

High Court Weighs Class Action Bans In Arbitration

By Jocelyn Allison

Law360, New York (November 09, 2010) -- The U.S. Supreme Court heard competing arguments Tuesday on whether it should uphold a California court's decision to strike down a class action waiver in AT&T Mobility LLC's consumer arbitration agreement in a case that could have far-reaching effects for the resolution of consumer disputes.

The justices hit counsel for both sides with tough questions during oral arguments in *AT&T Mobility v. Concepcion* as they considered whether the court's decision finding the class action ban unconscionable under California law could stand under the Federal Arbitration Act.

The court seemed wary of trampling on California's unconscionability doctrine but at the same time appeared concerned that a ruling for the respondents, Liza and Vincent Concepcion, could allow courts to chip away at arbitration so that it mirrored litigation.

"Are we going to sit in judgment?" Justice Antonin Scalia asked Andrew Pincus, counsel for AT&T, during his opening argument. "If a state wants to apply a lesser standard of unconscionability, can we strike that down?"

At the same time, some justices questioned how far states should be allowed to go in imposing rules that have the effect of inhibiting arbitration and questioned if a rule requiring class adjudication should be allowed if other types of rules imposing court-like procedures in arbitration would not be.

"What is the difference ... between a rule that says you must follow the rules of evidence in every adjudication and a rule that says class adjudication must always be available," Justice Samuel Alito asked counsel for the Concepcions, Deepak Gupta of Public Citizen Litigation Group.

"In the end, we have to make a value judgment about whether these things, one thing or the other, fits with arbitration," Justice Alito said. "That's what it comes down to."

The wireless contract at issue in the AT&T case provides consumers with cost-free arbitration and a minimum award of \$7,500 if the arbitrator's award exceeds AT&T's last settlement offer before the matter heads to arbitration.

Despite ruling it unconscionable, Judge Dana M. Sabraw of the U.S. District Court for the Southern of California hailed the contract as having "perhaps the most fair and consumer-friendly provisions that court has ever seen."

AT&T has asked the high court to decide whether the FAA preempts states from requiring class arbitration when such a mechanism is not "necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims."

Pincus, a partner at Mayer Brown LLP, argued that the California court made up a “special rule” to declare the class action ban unconscionable because it could not find it unconscionable under its general rules for invalidating unfair contract provisions.

“Their general rule doesn't invalidate this provision because the general rule says, is it fair to the people before the court?” he said after Tuesday's arguments. “The rule they applied here was a special rule targeted for this situation, and that's not what the law allows.”

Scott Nelson, senior attorney with Public Citizen Litigation Group, challenged AT&T's claim that its arbitration agreement was consumer-friendly, and said it was instead designed to prevent people from banding together to bring claims.

“I think there really is a pretty strong possibility that class actions as a practical matter in any kind of case that involves a contractual arrangement are likely to become an endangered species,” Nelson said after the oral arguments.

In a statement issued Tuesday, AT&T said “class actions frequently benefit lawyers rather than consumers, and a class action certainly is not the only method to protect consumers' legitimate interests.”

“Consistent with the strong federal policy favoring arbitration to settle consumer disputes, which the Supreme Court repeatedly has recognized, AT&T has created an innovative and highly consumer-friendly dispute resolution process,” it said.

Alan Kaplinsky, chair of the consumer financial services group at Ballard Spahr LLP who attended Tuesday's arguments, said it was unclear how the court would rule, but said it was likely that the court would issue a narrower opinion.

“I doubt very much that the Supreme Court is going to say the FAA preempts a state law invalidating class action waivers under every and all circumstances,” said Kaplinsky, who is not involved in the case. “They're probably not going to write that broad an opinion.”

AT&T is represented by Mayer Brown LLP.

The Concepcions are represented by Public Citizen, Hulett Harper Stewart LLP and Nicholas & Butler LLP.

The case is AT&T Mobility LLC v. Vincent Concepcion et ux., case number 09-893, in the U.S. Supreme Court.