United States Supreme Court Clears Way for Arbitration Clauses Limiting Class Action

In its recent decision in *AT&T Mobility LLC v. Concepcion*, the United States Supreme Court upheld the enforceability of arbitration clauses that disallowed classwide arbitration, striking down a California rule barring such provisions. This ruling at once reaffirms the enforceability of contractual arbitration provisions in general and opens the door for employers to shield themselves (at least for the time being) from class actions asserting, for example, wage and hour claims.

The plaintiffs in this case, the Concepcions, had entered into a service contract with AT&T which included an arbitration clause requiring customers to bring breach of contract claims only in their "individual capacity" and not as members of a class. When the Concepcions attempted to join a class action against AT&T, complaining of alleged false advertising, the company moved to compel arbitration per the terms of the contract. The federal trial and appellate courts, however, refused to require the Concepcions to arbitrate their claims as individual complainants, applying a California rule deeming "unconscionable" certain kinds of arbitration provisions that waive an individual's right to join a class action. The Supreme Court reversed, holding that the state rule stood "as an obstacle" to the Federal Arbitration Act and impeded the "liberal federal policy favoring arbitration." Although the issue addressed by the Court arose in connection with a consumer contract, the Court's decision is more broadly applicable, including to employment agreements containing provisions requiring the arbitration of work-related disputes.

In response to the Supreme Court's decision, some members of Congress have pledged to reintroduce the Arbitration Fairness Act, which would render unenforceable *any* pre-dispute arbitration agreement relating to employment, consumer, or civil rights claims. The Arbitration Fairness Act has been proposed twice before, in 2007 and 2009, but has never proceeded out of committee to a floor vote.

In light of the *Concepcion* decision, employers should consider carefully whether they would benefit from requiring, as a condition of employment, that employees sign an agreement that includes a provision requiring current and former employees to bring employment-related claims exclusively before arbitrators on an individual basis. Such a provision could be included, for example, in an offer letter that new employees are required to countersign as a condition of hire, or in an employee confidentiality agreement that all employees sign and in all of the employer's employment agreements. For many employers, wage and hour class action lawsuits represent their single most significant employment-related risk, particularly in light of the substantial settlements that are frequently paid by employers seeking to avoid the significant cost of defending wage and hour claims brought on behalf of large classes of employees and former employees. A mandatory arbitration agreement compelling plaintiff-by-plaintiff proceedings would effectively eliminate this threat (at least once the agreement covered all employees and former employees with claims not barred by applicable statutes of limitation).

Employers should, however, consult with experienced labor and employment counsel before deciding to adopt mandatory arbitration agreements. While arbitration is faster and less costly than litigation in many cases, this lower barrier to entry may operate to invite more claims-making by employees than would be the case if they had to run the gauntlet of civil litigation. Arbitration likewise lacks certain procedural safeguards that employers may use to their advantage to dispose quickly of claims lacking merit. Additionally, arbitral procedures provide employers with few avenues to appeal unfavorable rulings; and, for this reason, employers often find themselves without recourse to address the kinds of compromise outcomes that are commonplace in arbitration. Finally, the Supreme Court in the *Concepcion* decision made note of the pro-plaintiff aspects of AT&T's mandatory arbitration agreement, such as the company's responsibility to pay for the costs of arbitration and a generous minimum recovery for non-frivolous claims. Courts that consider the enforceability of arbitration agreements going forward may look for similar pro-plaintiff provisions as evidence that the agreement was fundamentally fair and thus not unconscionable (a basis for legal challenge to mandatory arbitration agreements that survives the decision in *Concepcion*).

If you have questions concerning the use of arbitration clauses with respect to employment-claims, please contact the Ropes & Gray attorney with whom you regularly work.