

November 10, 2011

### **Courts in California Struggle to Analyze Employment Arbitration Agreements after *AT&T Mobility v. Concepcion***

In April 2011, the U.S. Supreme Court issued its landmark decision in *AT&T Mobility, LLC v. Concepcion*, \_\_\_ U.S. \_\_\_, 131 S.Ct. 1740 (2011), holding 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 (see our alert dated [May 11, 2011](#)). Now, courts in California are wrestling with applying *AT&T* in the employment context, with confusing results for employers.

Earlier this summer, the California Second Appellate District Court of Appeal -- in what appears to be the first published decision on this topic since *AT&T* -- handed down an opinion in *Brown v. Ralph’s Grocery Company*, 197 Cal.App.4th 489 (2011), addressing the enforceability of an employment arbitration agreement that contained both a class action waiver and a waiver of employees’ rights to bring a representative action under the California Private Attorneys General Act (“PAGA”). The majority opinion overturned the trial court’s decision that the class action waiver was unconscionable. The panel refused to address, however, whether *AT&T* had overruled the California Supreme Court’s earlier decision in *Gentry v. Superior Court*. That case held that class action waivers in employment agreements could be unenforceable where a plaintiff establishes certain factors that, taken together, show that the waiver would undermine the vindication of a substantive statutory right. Instead, the majority opinion held that the plaintiff had not met his burden to establish these factors; indeed no evidence (other than the agreement itself) was submitted. The court, therefore, sidestepped the issue of whether *Gentry* remains good law following *AT&T*.

Turning to the PAGA issue, the majority in *Ralph’s Grocery* held that *AT&T*’s reasoning did not apply because PAGA has a quasi-public purpose. Specifically, PAGA “deputizes” citizens to enforce the California Labor Code and to protect the public by bringing a representative action as a private attorney general to collect civil penalties. The court concluded that PAGA would be frustrated by enforcement of an arbitration agreement containing a representative action waiver. On this point, the majority held that *AT&T*’s reasoning did not apply because it did not address enforcement of an arbitration

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agreement that would significantly undermine a state statute. The dissenting justice disagreed with the holding on PAGA, arguing that *AT&T* held that states could not invoke so-called public policy reasons to exclude certain claims from the reach of an arbitration agreement.

Not all courts have agreed with *Ralph's Grocery* regarding waivers of PAGA representative action waivers. In a recent decision, the United States District Court for the Central District of California in *Quevedo v. Macy's, Inc.* (C.D. Cal. Oct. 31, 2011), denied a motion for reconsideration of an earlier decision enforcing a class action and PAGA representative action waiver, and compelling arbitration of the plaintiff's individual wage and hour claims. The court followed the Supreme Court's *AT&T* ruling, and declined to follow *Ralph's Grocery* on the grounds that that *Ralph's* was not an intervening change in controlling law. In another recent decision, the United States District Court for the Southern District of California also declined to follow *Ralph's Grocery*. See *Grabowski v. C.H. Robinson Co.*, Case No. 10-cv-1658, 2011 WL 4353998 (S.D. Cal. Sept. 19, 2011)

On a related note, the United States Supreme Court recently issued an order vacating the California Supreme Court's decision in *Sonic-Calabasas A. Inc. v. Moreno*, No. 10-1450, 2011 WL 2148616 (October 31, 2011), which refused to enforce an arbitration agreement waiving an employee's right to first seek relief for wage claims before the labor commissioner (known as a *Berman* hearing). The United States Supreme Court remanded the case for further consideration in light of its decision in *AT&T*.

The law in this area is certain to evolve, given the conflicting decisions on these issues, and the possibility that the California Supreme Court will grant review in *Ralph's Grocery*. As a result, employers should exercise caution and seek the advice of counsel when deciding to implement or enforce class and PAGA representative action waivers.

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