

## Case Focus

### *AT&T Mobility LLC v. Concepcion:* Is Feeney Finis?

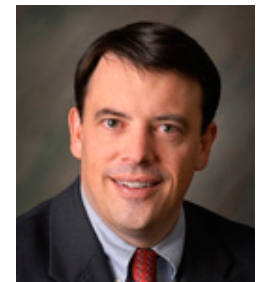
By Donald R. Frederico and Clifford H. Ruprecht

In *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the United States Supreme Court, by a 5-4 decision, held that the Federal Arbitration Act (“FAA”) preempted a California rule invalidating provisions in consumer contracts that require individual arbitration and that waive any right to bring a class action. Although the case before it involved the application of a California rule premised on the doctrine of unconscionability, the Court’s holding effectively overrules the Massachusetts Supreme Judicial Court’s decision in *Feeney v. Dell Inc.*, 454 Mass. 192 (2009), that class action waivers in consumer contracts contravene Massachusetts public policy. See D. Frederico, “*Feeney v. Dell Inc.: Consumer Class Actions and Public Policy*,” *Boston Bar Journal*, Winter 2010, at 6-7. Barring circumstances, such as fraud or duress, that negate the elements of contract formation, companies that sell consumer goods or services in Massachusetts may again rely on class action waivers contained in properly framed arbitration provisions of their consumer contracts.

In *Concepcion*, plaintiffs brought a putative class action, claiming that their cell-phone provider engaged in an unfair sales practice by charging them sales tax on phones that were advertised as free. The cell-phone contract required arbitration and provided that consumers could arbitrate in their individual



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capacity only, not as representatives of a class. The California Supreme Court had struck down such class action waivers as unconscionable in *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 162 (2005). The Supreme Court in *Concepcion* held that the *Discover Bank* rule is preempted by Section 2 of the FAA, 9 U.S.C. § 2, which provides that a written agreement to arbitrate “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”

Plaintiffs argued that Section 2’s savings clause precluded enforcement of the class action waiver. 131 S. Ct. at 1746. The Court disagreed, holding that a state law rule is not within the FAA’s savings clause if it “stand[s] as an obstacle to the accomplishment of the FAA’s objectives.” *Id.* at 1748. The *Discover Bank* rule failed under this analysis for several reasons, including the relative formality, slowness and cost of class-wide proceedings, and the greatly increased risk to defendants in class actions. *Id.* at 1751-53. On this latter point, the Court observed that businesses opting to resolve consumer claims through arbitration choose to forego multilayered appellate review and accept a greater risk of error because arbitration is less expensive than court litigation and the risk of harm in a single-plaintiff case is limited. Not so with class-wide arbitration, where the aggregation of claims renders the risk of error “unacceptable” to defendants, and where defendants would “be pressured into settling questionable claims.” *Id.* at 1752. *Cf. D. Frederico, supra*, at 7 (requirements for class certification “reflect a balancing of consumers’ interests in vindicating their small claims with the interests of business defendants to be free from pressure to settle unmeritorious cases... .”)

Thus, although the *Concepcion* majority reaffirmed the principle that the FAA requires only that arbitration agreements be placed on an equal footing with other contracts, it concluded that even a rule of general applicability will violate the FAA if it vitiates essential features of the agreement to arbitrate. A requirement that a corporate defendant arbitrate on a class basis or not at all, the Court reasoned, would so skew the balance of arbitration’s costs and benefits that it would deprive the contractual

arbitration provision of its fundamental purpose. Such an impairment of the contractual right to refer disputes to arbitration is precisely what the FAA's preemption clause is designed to prevent.

The Supreme Court's rejection of California's *Discover Bank* rule effectively overrules the SJC's rejection of class action waivers in *Feeney v. Dell, Inc.* Although *Feeney* is premised on public policy rather than unconscionability, this difference is not a distinction. See *Feeney*, 454 Mass. at 200, n.26 ("the reasoning of those courts [basing their decisions on grounds of unconscionability] have often overlapped and incorporated public policy.") Indeed, the SJC in *Feeney* had rejected the same FAA preemption argument that the Supreme Court would later adopt in *Concepcion*. And the SJC based its public policy rationale in *Feeney* on the need for class proceedings to vindicate small-dollar consumer claims, see *id.* at 204 (citing *Discover Bank*), an issue the *Concepcion* majority rejected as insufficient to overcome FAA preemption. 131 S.Ct. at 1753. See also, *Cruz v. Cingular Wireless, LLC*, No. 08-16080 (11th Cir., August 11, 2011)(rejecting public policy argument in light of *Concepcion* despite evidence that class action waiver would prevent vindication of small-dollar consumer claims).

After *Concepcion*, the argument that a class action waiver in an arbitration provision is unenforceable because it is unconscionable or against public policy appears foreclosed. Counsel seeking to avoid such waivers must find other grounds for doing so. Because challenges based on fraud, duress or similar state law doctrines would often raise individual issues, even if otherwise successful, they may preclude class certification. Counsel representing defendants in putative consumer class actions should, at the very outset, review their clients' consumer contracts for arbitration clauses containing class action waivers, and invoke any such waivers at the earliest opportunity. ■