

It's not a common practice.[®]

August 2011

Reporter

Employment Law

by Karina B. Sterman, Esq.

U.S. Supreme Court Works Its Magic On Class Actions One Case At A Time, But Offers No Magic Bullet For Employers Just Yet

Rarely does a case resonate so resoundingly in the business community that it actually leads to clients calling their lawyers. *AT&T Mobility, LLC v. Concepcion* is such a case, and many companies are now asking their lawyers for the “AT&T clause.” This is a brief but potent line in an arbitration agreement that limits any disputes between the parties to individual lawsuits “and not as a plaintiff or class member in any purported class or representative proceeding.” A veritable class-action avoidance magic wand. What makes this clause so special is not its relatively straightforward and simple language but the fact that it was actually enforced by a court. And not just any court...the United States Supreme Court.

Now, *AT&T Mobility* was not an employment law case by any stretch. It was a consumer lawsuit in which the Concepcions sued AT&T for making them pay between \$20 and \$30 for what was advertised as a “free

phone” offered in connection with signing up for the phone service. Having discovered the phone was not free, the Concepcions filed a class action against AT&T pointing out that AT&T’s “false advertising and fraud” were causing large-scale small harms to many individual consumers that could and should be addressed on a class-wide basis. While this was quite logical, the Concepcions were fooled by more than the \$20 “free” phone offer. They apparently also signed away their rights to any class action and could only sue for their own individual harm.

The Concepcions argued that such a class action waiver was unconscionable and unenforceable. This should not have been difficult to win as their argument was based squarely on California’s *Discover Bank v. Superior Court*, which stated as much. The trial court and even the Ninth Circuit Court of Appeal agreed with them and found that the class action waiver was unenforceable. AT&T,

2011 Seminars at ECJ

Tuesday, November 15, 2011—Common Wage and Hour Mistakes—What Every Employer Should Know by Lauren J. Katunich
Tuesday, November 15, 2011—Sexual Harassment Prevention Training by Kelly O. Scott

Please contact Brandi Franzman at bfranzman@ecjlaw.com for registration information.

This publication is published by the law firm of Ervin Cohen & Jessup LLP. The publication is intended to present an overview of current legal trends; no article should be construed as representing advice on specific, individual legal matters, but rather as general commentary on the subject discussed. Your questions and comments are always welcome. Articles may be reprinted with permission. Copyright ©2011. All rights reserved. ECJ is a registered service mark of Ervin Cohen & Jessup LLP. For information concerning this or other publications of the firm, or to advise us of an address change, please send your request to bfranzman@ecjlaw.com or visit the firm’s website at www.ecjlaw.com.

Reporter **Employment Law**

however, undaunted and apparently encouraged by the current conservative make up of the U.S. Supreme Court, decided to take their little “AT&T clause” to the next level of review. This was the right gamble.

In an upset (surprising only to California), the Supreme Court found the class action waiver perfectly enforceable because, after all, it grew out of an otherwise enforceable agreement to arbitrate claims and the Supreme Court is very much in support of arbitration agreements. Specifically, to the extent that this ruling trounced the specific holding of California’s *Discover Bank* case, the Supreme Court stated “when state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: the Conflicting rule is displaced by the [Federal Arbitration Act].”

It would seem then that after *AT&T Mobility*, employers should now all have arbitration agreements with their employees if they didn’t already have them and those who did should certainly add the “AT&T clause.” But things are not always as they seem. First, it should be noted that *AT&T Mobility* was not an employment law case and therefore its application in the employment law context remains to be seen. While the Supreme Court clearly overruled *Discover Bank v. Superior Court*, it did not address the seminal employment class action case of *Gentry v. Superior Court*. The *Gentry* court, having relied on *Discover*

Bank, held that class action waivers are not enforceable in the context of a wage and hour claim. This holding remains in effect and has yet to be directly tested in court. However, if the current holding in *Brown v. Ralphs Grocery Company* is any indication, California courts will not just meekly bow down to the Supreme Court’s holding.

Only two months after *AT&T Mobility*, the California Court of Appeal in *Brown* ruled that employees cannot be forced to give up their right to enforce wage and hour laws under the Private Attorney General Act (PAGA)¹ in an arbitration agreement. Despite the Court of Appeal’s wordsmithing that PAGA is an enforcement action rather than a true “class action”, this holding appears to fly squarely in the face of *AT&T Mobility*. Of course, there is always the chance that *Brown* will get appealed to the California Supreme Court and overturned, but until then it is the law in California.

So, what do these recent cases mean? Should every employer now be asking for the “AT&T clause” to be added to their arbitration agreements? May be.

Should every employer rely on it and feel insulated from any employee class actions? Not yet.

1. PAGA allows workers to sue on behalf of others—in other words, as a class action—for wrongs within the past one year and to collect 25 percent of fines, with the remainder being paid to the government. Notably, both PAGA and non-PAGA class actions provide attorneys’ fees to successful plaintiffs.

Did you know...

That effective July 1, 2011, the 0.2 percent federal unemployment tax (“FUTA”) surtax was discontinued?

That on June 23, 2011, the IRS announced a mid-year increase in the standard mileage rate used for calculating the deductible costs of operating an automobile? The new mileage rate for business is 55.5 cents per mile.

Well, now you know!

If you have any questions regarding this bulletin, please contact Kelly O. Scott, Esq., Editor of this publication and Head of ECJ’s Employment Law Department, at (310) 281-6348 or kscott@ecjlaw.com; or Karina B. Sterman, Esq. at (310) 281-6395 or ksterman@ecjlaw.com. If one of your colleagues would like to be a part of the Employment Law Reporter mailing list, or if you would like to receive copies electronically, please contact Brandi Franzman at (310) 281-6328 or bfranzman@ecjlaw.com.