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IS THERE AN ARBITRATION AGREEMENT WITH AN ENFORCEABLE CLASS ACTION WAIVER?

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By: **R. Ashby Pate**

In *AT&T Mobility v. Concepcion*, the United States Supreme Court upheld a class-action waiver in a standard consumer contract, first finding that the Federal Arbitration Act pre-empted state law on the issue of whether such contractual provisions are unconscionable. *Concepcion* concerned a class-action waiver in AT&T's standard contract for cellular service. The company's advertising stated that if you signed up for service, you would get a free phone. The plaintiffs signed up, received their free phone, but were charged sales tax; so they sued.

Faced with a class action challenging the sales tax charges, AT&T filed a motion to compel arbitration on an individual basis. It did so based on a provision in its contract calling for arbitration but requiring that it be brought in an "individual capacity, not as a plaintiff or class member in any purported class or representative proceeding."

The district court, in a decision affirmed by the Ninth Circuit, denied AT&T's motion, concluding that under California law, the class-action waiver was unconscionable. The Supreme Court reversed, holding that a state law "requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."

Since *Concepcion*, the Supreme Court has not only solidified but also expanded its approach to class-action waivers. In 2012, the court held that the FAA preempted a state law declaring unenforceable pre-dispute arbitration agreements in the context of claims against nursing homes for personal injury or wrongful death. *Marmet Health Care Ctr., Inc. v. Brown.* A year later, the court held that the FAA prohibits courts from invalidating a class-action waiver on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery. *Am. Exp. Co. v. Italian Colors Rest.* The court recently reiterated that an agreement to use "individualized rather than class or collective action procedures" is "pretty absolutely" protected by the FAA. *Epic Sys. Corp. v. Lewis.*

Earlier this year, the Supreme Court further limited the availability of class arbitration when it decided *Lamps Plus, Inc. v. Varela*. The plaintiff, an employee of the defendant company, was tricked by a hacker impersonating a company official into disclosing his personal tax information as well as that of other company employees. A fraudulent federal income tax return was filed in his name, and he filed a putative class action against the company. His employment agreement required arbitration but was silent regarding the availability of class arbitration. The district court and the Ninth Circuit concluded that because the agreement did not expressly preclude class arbitration, the agreement was ambiguous and class arbitration was permissible.

The Supreme Court reversed, holding that an ambiguous arbitration agreement does not provide a sufficient "contractual basis" to conclude that the parties agreed to class arbitration. Thus, *Lamps Plus* extends the court's trend in an important way: not only can an arbitration agreement waive the availability of class arbitration, an agreement that is silent or ambiguous as to the availability of class arbitration does not permit class arbitration. Unless parties *agree* to class arbitration, it is not available.