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Employment Law Alert

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New Ruling Paves the Way for Class Action Waivers in Arbitration Agreements

The U.S. Supreme Court has ruled that the Federal Arbitration Act (FAA) preempts California's rule that invalidates arbitration agreements in which the parties waive the right to class-wide proceedings. Although this new decision arose in a consumer protection setting, its holding might also apply to arbitration provisions in employment contracts.

In *AT&T Mobility LLC v. Concepcion*, No. 09-893 (Apr. 27, 2011), the Supreme Court examined the arbitration provision in a cellular telephone service contract. The provision required a party to pursue claims in an "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." AT&T had moved to compel arbitration after the plaintiffs brought a class action in federal court alleging false advertising and fraud in connection with AT&T's policy of charging sales tax on phones advertised as free. The district court refused to compel arbitration, concluding that the arbitration agreement was unconscionable under the rule established by the California Supreme Court in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), which declares class action waiver provisions in arbitration agreements to be unconscionable. The Ninth Circuit affirmed this order, rejecting AT&T's contention that the FAA preempted the "*Discover Bank* rule."

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The U.S. Supreme Court reversed in a 5-4 decision, holding that the FAA displaced California's *Discover Bank* rule. The Court explained that the *Discover Bank* rule conflicts with the FAA's purposes of ensuring the enforcement of arbitration agreements according to their terms and promoting arbitration as an informal, streamlined method of dispute resolution. The *Discover Bank* rule, said the Court, is inconsistent with these purposes because it: (1) requires class-wide arbitration despite the terms of the parties' agreement; (2) makes arbitration more formal, cumbersome and costly; and (3) exposes defendants to the risk of an erroneous arbitral decision in a high-stakes case that is subject to very limited judicial review.

Because this new decision rests on the preemptive effect of the FAA, it is possible that the holding would apply to any arbitration provision governed by the FAA. However, whether courts will extend this holding to arbitration provisions in the employment context to permit

class action waivers, for example, of wage and hour disputes, remains an open question. The arbitration agreement examined by the high court in *AT&T Mobility* contained many consumer-friendly protections; a mandatory employment arbitration agreement lacking similar protections for employees could run the risk of being held invalid. In addition, a class action waiver in an employment arbitration agreement may be vulnerable to challenge by the National Labor Relations Board, which has taken the position, pre-*AT&T Mobility*, that such waivers could interfere with employee rights under the National Labor Relations Act to engage in concerted activity. It remains to be seen whether the Board will revise its position in light of the Supreme Court's new decision. For these reasons, California employers should consult with counsel before inserting class action waivers in mandatory arbitration agreements to analyze the risks and benefits of this approach, as well as to make sure that any such waiver is properly drafted.

Miller Law Group exclusively represents business in all aspects of California employment law, specializing in litigation, risk management, wage and hour class actions, ERISA litigation, and appellate law. If you have questions about your workplace obligations, please contact Michele Ballard Miller (mbm@millerlawgroup.com) or Carolyn Rashby (cr@millerlawgroup.com), or call (415) 464-4300. To learn more about our firm, visit our website at www.millerlawgroup.com.

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