# Landmark USSC Decision:

## *AT&T Mobility LLC v. Concepcion et ux.*

On April 27, 2011, exactly one year to the date that *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010) was decided, the United States Supreme Court handed down its decision in *AT&T Mobility LLC v. Concepcion et ux.*, 131 S. Ct. 1740 (2011), reinforcing *Stolt-Nielsen's* ruling that arbitration agreements must be enforced as written, and expanding that decision to include arbitration agreements containing express bans on class-wide proceedings. In *Stolt-Nielsen*, the Supreme Court interpreted an arbitration agreement that was silent regarding class claims, and held that absent express consent, a party may not be compelled to submit to class arbitration. *Stolt-Nielsen*, 130 S. Ct. at 1775. In *Concepcion*, the Supreme Court expanded upon this precedent and held that the Federal Arbitration Act ("FAA") preempts a California rule finding arbitration agreements that expressly disallow class-wide proceedings under certain circumstances to be unconscionable and thus unenforceable. The significance of the Supreme Court's 5-4 *Concepcion* ruling is discussed below.[1]

In AT&T Mobility LLC v. Concepcion et ux., 563 U.S., the Supreme Court held that the FAA preempts a California rule finding arbitration agreements that expressly disallow class-wide proceedings under certain circumstances to be unconscionable and thus unenforceable.

### A. Procedural Background

Mr. and Mrs. Concepcion (together "Concepcion") entered into an agreement for the purchase and service of a cellular telephone with what is now AT&T. *Concepcion*, 131 S. Ct. at 1744. The contract expressly provided for individual arbitration of all disputes. *Id.* Unhappy that they were charged $30.22 in sales taxes for their "free" phone, Concepcion filed a lawsuit in federal district court in California. *Id.*

AT&T moved to compel arbitration under the terms of its agreement. *Id.* at 1744-45. Concepcion opposed, arguing that the arbitration agreement was unconscionable (and thus unenforceable) under California law because it banned class-wide procedures. *Id.* at 1745. Despite the fact that the district court viewed the relevant arbitration agreement as favorable to Concepcion,[2] it denied AT&T's motion to compel arbitration. *Id.* In doing so, the district court relied on *Discover Bank v. Superior Court*, where the California Supreme Court found that a class action waiver provision was unconscionable, and thus unenforceable under California law when (a) it was part of a

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consumer contract of adhesion, (b) disputes involved small amounts of damages, and (c) the party with superior bargaining power had carried out a scheme to deliberately cheat large numbers of individuals out of small sums of money (the "*Discover Bank* Rule"). *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 162 (2005).

AT&T appealed the denial of its motion to compel arbitration, and the United States Court of Appeals for the Ninth Circuit upheld the district court's decision, finding that the arbitration agreement between AT&T and Concepcion was unconscionable and thus unenforceable based on the *Discover Bank* Rule. 131 S. Ct. at 1745; *see also Laster v. AT&T Mobility LLC*, 584 F. 3d 849, 855 (2009). The United States Supreme Court granted certiorari.

The Supreme Court restated the well-known principles that arbitration agreements must be placed "on an equal footing with other contracts" and enforced "according to their terms."

### B. Class Arbitration Waivers Are Permissible Under the FAA

The Supreme Court found that because it "stands as an obstacle" to the FAA, the *Discover Bank* Rule is preempted by the FAA. 131 S. Ct. at 1753. Accordingly, the Supreme Court reversed and remanded the Ninth Circuit's decision, and held that the arbitration agreement in place between AT&T and Concepcion was not unconscionable and unenforceable.

### C. The Supreme Court's Analysis

Noting that the FAA was enacted to combat "wide-spread judicial hostility to arbitration," and reflects a "liberal federal policy favoring arbitration," the Supreme Court restated the well-known principles that arbitration agreements must be placed "on an equal footing with other contracts" and enforced "according to their terms." *Id.* at 1748. Of course, not all arbitration agreements must be enforced under the FAA, which permits the invalidation of agreements "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Under this "saving clause," arbitration agreements may be invalidated under "generally applicable contract defenses" (including fraud, duress, unconscionability, etc.) but not by defenses that apply *only to* arbitration agreements. *Concepcion*, 131 S. Ct. at 1746.

