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Supreme Court Opens the Door to Enforcing Class Action Waivers and Bars in Arbitration Agreements – Today's Decision in *AT&T Mobility v. Concepcion*

Today, the United States Supreme Court held in *AT&T Mobility v. Concepcion,* 563 U.S. __ (2011), by a 5-4 majority, that the Federal Arbitration Act (FAA) prohibits states from conditioning the enforceability of arbitration agreements on the availability of class arbitration. The Supreme Court's decision in *Concepcion* is the next step in a series of recent decisions by the Court, including last term's *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 559 U.S. __ (2010), emphasizing that "[t]he overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Concepcion,* Slip Op. at 9.

Today's Supreme Court decision in *Concepcion* sends important signals about enforcing class action waivers or bars in arbitration agreements. In a broadly worded decision, the Court held that states cannot prohibit parties from agreeing to waive or bar class actions in favor of individual arbitration because such a rule would stand as an obstacle to the accomplishment of the objectives of the FAA, including the enforcement of arbitration agreements according to their terms. In addition, consistent with *Stolt-Nielsen,* the Court recognized that class arbitration — unless consensual — is inconsistent with the FAA. Thus, it appears under *Concepcion,* state law unconscionability doctrines can no longer be used to strike down class action waivers in

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consumer and employment arbitration agreements as against public policy. As the Court noted with respect to the enforcement of consumer arbitration agreements, "[o]f course States remain free to take steps addressing the concerns that attend contracts of adhesion — for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms." Slip Op. at 12 n.6.

Justice Antonin Scalia, writing for the majority, found that FAA Section 2 preempts California's rule classifying most class action waivers in consumer contracts to be unconscionable because such a rule "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives'" of the FAA. Slip Op. at 18 (citations omitted). The Court held that California's rule interferes with arbitration because there is little incentive for lawyers to arbitrate on behalf of individuals "when they may do so for a class and reap far higher fees" and little incentive for companies to pursue individual arbitrations when they will be faced with the inevitable class action. *Id.* at 13. Consistent with *Stolt-Nielsen,* the Opinion goes on to explain that class arbitration — to the extent it is not consensual — is inconsistent with the FAA. Class arbitration sacrifices the principal advantages of arbitration and makes the process slower and more costly. It requires procedural formality. And, given the limited appellate rights related to arbitrations, it increases risks to defendants. The Court determined that "[a]rbitration is poorly suited to the higher stakes of class litigation." *Id.* at 16.

Finally, addressing the argument that class proceedings are necessary to prosecute small-dollar value claims, the Opinion concludes that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." Slip Op. at 17.

In an interesting turn, Justice Stephen Breyer, writing for the dissenting four Justices, argues under principles of federalism that California's rule should not be preempted by the FAA: "California is free to define unconscionability as it sees fit, and its common law is of no federal concern so long as the State does not adopt a special rule that disfavors arbitration." Slip Op. at 9. Noting that the California Supreme Court has set forth circumstances under which it believes the terms of consumer contracts are unconscionable, Justice Breyer asks "[w]hy is this kind of decision — weighing the pros and cons of class proceedings alike — not California's to make?" *Id.* at 10.

After today's Opinion in *Concepcion,* that kind of decision is no longer up to the states to make. Class action waivers and bars in arbitration agreements have new vitality under today's decision by the United States Supreme Court in *Concepcion*.

For more information on the *Concepcion* case or the Squire Sanders arbitration practice, please contact your principal Squire Sanders lawyer or one of the lawyers listed in this Alert.

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