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California Consumer and Employment Class Action Law Update

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Supreme Court Gives Business the Gift of Class Action Waivers in Arbitration Agreements

The latest ruling from the United States Supreme Court handed business an unexpected victory. The Supreme Court ruled that California, or any other state, cannot override an arbitration agreement covered by the Federal Arbitration Act ("FAA") simply because the agreement disallowed class action proceedings.

The Supreme Court's Decision

In AT&T Mobility, LLC v. Concepcion, California consumers sued AT&T for allegedly defrauding them by charging sales tax on cell phones it advertised as free. The lawsuit was brought as a class action. AT&T invoked the arbitration clause of its consumer contract which required any complaints to be submitted to private arbitration. The contract further prohibited customers from bringing any such claims as a class action.

AT&T's class action waiver was found by both the District Court and Ninth Circuit to be unconscionable and unenforceable, even though the arbitration agreement was consumer friendly and cost free. The Ninth Circuit rested its decision on the California Supreme Court's ruling in Discover Bank v. Superior Court, 36 Cal.4th 148 (2005), which essentially ruled that it was unfair to require individuals to arbitrate their small disputes as individual claims only, and not on a class-wide basis. Class actions are believed by some to have a deterrent effect, which is not as existent with individual claims.

The United States Supreme Court rejected California's rationale and overruled the Discover Bank decision. In a decision written by Justice Scalia, the Court ruled that California's prohibition of class action waivers was pre-empted by the FAA. California law cannot stand as an obstacle to the FAA's objective to enforce arbitration agreements according to their terms. Simply put, federal law favors arbitration and the U.S. Supreme Court will not allow California, or other states, to make arbitration obsolete, cumbersome, or more costly.

Four Justices dissented from the majority's opinion, and expressed concern that class actions are necessary to prevent small claims from being unprosecuted. However, the Court's majority concluded that class arbitration, to the extent it is manufactured by the Discover Bank Rule, rather than consensual, is inconsistent with the FAA.

Implications for Employment Arbitration Agreements

Since the AT&T case involved consumers, and not employees, it is reasonable for employers to ask whether this case could impact the growing number of wage and hour and employment discrimination class action lawsuits. For most, the ruling would appear to apply to arbitration agreements in the employment context too. However, and not surprisingly, California has more than one Supreme Court decision involving the topic of arbitration agreements and class action waivers. The California Supreme Court in Gentry v. Superior Court, 42 Cal.4th 443 (2007) applied the Discover Bank Rule in refusing to enforce, without further trial court consideration, a class action waiver in a wage and hour case. The Gentry decision expanded on the Discover Bank Rule but also called for consideration of other factors besides the "size of claim" to determine whether to enforce a class action arbitration waiver.

Undoubtedly, at least in California, the Gentry decision will now be subject to significant scrutiny with employees arguing that it survived the AT&T decision and employers contending that it too was overruled by the United States Supreme Court. Although there are still battles to fight, employers currently not utilizing an arbitration agreement may want to consider whether such a policy is right for their company. Employers with arbitration agreements should likewise consider seeking legal advice to consider using class action waiver provisions if their agreements do not already contain them. There is much to consider so employers should seek experienced counsel.

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