EMPLOYMENT LAW ALERT

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AT&T Mobility v. Concepcion: Unprecedented Support for Class Action Waivers in Employment Arbitration Agreements

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The Supreme Court's recent decision in *AT&T Mobility v. Concepcion*[1] ("*Concepcion*") has justifiably generated a lot of buzz. In holding that the Federal Arbitration Act ("FAA") preempts California's rule invalidating class action waivers in most consumer contracts, the Court in *Concepcion* not only continued its run of pro-arbitration decisions, but did so using notably strong language that was not limited to the consumer class action context. *Concepcion* therefore has the potential to effect sweeping change in the area of employment arbitration agreements with class action waivers, and provides a forceful new basis for employers wishing to implement such agreements.

Concepcion, however, is already under attack. Legislation designed to limit or even undo its holding has already been introduced in Congress and at least one state legislature, and the plaintiffs' bar will of course attempt to confine the significance of *Concepcion* to the consumer class action context. Therefore, while *Concepcion* could signal a paradigm shift in the context of employment arbitration agreements with class action waivers, its full impact is still in flux.

Below we supplement Orrick's recent Client Alert regarding *Concepcion* by providing a more detailed look at the decision, as well as an analysis of its impact for employers wishing to implement class action waivers in employment arbitration agreements.

Concepcion

Concepcion involved a proposed class action asserting claims of fraud and false advertising stemming from Plaintiffs' purchase of cellular telephone service from AT&T. Plaintiffs claimed that they purchased the service having relied on AT&T's promise of a "free" telephone, only to discover that they were later required to pay sales tax on the retail value of the phone. The phone service agreement included an arbitration provision requiring any disputes between AT&T and the customer to be submitted to arbitration, as well as a "class action waiver" that prohibited customers from bringing any claims in a class action or other representative proceeding.

After Plaintiffs filed their lawsuit, AT&T moved to compel arbitration. The district court denied AT&T's motion, holding that the arbitration agreement's class action waiver was unconscionable and therefore unenforceable under *Discover Bank v. Superior Court*, 36 Cal.4th 148 (2005), a California Supreme Court decision that, in effect, held most class action waivers in consumer contracts to be unenforceable. The district court did so despite the many consumer-friendly provisions in the contract, including, among others: (1) a requirement that AT&T pay all arbitration costs for non-frivolous claims; (2) a requirement that arbitration take place in the county of the customer's billing address; (3) a provision that, as to claims for $10,000 or less, the customer can choose whether the arbitration proceeds in person, by phone, or based on submissions; (4) a provision precluding AT&T from seeking reimbursement for its

attorneys' fees; and (5) a provision that, in the event of a customer arbitration award exceeding AT&T's last settlement offer, AT&T must pay a $7,500 recovery fee and double the amount of the customer's attorney's fees.

The Ninth Circuit affirmed the district court, holding that the class action waiver was "exculpatory" and void as a matter of public policy because it protected AT&T against all types of class actions. The Ninth Circuit further found that the FAA did not preempt the so-called "*Discover Bank*" rule that most class action waivers in consumer contracts are unconscionable. In support of this holding, the Ninth Circuit relied on Section 2 of the FAA, which permits arbitration agreements to be invalidated "upon such grounds as exist at law or equity for the revocation of any contract." The Ninth Circuit reasoned that the *Discover Bank* rule fell within the ambit of Section 2 because it constituted the California Supreme Court's "refinement" of California's unconscionability doctrine – a ground existing under California law for the revocation of contracts – in the context of consumer class action waivers.

The Supreme Court reversed, and, in a 5-4 decision authored by Justice Scalia, held that the FAA preempts the *Discover Bank* rule. The Court emphasized that "[t]he overarching purpose of the FAA…is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings," and that the FAA reflects a "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." In light of the purposes and policies behind the FAA, the Court further found that the *Discover Bank* rule's prohibition of class action waivers presented "an obstacle to the accomplishment and execution of the full purposes and objectives" of the FAA.

