

AT&T Mobility LLC v. Concepcion: What is the Scope of Federal Preemption in Class Waiver Cases?

Part I

Introduction

In our recent feature [What to Make of the Second Circuit Voiding a Class Action Waiver Under California's Discover Bank Rule?](#), we briefly discussed *AT&T Mobility LLC v. Concepcion*, No. 09-893, a case which asks the **United States Supreme Court** to determine whether the **Federal Arbitration Act** preempts California's Discover Bank rule. The Discover Bank rule deems unconscionable class action and class arbitration waivers in adhesive contracts in circumstances where a consumer alleges that a party with superior bargaining power has committed widespread but small-dollar fraud. Petitioner AT&T Mobility LLC ([AT&T Mobility](#)) has filed its brief ([here](#)); various organizations, including the Chamber of Commerce of the United States of America, have filed an impressive stack of amicus curiae briefs supporting AT&T Mobility ([here](#)); Vincent and Liza Concepcion (the [Concepcions](#)) have filed their brief, which was posted online earlier today ([here](#)); and AT&T will presumably submit a reply brief. The Court has scheduled argument for November 9, 2010.

AT&T Mobility is an extremely important case because it will decide whether the Federal Arbitration Act preempts certain state law unconscionability and public-policy-based rules that are principally directed at class arbitration and class action waivers. This issue has spawned a number of conflicting decisions in the state and federal courts, including *Feeney v. Dell, Inc.* 454 Mass. 192 (2009), a case we blogged back in 2009 ([posts here](#) and [here](#)).

This two-part feature takes a closer look at *AT&T Mobility*, considers the principal issues before the Court, and ventures a guess on what the outcome will be. This Part I discusses the background of the case, and Part II ([here](#)) outlines Federal Arbitration Act preemption rules, analyzes and explains why we believe the Federal Arbitration Act expressly and impliedly preempts the Discover Bank rule, and provides our best guess as to what the Supreme Court will conclude.

AT&T Mobility: Background

Like plaintiffs in most other class waiver cases the *Concepcions*' claim is small; they seek only about \$30.00 in compensatory damages. They say *AT&T Mobility*, a cell-phone communications provider, fraudulently represented that it would give them free cell phones, but allegedly charged federal and state taxes for these [free](#) phones.

The *Concepcions* want to proceed on a class action basis, and to that end they wish to bypass a clear and unambiguous class waiver contained in the arbitration agreement in their contract with *AT&T Mobility*. The arbitration agreement stipulates that it shall be void in its entirety if a court does not enforce the waiver.

The *Concepcions* say the waiver is unenforceable under California's Discover Bank rule, which renders a class-action or class-arbitration waiver unenforceable on unconscionability grounds if:

- [1] found in a consumer contract of adhesion
- [2] in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and
- [3] it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.

Discover Bank v. Superior Ct., 36 Cal.4th 148, 162-63 (2005).

AT&T Mobility's arbitration agreement is unique in that it contains some very consumer friendly provisions, which were summarized this way in *AT&T Mobility*'s initial Supreme Court brief:

Cost-free arbitration for non-frivolous claims: [\[AT&T Mobility\]](#) will pay all [\[American Arbitration Association \(?AAA?\)\]](#) filing, administration and arbitrator fees' unless the arbitrator determines that the claim [\[is\]](#) frivolous or brought for an improper

purpose (as measured by the standards set forth in Federal Rule of Civil Procedure 11(b))" [in which case arbitration costs payable by the consumer are capped at \$125.00].

Convenience: Arbitration takes place "in the county . . . of [the customer's] billing address," and for claims of \$10,000 or less, customers have the exclusive right to choose whether the arbitrator will conduct an in-person hearing, a hearing by telephone, or a "desk" arbitration in which "the arbitration will be conducted solely on the basis of documents submitted to the arbitrator."

Flexible consumer procedures: Arbitration is conducted under the AAA's Commercial Dispute Resolution Procedures and the Supplementary Procedures for Consumer-Related Disputes, which the independent, non-profit AAA designed with consumers in mind;

Small claims court option: Either party may bring a claim in small claims court in lieu of arbitration;

Full remedies available: The arbitrator may award the claimant any form of individual relief (including statutory attorneys' fees, statutory damages, punitive damages and injunctions) that a court could award; and

No confidentiality requirement: Customers and their attorneys are not required to keep the results of the arbitration confidential.

AT&T Mobility's Br. at 5-6.

The arbitration clause also contains a number of consumer-friendly features designed to encourage California consumers to submit to bilateral arbitration even small-dollar claims:

\$7,500 minimum recovery if arbitral award exceeds [AT&T Mobility's last settlement offer]: If the arbitrator awards a California customer relief that is greater than [AT&T Mobility's] last "written settlement offer made before an arbitrator was selected" but less than \$7,500, [AT&T Mobility] will pay the customer \$7,500 rather than the smaller arbitral award;

Double attorneys' fees: If the arbitrator awards the customer more than [AT&T Mobility's] last written settlement offer, than [AT&T Mobility] will "pay [the customer's] attorney, if any, twice the amount of attorneys' fees, and reimburse any expenses, that [the] attorney reasonably accrues for investigating, preparing, and pursuing [the] claim in arbitration;" and

[AT&T Mobility disclaims right to seek attorneys' fees]: "Although under some laws [AT&T Mobility] may have a right to an award of attorneys' fees and expenses if it prevails in an arbitration, [AT&T Mobility] agrees that it will not seek such an award [from the customer]."

AT&T Mobility's Br. at 6-7.

The district court said these provisions "sufficiently incentivize[] consumers" to pursue "small dollar" claims and "prompts" AT&T to make settlement offers favorable to consumers "even for claims of questionable merit." It nonetheless denied AT&T Mobility's motion to compel arbitration, holding that the class waiver was unconscionable under California's Discover Bank rule because it "forbid the Concepcions from representing a class of allegedly similarly-situated claimants."

The **United States Court of Appeals for the Ninth Circuit** acknowledged that the arbitration agreement "essentially guarantee[ed]" that AT&T Mobility "will make any aggrieved customer whole who files a claim." *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 856 n.9 (9th Cir. 2009), cert. granted sub nom. *AT&T Mobility LLC v. Concepcion*, ___ U.S. ___, 130 S.Ct. 3322 (2010). But relying on its previous decision in *Shroyer v. New Cingular Wireless Serv.*, 498 F.3d 976 (9th Cir. 2007), it held that the class waiver was unconscionable under Discover Bank, and that the Discover Bank rule was not expressly or impliedly preempted by the Federal Arbitration Act.

The question before the Supreme Court is: "Whether the Federal Arbitration Act preempts States from conditioning the enforceability of an arbitration agreement on the availability of particular procedures " here, class-wide arbitration " when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims." That's simply another way of asking whether the Federal Arbitration Act preempts the Discover Bank rule under the circumstances presented in *AT&T Mobility*.

If the Supreme Court affirms the Ninth Circuit, the Concepcions will be permitted to pursue the class action complaint they filed in the district court. If the Supreme Court holds that the Federal Arbitration Act preempts the Discover Bank rule, and reverses the Ninth Circuit, then the Concepcions will be required to arbitrate their \$30.00 dispute with AT&T Mobility on a strictly bilateral

basis.

In Part II (**here**) we delve into the preemption issues and take a guess at how the Supreme Court will dispose of this case.