

## CLIENT ALERT: United States Supreme Court Upholds Arbitration Agreement Waiving Class Action Rights

On April 27, 2011, the United States Supreme Court held that federal law preempts a California Supreme Court decision that banned class action waivers in consumer arbitration agreements. In *AT&T Mobility LLC v. Concepcion*, the United States Supreme Court upheld the ability of companies to eliminate class action lawsuits and require such claims to be heard in private arbitration through carefully drafted pre-dispute arbitration agreements. This decision is important not only for consumer arbitration agreements, but also for employers seeking to eliminate the threat of class action lawsuits in employment disputes.

The issue in *AT&T Mobility* was the enforceability of an arbitration clause in a cellular telephone contract between a customer and AT&T. Plaintiffs filed suit against AT&T concerning certain fees in a contract on behalf of themselves and a class. AT&T moved to compel arbitration under the contract between the parties. The lower courts denied AT&T's motion to compel arbitration, relying on *Discover Bank v. Superior Court*, a case in which the California Supreme Court held that class action waivers in consumer arbitration agreements are unconscionable and, therefore, unenforceable as a matter of public policy. In a 5-4 decision, the United States Supreme Court concluded that the *Discover Bank* rule was preempted by the Federal Arbitration Act ("FAA"), which evidences Congress's federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract.

In light of *AT&T Mobility*, employers with pre-dispute arbitration agreements in employment contracts should consider whether to insert class-action waivers if such a provision is not already contained in the contract. Employers may now rely on the FAA as a basis for arguing that state law should not prohibit the imposition of class waivers or other arbitration clauses that are inconsistent with the FAA. It remains, however, an open question how this decision would have come down had the basis for rejecting the arbitration provision been federal law (such as an argument regarding the exclusivity of the Federal Fair Labor Standards Act, which contains its own statutory collective action mechanism). Nonetheless, *AT&T Mobility* increases the potential for the enforcement of a carefully worded and crafted pre-dispute class action arbitration provision.

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