ii) disputes between the parties are likely to involve small amounts of money and (iii) the party with inferior bargaining power alleges a deliberate scheme to defraud. The *Discover* court relied on FAA section 2, which provides that arbitration agreements are "valid, irrevocable and enforceable save upon grounds as exist in law or equity for the revocation of any contract," as well as state statutes of general application.

The 9th Circuit affirmed a district court decision following *Discover Bank* to hold that an arbitration agreement with a class waiver provision was unenforceable, even though the agreement contained provisions the district court believed were likely to prompt full or even excess payment to the customer without the need to arbitrate or litigate. (Other circuit courts of appeal, including, quite recently, the 2nd Circuit, have reached similar conclusions on the basis of state law.)

In a 5-4 decision authored by Justice Scalia, the Supreme Court reversed, holding that application of what it termed "the *Discover Bank* rule" would frustrate the purposes of the FAA by interfering with the "fundamental attributes of arbitration," including procedural informality, and by exposing defendants to excessive risk given the unavailability of appellate review.

Justice Breyer wrote a dissenting opinion joined by Justices Ginsburg, Sotomayor and Kagan. The dissenters stressed that small-dollar claims might go unresolved if class treatment is unavailable in arbitration.

This case is important to businesses that include arbitration provisions in their agreements with customers or employees. The new case confirms that "the FAA prohibits States from conditioning the enforceability of ... arbitration agreements on the availability of classwide arbitration procedures,"<sup>2</sup> at least when the agreements are as favorable as AT&T's to the party with inferior bargaining power. This case has the potential to eliminate many class actions by requiring claimants to pursue individual actions in arbitration. Businesses will want to review their current arbitration provisions in light of this decision.

<sup>1</sup> 36 Cal. 4th 148 (2005).

<sup>2</sup> Slip Op. at 1.



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