Turning to the *Discover Bank* Rule, the *Concepcion* Court found that California's frequent refusal to enforce as "unconscionable" consumer arbitration agreements containing class waiver provisions was preempted by the FAA. While the saving clause preserves generally applicable contract

defenses to an arbitration agreement, it does not preserve state-law rules which impede the FAA's objectives. 131 S. Ct. at 1748. As such, California cannot provide a common law "right" to participate in a class-wide proceeding if such right effectively eviscerates the FAA. *Id.*

The purpose of the FAA is to promote arbitration by enforcing arbitration agreements "according to their terms" and "facilitat[ing] streamlined proceedings." *Id.* The informality of arbitration reduces cost and increases speed. *Id.* at 1749. The FAA's purpose would not be met, and these benefits would cease to exist, if class-wide arbitration was forced upon a party absent consent. *Id.* at 1749-51. As such, the *Discover Bank* Rule, invalidating arbitration agreements to promote class-wide proceedings, is inconsistent with and preempted by the FAA. *Id.* at 1753. Class arbitration may only proceed when there is express consent by the parties. *Id.*

California cannot provide a common law "right" to participate in a class-wide proceeding if such right effectively eviscerates the FAA.

Expanding upon *Stolt-Nielsen,* the Supreme Court provided three reasons that class arbitration without express consent is impermissible: (1) The principal advantages of arbitration, increased speed and decreased costs, would be lost in a class proceeding. For example, an arbitrator cannot decide the merits of a class proceeding before considering issues such as class certification, whether the named parties are adequately representative and typical, how class discovery should proceed, and how to sufficiently protect absent class members. *Id.* at 1751. (2) Class arbitrations require procedural formality that bi-lateral proceedings forgo. Absent class members cannot be bound by decisions without adequate protection and representation, which necessitates procedural formality and requirements. The Supreme Court found it "unlikely" that by passing the FAA, Congress intended to leave the disposition of such requirements to the discretion of an arbitrator, who is generally not subject to review. *Id.* at 1751-52. (3) Class arbitration "greatly increases risks to defendants." *Id.* at 1752. When damages owed to tens of thousands of class members are aggregated and decided in one proceeding, the risk of an error (which is generally not subject to review) could be unacceptable, and defendants would be pressured into settling

claims. *Id.* As such, arbitration "is poorly suited to the higher stakes of class litigation." *Id.*

The Concepcion majority rejected the dissent's position that class proceedings are necessary to prosecute small-dollar claims that might other-wise slip through the legal system. *Id.* at 1753. While this position may be desirable, states cannot require a procedure that is inconsistent with the FAA. *Id.* The Supreme Court finally noted that Concepcion was "better off" under the arbitration agreement with AT&T than as a participant in a class action, which "could take months, if not years" to be resolved and may yield only a small reward. *Id.*

### D. Interpretation

As arbitration agreements have become nearly standard in consumer contracts, Concepcion will likely to be subject to interpretation by many courts in the coming months and years. Concepcion applies to both silent agreements and those which expressly ban class arbitration. Because Concepcion specifically preempts the Discover Bank Rule under the FAA, and the facts of that case were unique, class action prohibitions in arbitration agreements may be subject to future challenges based on other arguments and standards. For example, claimants may attempt to attack arbitration agreements as unconscionable based on the nature of the process or other terms. However, until such time, Concepcion will prevent claims from moving forward in arbitration on a class-wide basis absent express agreement, and will also prevent courts from invalidating arbitration agreements simply because they contain an express class ban.

The Concepcion majority rejected the dissent's position that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system.

[1] The opinion of the Court was delivered by Justice Scalia, and joined by Justices Roberts, Kennedy, Thomas and Alito. Justice Breyer delivered the dissent, which was joined by Justices Ginsburg, Sotomayor and Kagan.

[2] The relevant arbitration agreement required the following: (1) AT&T must pay all costs for non-frivolous claims, (2) the arbitration must take place in the county in which the customer is billed, (3) for claims of $10,000 or less, the customer may choose whether to proceed in person, by submission, or by phone, (4) either party may choose to proceed in small claims court in lieu of arbitration, (5) the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages, (6) AT&T may not seek reimbursement of its attorneys' fees, and (7) and if the customer receives an award greater than AT&T's last settlement offer, AT&T must pay at least $7,500 and twice the amount of the customer's attorneys' fees. 131 S. Ct. 1744.