

# Louisiana Advocates

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# AT&T v. Concepcion — a blow to consumer rights

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*AT&T v. Concepcion* is an important — and unfortunate — decision that will undoubtedly negatively affect consumer rights for years to come. In a 5-4 decision, the United States Supreme Court held that arbitration agreements containing class action waivers are enforceable. This decision could very well be the death knell for many consumer class actions in which contracts of adhesion form the relationship between the parties.

The ruling gives companies broad authority to not only compel arbitration of disputes but also to forbid consumers, arguably cheated in the same way, from joining together in class actions to pursue collective remedies.

As a way of background, Vincent and Liza Concepcion complained that AT&T charged them \$30.22 in sales tax for a cell phone that AT&T said would be “free” if the Concepcions switched their cell phone service to AT&T. The Concepcions sought to bring a class action under California law against AT&T for the charges, contending that AT&T was guilty of fraud and cheated millions more consumers in the same way.

The problem with such a claim was that AT&T’s contracts provided not only for arbitration of all disputes between the parties, but also required that claims be brought in the parties’ “individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.”

AT&T also had a special clause in its contracts stating that AT&T would pay a customer \$7,500 if the arbitrator issued an award in favor of a California customer that was greater than AT&T’s last written settlement offer made before the arbitrator was selected.

AT&T moved to compel arbitration of



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the Concepcions’ claims under the agreement. The district court — despite finding that the informal dispute resolution process called for in the agreement was “quick, easy to use,” and likely to lead to “prompt, full,” and perhaps “excess payment” to the consumer — denied the motion to compel arbitration, relying upon *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 113 P.3d 110

(2005). In that case, the California Supreme Court invalidated another arbitration provision forbidding class-wide arbitration as unconscionable.

The Ninth Circuit affirmed the district court’s decision, finding the class action waiver unconscionable, again relying upon *Discover Bank*. The Ninth Circuit also rejected AT&T’s argument that *Discover Bank* discriminated against arbitration and rejected the contention that the Federal Arbitration Act (FAA) preempted any state law interfering with the right to compel arbitration.

Justice Antonin Scalia, writing for the majority (composed of Chief Justice John Roberts and Justices Anthony Kennedy, Samuel Alito, and Clarence Thomas, who wrote his own concurring opinion), framed the decision as “whether the Federal Arbitration Act prohibits states from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures.”

Sect. 2 of that act makes arbitration agreements “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. Sect. 2. The court noted that it had previously described this provision as reflecting a “liberal federal policy

favoring arbitration” as well as the “fundamental principle that arbitration is a matter of contract.” As a result, the court started with the premise that courts must place arbitration agreements on “equal footing” with other contracts and enforce the arbitration agreements “according to their terms.”

The court noted, however, that the final phrase of Sect. 2 of FAA permits arbitration agreements to be invalidated “upon such grounds as exist at law or in equity for the revocation of any contract.” The court noted that this savings provision permits invalidation by “generally applicable contract defenses, such as fraud, duress, or unconscionability” but not by defenses that apply “only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.”

The court stated the question before it was whether Sect. 2 preempts the “*Discover Bank* rule.” In particular in *Discover Bank*, the California Supreme Court found that when a class action waiver “is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money,” the waiver is unconscionable under California law and would not be enforced.

The majority reasoned that although the savings provision preserves applicable contract defenses, “nothing in it suggests an intent to preserve state-law rules that stand

as an obstacle to the accomplishment of the FAA’s objectives.” The court continued that “[t]he overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”

The court also noted that the “principal purpose” of FAA is to ensure that arbitration agreements were enforced according to their terms. The court found that “the point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute.” The court held that California’s *Discover Bank* rule “interferes with arbitration. Although the rule does not require classwide arbitration, it allows any party to a consumer contract to demand it *ex post*.” (Emphasis in original.)

Shifting to policy considerations, the

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court stated that “class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA.” The court gave three reasons for this conclusion.

First, the court explained its view that “the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration — its informality — and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.” Secondly, the court stated that “class arbitration *requires* procedural formality.” (Emphasis in original.) The court worried that certain formalities, like those to protect absent class members, would not be available in class-wide arbitrations.

Thirdly, the court stated that “class arbitration greatly increases risks to defendants. Informal procedures do of course have a cost: The absence of multilayered review makes it more likely that errors will go uncorrected.” The court laid out the perceived dangers to a defendant: “. . . [W]hen

damages allegedly owed to tens of thousands of potential claimants are aggregated and decided once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.”

The court further stated that “[a]rbitration is poorly suited to the higher stakes of class litigation” given the lack of meaningful judicial oversight. The court concluded that “[w]e find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision.”

The court found that “[a]rbitration is a matter of contract, and the FAA requires courts to honor parties’ expectations.” In conclusion, the court summarily dealt with the dissent’s claim that class proceedings were “necessary to prosecute small-dollar claims that might otherwise slip through the legal system.” The court concluded that “[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.”

This decision will unquestionably encourage other companies to include class action waivers in arbitration clauses. Consumers, with no bargaining rights, will lose an important tool to help level the playing field with corporate wrongdoers and be forced to arbitrate only individual suits, without the power of aggregation.

Of course, it is questionable even then whether consumers (much less their lawyers) will go through the hassle of arbitrating small claims. As one federal appellate court stated, “The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.” *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (CA7 2004) (Emphasis in original.)

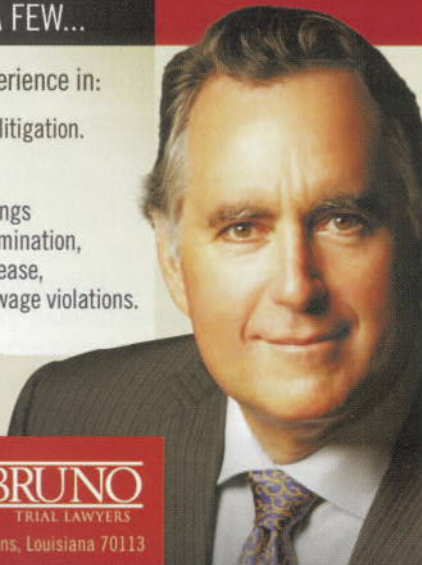
The effect of this decision may very well be the absence of any meaningful right of recovery for consumers shorted by unscrupulous companies.

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