KIRKLAND ALERT

May 2011

Supreme Court Upholds Class-Action Ban in Arbitration Agreements

On April 27, 2011, the Supreme Court issued a landmark decision in *AT&T Mobility LLC v. Concepcion*, No. 09-893 (U.S. 2011), holding that arbitration agreements banning class actions are enforceable — even in jurisdictions that, as a matter of common law, deem such bans unconscionable. The decision curtails the ability of states to regulate arbitration agreements, placing greater emphasis on their plain terms.

The decision in Concepcion

The arbitration agreement at issue arises from an AT&T wireless service contract requiring arbitration on an individual basis. Lower courts, including the Ninth Circuit, held the provision unconscionable under California law because of its ban on class actions.

In a 5-4 decision, the Supreme Court reversed, concluding that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the Federal Arbitration Act (FAA)." Slip op. at 9. The Court cited multiple grounds for this inconsistency, namely that arbitration is ill-suited to high-stakes class actions and that informality is one of arbitration's key advantages. In other words: "The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute." *Id.* at 10. The decision is not limited to arbitration agreements in any particular industry or setting.

The consequences of Concepcion

The decision in *Concepcion* comes on the heels of a related question settled by the Supreme Court last year. In *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), the Court determined the FAA bars arbitrators from commencing class arbitration proceedings where class proceedings are not expressly permitted by the underlying arbitration clause. Taken together, these decisions forbid courts from compelling parties to arbitrate on a classwide basis unless they have expressly agreed to do so, and more generally suggest a commitment to enforcing arbitration agreements according to their plain terms.

Thus, while it is now settled law that arbitration agreements can ban class actions and require individual resolution of disputes, the effects of the decision likely reach further. The Court suggested FAA preemption could extend to all state attempts at regulating arbitration proceedings by imposing requirements not found in the underlying agreement to arbitrate. For example, the Court specifically identified state law requiring judicially-supervised discovery of arbitration as preempted, as well as any state requirement that arbitration proceedings adhere to the Federal Rules of Evidence. Slip op. at 7-8.

In view of the Court's holding, we recommend

- Considering individual, bilateral arbitration provisions to minimize class action exposure.
- Reviewing existing arbitration agreements to confirm they reflect only drafting intent.

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