ORANGE COUNTY BUSINESS JOURNAL

U.S. Supreme Court Limits Class Action Lawsuits

The heavy hand of litigation v. the invisible hand of the marketplace

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On April 27, 2011, the United States Supreme Court held in *AT&T Mobility LLC v. Concepcion* that the Federal Arbitration Act of 1925 preempts state laws, such that businesses can contractually require their customers to submit to arbitration and, as individuals, not as a class action. Thus, an appropriately crafted arbitration provision can prevent consumers from joining together in class actions against the company. This does not eliminate the possibility of a claim by the consumer, however. The consumer can still seek redress, but the consumer must comply with the contract that they signed. And, if they signed a contract that includes an arbitration provision, which disallows class actions, then the consumer must abide by that.

In *Concepcion*, plaintiffs Vincent and Liza Concepcion sued AT&T Mobility contending that AT&T had engaged in false advertising and fraud by charging sales tax on phones it advertised as free. The Concepcions were charged $30.22 sales tax on the full retail price of the cell phone. They filed a lawsuit against AT&T for deceptive practices on behalf of a class of consumers who purportedly were overcharged. The Concepcions, however, along with their fellow plaintiffs, had signed a contract with AT&T that contained a mandatory arbitration clause which required them to resolve their disputes through arbitration and barred them from seeking class-action treatment with other consumers, whether through arbitration or in a lawsuit brought in court.

California state law has considered this kind of contract to be voidable and unenforceable under the doctrine of "unconscionability." Before this case had reached the Supreme Court, the Ninth Circuit Court of Appeals had ruled that the contract was unenforceable, and that the class action against AT&T could proceed. But the U.S. Supreme Court in *Concepcion* found that such a determination itself was a form of discrimination, and against a liberal federal policy favoring arbitration. The California holding would allow a party to a consumer contract to demand *classwide* arbitration, after the fact.

The majority opinion, written by Justice Antonin Scalia, reasoned that "requiring the availability of class wide arbitration interferes with fundamental attributes of arbitration." About companies that have taken the effort to draft and include an arbitration clause that eliminates the right of appeal in their agreements, Scalia wrote, "we find it hard to believe that [they] would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision."

Concepcion is expected to have far-reaching effects. Arbitration clauses are often included in the fine print of billing inserts, employment handbooks, health insurance plans, and professional service agreements. They appear in cell phone contracts and deposit accounts with banks. And following *Concepcion*, class action waiver provisions in arbitration agreements should be enforceable.

Corporate attorneys are advising their clients to include class action bans in their arbitration clauses. An arbitration provision, based on the *Concepcion* case, would include language along the following lines:

> You agree that by entering into this Agreement, you are waiving the right to a trial by jury, or to participate in a class action. This Agreement relates to a transaction in interstate commerce, and therefore the Federal Arbitration Act governs the interpretation and enforcement of this provision. You agree that you may bring claims against the company only in your individual capacity, and not as a plaintiff or class member in any purported class or any representative proceeding. Further, unless you and the company agree otherwise in writing, the arbitrator shall not consolidate more than one person's claims, and may not otherwise preside over any forum of representative

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or class proceeding.

The minority opinion in *Concepcion*, written by Justice Stephen Breyer, said that without class actions, minor frauds would not be remedied. "What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees steaming from a $30.22 claim?"

There could be a legislative and administrative backlash. Senators Al Franken (D-MN) and Richard Blumenthal (D-CT), along with Rep. Hank Johnson (D-GA), have announced that they intend to reintroduce the Arbitration Fairness Act, first introduced in 2007, which would ban arbitration clauses in employment, consumer, and civil rights cases. Moreover, Elizabeth Warren, head of the Consumer Financial Protection Bureau (CFPB), is an ardent supporter of consumer safeguards. Some contend that the CFPB has the power to regulate arbitration in consumer-services contracts. The CFPB could conclude that class-action bans are detrimental to consumers, and upend the brunt of the effects of *Concepcion*.

But not every case needs a legal resolution. Consumers have market redress. If companies should chose to gouge their consumers with tiny, bite-sized damages, the market has the proven ability to speak through the web and its "apps" with great alacrity. Now, the redress will be in the market place, rather than in the courts.