

Litigation Management in a NEW YORK Minute - 2011 Edition

CLASS ACTION UPDATE

Tony Lathrop
Moore & Van Allen



CLASS ACTIONS – WAIVER OF RIGHT TO PARTICIPATE – ARBITRATION AGREEMENT

New Supreme Court Ruling Allows Class Action Waivers

Moore & Van Allen

AT&T Mobility LLC v. Vincent Concepcion et ux, No. 09-893, 2011 U.S. LEXIS 3367 (Nov. 9, 2010, argued; April 27, 2011, Decided)

- Putative Class Action Suit Against Cellular Telephone Service Provider in Federal District Court
- Allegations of False Advertising and Fraud; Concepcions were charged sales tax on retail value of phones provided free under service contract.

2

Moore & Van Allen

AT&T Mobility LLC v. Vincent Concepcion et ux, No. 09-893, 2011 U.S. LEXIS 3367 (Nov. 9, 2010, argued; April 27, 2011, Decided)

- Contract Between Customer and Provider.
- Established Dispute Proceedings and provided for arbitration of unresolved disputes.
- Contract precluded class arbitration.

3

Moore & Van Allen

District Court's Holding

- Denied AT&T's motion to compel arbitration

4

Moore & Van Allen

District Court (cont.)

District Court described AT&T's arbitration agreement favorably, noting,

- Informal dispute resolution process was quick, easy to use
- Likely to prompt full or even excess payment to customer without the need to arbitrate or litigation.

5

Moore & Van Allen

District Court (cont.)

- \$7,500 minimum recovery.
- Consumers who are members of a class will likely be worse off.

6

Moore & Van Allen

District Court Holding (cont.)

- Arbitration provision was unconscionable
- AT&T had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions.

7

Moore & Van Allen

9th Circuit Ruling

- Affirmed District Court (denial of motion to compel arbitration)
- Contractual arbitration provision was unconscionable under California's Discover Bank rule.

8

Moore & Van Allen

California's Discover Bank Rule

- Class action waivers in consumer contracts of adhesion are unconscionable in cases where a party with superior bargaining power is alleged to have cheated large numbers of consumers out of individually small sums of money.

9

Moore & Van Allen

9th Circuit (cont.)

- Discover Bank rule was not preempted by FAA because that rule was simply “a refinement of the unconscionability analysis applicable to contracts generally in California.”

10

Moore & Van Allen

U.S. Supreme Court Holding

- Because it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”, ..., California’s Discover Bank rule is preempted by the FAA.

11

Moore & Van Allen

Section II of the FAA

- Permits agreements to be invalidated by “generally applicable contract defenses,” but not by defenses that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue.

12

Moore & Van Allen

Discover Bank Rule

- Deemed by the Court not to be a ground that “exists at law or inequity for the revocation of any contract” under FAA § 2.

13

Moore & Van Allen

Discover Bank Rule (cont.)

- Although FAA § 2’s saving clause preserves generally applicable contract defenses, it does not suggest an intent to preserve state law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.

14

Moore & Van Allen

Discover Bank Rule (cont.)

- The FAA’s overarching purpose is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate informal, streamlined proceedings.

15

Moore & Van Allen

Supreme Court Holding (cont.)

- Class arbitration, to the extent it is manufactured by Discover Bank rather than consensual, interferes with fundamental attributes of arbitration.
- The switch from bilateral to class arbitration sacrifices arbitration's informality and makes the process slower, more costly and more likely to generate procedural morass than final judgment.

16

Moore & Van Allen

Supreme Court Holding (cont.)

- Class arbitration greatly increases risks to defendants; the absence of a multi-layered review makes it more likely that errors will go uncorrected.
- That risk of error may become unacceptable when damages allegedly owed to thousands of claimants are aggregated and decided at once; arbitration is poorly suited to these higher stakes.

17

Moore & Van Allen

Supreme Court Holding (cont.)

- In litigation, a defendant may appeal a certification decision and a final judgment, but 9 USC§10 limits the grounds in which Courts can vacate arbitral awards.

18

Moore & Van Allen

Impact of Supreme Court's Decision

Consider including waivers of class action rights in contractual arbitration provisions.



tonylathrop@mvalaw.com
704.331.3596

100 North Tryon Street
Suite 4700
Charlotte, NC 28202-4003

PRACTICE AREAS

Class Actions & Multi-District
Litigation
Commercial Litigation &
Alternative Dispute Resolution
Eminent Domain Litigation
Employment & Labor
Employment Litigation
Environmental Litigation &
Toxic Torts
Intellectual Property Litigation
Land Use & Zoning Litigation
Litigation

EDUCATION

B.A., University of North
Carolina at Chapel Hill, 1983
J.D., University of North
Carolina at Chapel Hill, 1988

Moore & Van Allen

Tony Lathrop -- Member

Tony Lathrop brings experience and a high level of analytical ability, professional credibility and creativity to handling litigation matters. He rigorously represents his clients' interests in a diverse range of claims and actions. A certified mediator, Mr. Lathrop has extensive experience representing business clients in mediation. His service to the legal profession in North Carolina has allowed him to develop relationships across the state that benefit the firm's clients.

Mr. Lathrop has handled cases in North Carolina's courts, before arbitrators and before the North Carolina Industrial Commission. Recent matters include:

- A breach of a contract claim (sale of a \$40 million manufacturing facility), representing a plaintiff Fortune 500 corporation.
- Approximately 20 municipal eminent domain actions, representing the condemnor.
- A trademark infringement and breach of contract action involving competing cable television networks.
- A post-acquisition dispute over corporate liability for property taxes, software and depreciation of real estate.
- Summary judgment for defendants on a police liability claim in Federal court, which was affirmed by the Fourth Circuit.
- A breach of contract claim (pricing, cancellation costs), representing a tier-one automotive parts supplier.
- A coverage dispute over provisions of a contingent automobile liability insurance policy in connection with the vehicle leasing program of a Fortune 500 company.
- A trade secrets/corporate raiding case involving competing general contractors.
- A motor vehicle products liability claim defending an international vehicle manufacturer.
- A helicopter products liability claim defending an international manufacturer.