The Court rejected the claim that the *Discover Bank* rule constituted a "ground…at law or equity for the revocation of any contract" under Section 2 of the FAA. In doing so, the Court drew an important distinction between "generally applicable" contract defenses – which Section 2 allows to be utilized to invalidate arbitration agreements – and "state law rules" (such as the *Discover Bank* rule) that employ such "generally applicable" contract defenses in a manner that specifically targets particular types of contracts such as arbitration agreements. The Court held that such "state law rules" conflict with the FAA's purpose of ensuring the enforcement of arbitration agreements according to their terms because they inevitably fail to place arbitration agreements "on equal footing" with other types of contracts.

Importantly, the Court emphasized the difficulties of implementing class arbitration procedures in arbitration agreements that are, by their terms, "bilateral" – or between two parties. As the Court observed, class-wide arbitration requires different procedures that many arbitrators do not know very well, and it makes confidentiality more difficult. The Court thus concluded that "manufactured" class arbitration is inconsistent with – and preempted by – the FAA because (1) it makes the arbitration "slower, more costly, and more likely to generate procedural morass than final judgment"; (2) it requires the very procedural formality that bilateral arbitration is intended to minimize; and (3) it "greatly increases risks to defendants" and is "poorly suited to the higher stakes of class litigation" due to the inherent risk in arbitration that errors go uncorrected due to the lack of an appeals process. As the Court noted, "[r]equiring the availability of classwide arbitration interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."

The Impact of Concepcion

Concepcion provides unprecedented support for employers wishing to include arbitration clauses with class action waivers in their employment agreements, and is especially promising in the wage-and-hour context. Though *Concepcion* arose in the context of a consumer contract, the rationale supporting its holding was generally worded and openly hostile to class action procedures in arbitration. Indeed, the *Concepcion* Court flatly noted that "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is undesirable for unrelated reasons." As a result, *Concepcion* arguably invalidates *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007), a California Supreme Court decision based on *Discover Bank* that has often been utilized to invalidate class action waivers in the employment context.

Given its strong language, *Concepcion* not only invalidates state law rules that forbid class action waivers in arbitration agreements, it also arguably invalidates state-law rules that impose standards directed at arbitration agreements in general. In California, for example, arbitration agreements in employment contracts have been subject to the unconscionability and public policy standards set forth in *Armendariz v. Foundation Health Psychare Servs., Inc.*, 24 Cal. 4th 83 (2000) and its progeny. Together, these standards have imposed significant restrictions on the ability of employers to require arbitration in employment agreements. In light of *Concepcion*, the validity of these standards is in jeopardy because such standards arguably single out arbitration agreements and fail to put them on "equal footing" with other contracts.

The long-term impact of *Concepcion*, however, remains in flux. In addition to the inevitable attacks from the plaintiffs' bar,[2] efforts to limit or even undo *Concepcion* have already begun in Congress and at least one state legislature. In Congress, Senators Al Franken and Richard Blumenthal, along with Congressman Hank Johnson, recently reintroduced the Arbitration Fairness Act ("AFA"), which, if passed, would eliminate forced arbitration clauses in employment, consumer, and civil rights cases, and would allow consumers and workers to choose arbitration in the event of a dispute. And in California, an amended version of Assembly Bill 1062 has been introduced that, if passed, would make most court-ordered denials of motions to compel arbitration non-appealable.

Class action waivers in arbitration agreements also may be increasingly scrutinized under the National Labor Relations Act ("NLRA"). Section 7 of the NLRA guarantees all employees, including those who are not represented by a union, the right to engage in "concerted activities." Though the National Labor Relations Board ("NLRB") has not yet issued any decisions regarding the interplay between Section 7 and class action waivers in arbitration agreements, its former general counsel, Ronald Meisberg, released a memorandum regarding this issue in June 2010.[3] In the memorandum, Meisberg articulates four conclusions on this issue, including:

- Filing a class action lawsuit or class-wide arbitral claim along with, or on behalf of, other employees is a protected "concerted" activity under the NLRA, and under the NLRA employees may not be threatened, disciplined, or discharged for doing so;

- A "mandatory arbitration agreement" that is so broadly worded that it can be reasonably read by an employee as prohibiting him or her from engaging in concerted activity under Section 7 of the NLRA – by, for example, filing a class action lawsuit – is unlawful under the NLRA;
- Employers may nonetheless require individual employees to sign agreements requiring arbitration of their non-NLRA employment claims, including agreements containing class action waivers, without *per se* violating the NLRA, provided that such agreements clarify that the employees may challenge the enforceability the agreements without employer discipline or retaliation. The enforceability of such agreements would be determined under non-NLRA law; and
- Employees who have signed agreements to arbitrate their non-NLRA claims containing class action waivers are still protected by the NLRA, though employers may of course seek to enforce such waivers.

