Client Alert

A recent Second Circuit decision further erodes the confidence business may have had in the Supreme Court's AT&T Mobility v. Concepcion *decision, which had provided a blueprint for class action waivers.*

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Plaintiffs Are Once Again Invalidating Class Action Waivers

In April of last year, a certain euphoria went up in the business community over the Supreme Court's decision in *AT&T Mobility v. Concepcion* in which the Supreme Court ruled that companies could bar class actions in their agreements with customers through appropriately crafted arbitration provisions.

While many businesses scrambled to revise their agreements to take advantage of the decision, the plaintiffs' bar scrambled with equal vigor to set about poking holes in the *Concepcion* decision. In less than a year, they have achieved remarkable success.

An early victory for the plaintiffs came in the July of 2011 decision of *Brown v. Ralphs Grocery*. In *Brown*, an employee of the grocery store sought to bring a representative action under the Private Attorney General Act alleging labor code violations. The employment agreement contained an arbitration agreement by which the employee waived the right to bring just such representative actions, and was instead required to pursue her claims in an individual arbitration. A representative action is like a class action, but is designed to enforce laws for the benefit of the public. The *Brown* court decided that *Concepcion* did not expressly address representative actions – it addressed class actions – and therefore did not apply.

Then in January of 2012, the National Labor Relations Board issued its decision in *Cuda v. D.R. Horton*. The complaining employee in *D.R. Horton* alleged that the company had improperly failed to pay overtime to its superintendents. In the decision, the NLRB ruled that an arbitration provision in an employment agreement that bars employees from filing class actions violates the provisions of the federal labor laws that protect an employee's right to engage in "concerted activities." The NLRB distinguished *Concepcion* by saying that *Concepcion* preempted a state law that stood in the way of arbitration, but that same preemption would not apply to the federal labor laws protecting concerted activities.

And on February 2, 2012, the Second Circuit gave us *In re American Express Merchants*. At issue in that case were American Express's agreements with merchants

that contained an arbitration provision waiving class actions. The court said that *Concepcion* never held that all class action waivers in arbitration provisions were "per se enforceable." The court found that *Concepcion* did not apply where, as was the case here, the plaintiff-merchants had shown that the class action bar effectively precluded them from seeking vindication of their statutory rights under antitrust laws because individual arbitrations would be prohibitively expensive. The court limited its findings to the facts of this case, but then threw the door to future challenges wide open by suggesting that the validity of these provisions should be decided on a case-by-case basis.

Conclusion

The simplicity and certainty created by *Concepcion* that companies may waive class actions through appropriately crafted arbitration provisions is now gone. Companies who have amended their contracts in light of *Concepcion*, or who are planning to, should carefully consider the risks of having their contracts tied up in costly litigation in the courts of appeal.

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