Supreme Court Expands Use Of Arbitration Agreements

Insights
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On April 27, 2011, the U.S. Supreme Court upheld the enforceability of class action waiver provisions in arbitration agreements. Under such provisions, parties both agree to arbitrate their disputes, and waive the right to participate in class action lawsuits or class arbitrations. The Court's ruling allows businesses to require customers to arbitrate their disputes individually, and reaffirms the federal policy favoring arbitration. This is good news for employers. *AT&T Mobility LLC v. Concepcion.*

Background
The U.S. Supreme Court has long recognized that the Federal Arbitration Act (FAA) manifests a liberal federal policy favoring arbitration agreements. Under Section 2 of the FAA, arbitration agreements are enforceable as a matter of federal law except as may be provided for by a state's law regarding the "revocation of any contract." The FAA preempts any state law that discriminates against arbitration agreements.

In April of 2010, the Supreme Court decided *Stolt-Nielsen S.A. v. AnimalFeeds, Inc.*, which held that parties to arbitration agreements silent on the issue of class arbitration cannot be compelled to arbitrate a class action claim. Arbitration, the Court explained "is a matter of consent, not coercion." In *AT&T Mobility LLC v. Concepcion*, the Court considered an analogous issue: whether parties can preclude class actions and class-arbitration entirely by arbitration agreement.

Facts
In 2002, Vincent and Liza Concepcion signed a two-year service contract with AT&T Mobility (ATTM) for wireless phone service. In return for signing the two-year agreement, ATTM provided the Concepcions with new cell phones for free or at a discounted price. Pursuant to California law, ATTM charged the Concepcions sales tax on the full value of the phones, which amounted to $30.22. The Concepcions sued ATTM in the federal district court, claiming that ATTM had committed fraud by charging them the sales tax on phones that ATTM advertised as "free."

Contained in the contract between ATTM and the Concepcions was a clause requiring the latter to arbitrate any disputes with ATTM directly, and prohibiting them from participating in any class action lawsuit against ATTM. After the Concepcions filed their lawsuit, ATTM added to its service contract with the Concepcions a "premium" payment provision guaranteeing, in this instance, an additional $7,500 payment should an arbitrator award an amount greater than ATTM's final pre-arbitration settlement offer. After adding this provision, ATTM sought to compel arbitration. The court denied ATTM's motion on the ground that the arbitration clause was unconscionable under

court denied ATTM's motion on the ground that the arbitration clause was unconscionable under California law, and that the FAA did not preempt California law. ATTM appealed to the U.S. Court of Appeals for the 9th Circuit.

In its appeal, ATTM argued that the FAA preempted California law, but even if it did not, the arbitration clause was not unconscionable because the premium payment clause provided adequate incentive for a consumer to pursue a claim. The 9th Circuit held that California law was not preempted and agreed with the district court that ATTM's class action waiver provision was unconscionable. The 9th Circuit also rejected ATTM's argument that the "premium" payment rendered the contract valid because ATTM could avoid the premium payment by offering the full amount of the claim before going to arbitration, which here was the very modest sum of $30.22. Thus, the amount ATTM was likely to pay was too small to induce the average consumer to pursue an individual claim.

The Supreme Court's Decision

In a 5-4 decision, the Supreme Court held that while the FAA's savings clause permits arbitration agreements to be invalidated by "generally applicable contract defenses," it does not allow their invalidation by defenses that apply only to agreements to arbitrate. Chief Justice Roberts and Justices Alito, Kennedy, and Thomas joined in Justice Scalia's majority opinion. Justices Breyer, Ginsburg, Sotomayor, and Kagan dissented.

As Justice Scalia explained, nothing in Section 2 of the FAA "suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishments of the FAA's objectives." The FAA's purpose is to "promote arbitration," whereas, California's rule prohibiting class action waivers in consumer contracts interfered with arbitration. Therefore, the FAA preempted the California rule.

Even if, as the dissent argued, "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system," the majority held that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."

Conclusion

This decision is welcome news to employers that require employees to sign arbitration agreements as a condition of employment. Like the commercial arbitration agreement in *Concepcion,* employment arbitration agreements are typically governed by the FAA, and therefore, class action waivers in such arbitration agreements are likely valid and enforceable. When this decision is viewed in combination with the holding in *Nielsen S.A. v. AnimalFeeds, Inc.,* an employer may now be able to limit its exposure to class actions and class arbitrations, if not avoid them altogether.

You can help avoid class actions by requiring your employees to sign mandatory arbitration clauses that prevent them from joining any class actions directed at your company. You may also avoid class arbitration by not agreeing to use or allow such actions. Employers already using arbitration agreements may want to review the agreements to ensure that they provide the maximum amount of protection against class actions and class arbitrations.

For more information, contact your regular Fisher Phillips attorney.

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