Unfortunately, these guidelines are less than clear and leave much to be decided by the NLRB and the courts. Should the NLRB or the courts take an aggressive stance, class action waivers might be found to impermissibly waive employees' rights to engage in protected concerted activity under the NLRA.

Another potential avenue for challenging class action waivers could arise in the context of equal employment opportunity claims, including claims under Title VII of the Civil Rights Act of 1964, as amended, the Age Discrimination in Employment Act of 1967, as amended, and the Americans with Disabilities Act of 1990, as amended. Both the Supreme Court and the Equal Employment Opportunity Commission ("EEOC") have concluded that individuals may file charges of discrimination with the EEOC under such laws notwithstanding any restrictions on their rights to institute private, class-wide litigation in the courts. A broadly-worded arbitration provision with a class action waiver might therefore fail hold up in the EEO context, at least to the extent that it purports to restrict an employee's right to bring a charge with the EEOC.

Lessons for Employers

Employers that do not utilize arbitration clauses with class action waivers may wish to consider doing so following *Concepcion* after evaluating all of the benefits and disadvantages of arbitrating employment claims. Certainly, the most significant benefit following *Concepcion* is the potential ability to preclude class, collective or other representative litigation. However, arbitration also raises potential disadvantages. Because the employer typically bears the cost of the arbitrator, arbitration can be quite expensive. In addition, arbitrators are often perceived as more likely to "split the baby" and render a compromise award regardless of the merits of the case, and are less likely to grant dispositive motions, such as summary judgment and dismissal motions. Finally, because arbitration lacks the comprehensive appellate review process found in litigation proceedings, it is difficult, if not impossible, to reverse an erroneous decision.

Employers that seek to implement class action waivers after weighing the pros and cons should be conservative in their approach to doing so – at least until *Concepcion* receives thorough treatment in the courts – in order to account for the above-described risks and maximize the likelihood of enforcement. The following provisions, among others, should be considered:

- Provisions that track the pro-consumer provisions in the arbitration agreement at issue in *Concepcion*. The Supreme Court in *Concepcion* emphasized the district court's observation that the typical consumer was likely to be better off in bilateral arbitration than a class action lawsuit given the very pro-consumer aspects of the arbitration agreement at issue. Employers should consider emulating these provisions as much as possible.
- NLRA-Related Provisions. Given the potential for increased scrutiny of class action waivers under the NLRA, employers should consider provisions designed to account for this risk, including provisions clarifying that arbitration does not constitute a waiver of NLRA rights.
- EEO-Related Provisions. Given the potential that class action waivers could be invalidated to the extent that they to preclude employees from filing charges of discrimination with the EEOC, employers should consider including provisions specifying that employees retain the right to do so.
- "Opt-Out" Provisions. Opt-out provisions give employees the right to opt-out of arbitration, usually within a prescribed time period following distribution of the arbitration policy. Such provisions help to weaken any argument that the arbitration agreement is procedurally unconscionable.

These and other provisions may, depending on the particular situation, increase the likelihood of enforcement of a class action waiver. Of course, each particular employment scenario must be evaluated independently, and not all such provisions will be helpful or practicable. Careful drafting is crucial.

Conclusion

Concepcion is a potential "game changer" that employers should carefully consider as a basis for implementing arbitration agreements with class action waivers in their employment agreements. Orrick's Employment Law Practice has the knowledge, expertise and resources to assist employers in analyzing whether such an agreement makes sense in light of their particular needs, and if so, how to draft and implement it.

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[1] 131 S. Ct. 1740 (U.S. April 27, 2011).

[2] For example, plaintiff attorneys will likely argue for the imposition of new procedural restrictions on class action waivers in light of the Supreme Court's observation in *Concepcion* that "states remain free to take steps addressing the concerns that attend contracts of adhesion – for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted."

[3] *See* Memorandum from Ronald Meisberg, Gen. Counsel, NLRB, to All Regional Directors, Officers-In-Charge, and Resident Officers, Memorandum GC-10-06 (June 16, 2010), available at http://www.nlrb.gov/publications/general-counsel-memos.