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'AT&T Mobility' May Have Big Impact on Employment

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On April 27, the United States Supreme Court handed down *AT&T Mobility LLC v. Concepcion*, **11 C.D.O.S. 4842**. This 5–4 decision invalidated California's judge-made Discover Bank rule, which had required that most consumer contract arbitration agreements provide for class arbitration or else be stricken down as unconscionable. The court held that this law was preempted by the Federal Arbitration Act.

While California precludes class action waivers outside the arbitration context as well, the court reversed precedents that had held that a state law that generally limits all contracts — not just arbitration agreements — escapes FAA preemption. Instead, the court held the FAA preempts not only state laws that expressly disfavor arbitration, but also ones — like a ban on class action waivers that effectively requires arbitration agreements to provide for class arbitration — that "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." The court held that Congress' primary intent in enacting the FAA was to "ensure the enforcement of arbitration agreements according to their terms so as to facilitate informal, streamlined proceedings."

The most immediate effect of the decision is to overturn the raft of precedents across the country that had invalidated "class action waivers" in arbitration agreements on the ground that such waivers are either unconscionable, serve as "exculpatory clauses" that effectively insulate companies from liability for wrongdoing, or otherwise violate "public policy." Accordingly, the bulk of the commentary on *AT&T Mobility* has focused on how it will impact class actions. There has been much hand-wringing by the plaintiff's class action bar over whether companies will adopt, en masse, arbitration agreements with class action waivers.

A potentially more far-reaching aspect of the holding, however, was the court's refusal to adopt any sort of balancing of state public policy interests with the goals of the FAA. The majority flatly held that "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." This holding impacts much more than just class action waivers. For example, *AT&T Mobility* could invalidate many state law restrictions on employers who wish to require as a condition of employment that their employees arbitrate all employment disputes. How broadly courts construe *AT&T Mobility* will likely impact whether employers who have not required arbitration of disputes will now implement mandatory arbitration. After all, there are many other factors a company must weigh in deciding whether to submit claims to arbitration beyond evaluating the impact on class actions.

In 2000, before wage/hour class actions were widespread, the California Supreme Court issued *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal.4th 83 (2000), a decision which, like Discover Bank, relied on a mix of public policy and common law unconscionability rationales to restrict how employers could structure mandatory arbitration agreements. While the case was directed only at claims under the state Fair Employment and Housing Act, subsequent decision have applied it to essentially all employment law claims arising in California. In *Armendariz*, the California Supreme Court held that mandatory arbitration agreements for employees must contain various provisions or else they risk invalidation on unconscionability/public policy grounds. Specifically:

- The agreement cannot limit the remedies available to an employee in a court action.
- The agreement must provide for sufficient discovery to allow plaintiffs to gather necessary evidence to prove their claims.
- The agreement must provide for a written decision that will allow meaningful review even on the limited grounds for reviewing arbitral decisions.
- The employee cannot be required to pay for the arbitrator or pay any additional costs beyond those routinely faced in court litigation.
- The employer cannot limit the claims subject to arbitration such that only claims typically brought by employees are subject to arbitration.

More than 500 decisions have come down since 2000 that have further refined the *Armendariz* rules, mostly by placing additional restrictions beyond those in the original case. In total, these restrictions have eliminated much of the

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flexibility in how arbitration agreements can be fashioned.

The court in *AT&T Mobility* did not purport to ban states from imposing any limitations or arbitration agreements. On the contrary, the court stated that a state would be free to enact a law "requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted" or other laws requiring adequate notice of arbitration agreements, so long as the laws do not "conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms." The question is whether any of the *Armendariz* limitations violate this rule.

Most of the *Armendariz* limitations would not seem to implicate *AT&T Mobility*. For example, requiring at least minimal discovery, precluding restrictions of remedies, and requiring the arbitrator to furnish a written decision are all examples of rules wholly consistent with arbitration that do not serve to chill employers from instituting mandatory arbitration. The last two *Armendariz* provisions are suspect, however.

One of the primary reasons employers are dissuaded from instituting mandatory arbitration is the requirement that, no matter how weak the employee's claim, the employer must be responsible for all forum costs except for a trivial filing fee that cannot exceed the cost of filing an action in court. This is distinguished from simply treating arbitration fees as a recoverable cost that an employer might be required to advance at the outset of arbitration, but which can be recovered from the plaintiff if the employer prevails.

As many employers can attest from experience, it is extremely difficult to defeat a claim in arbitration through a pretrial motion because arbitrators have strong incentives to allow a full hearing before issuing a decision. These include the arbitrator's desire to seem fair to employees (necessary to continue to attract business) and because the majority of their pay is generated by conducting evidentiary hearings. The practical result is that employers can virtually always expect one of two outcomes in arbitration — claims either settle or involve a full evidentiary hearing, with an arbitrator charging them tens of thousands of dollars per case. Requiring that employers pay all the forum costs translates into a hefty tax that would certainly dissuade some employers from otherwise using arbitration.

That is not to say that there are no valid public policy rationales for the *Armendariz* requirement that employers bear all forum costs. After all, if employees faced the risk of being held responsible for the sizable forum costs if they did not prevail, that would likely dissuade some employees from seeking redress, even on non-frivolous claims. In that sense, mandating arbitration without the guarantee of employee insulation from forum costs arguably acts as an undesirable "exculpatory clause," contrary to public policy. Absent *AT&T Mobility*, a state could weigh the public policy in favor of promoting arbitration against the public policy of protecting employees and fashion a rule like the one in *Armendariz* that protects employees at the expense of promoting arbitration. But *AT&T Mobility* eliminates states' rights to engage in such a balancing exercise. Rather, the requirement that employers pay all the forum costs for arbitration must instead be defended on the ground that it does not burden arbitration — a tough argument.

The requirement that employers subject all claims to arbitration, rather than just those most typically filed by employees, seems to be an even clearer example of a state law that unduly burdens arbitration. The court in *AT&T Mobility* noted that, at least under federal precedent, "parties may agree to limit the issues subject to arbitration." There is no reason to assume that parties could not rationally agree that only wrongful termination claims would be subject to arbitration, but not other claims between the parties. The belief that no rational employee would agree to that restriction rests on a premise that arbitration is an inferior forum for the employee. That may be true or false, but it plainly is an assumption hostile to arbitration of employment disputes. Employers may have legitimate reasons to favor arbitration of certain disputes over others, and effectively forcing them to submit all disputes to arbitration (especially when they must pay all the forum costs) is another "arbitration tax" that may dissuade employers from agreeing to arbitration in the first place.

Presumably, no employer wants to be the test case for a provision in an arbitration agreement that conflicts with *Armendariz*. It is thus doubtful that employers with mandatory arbitration programs fashioned under the *Armendariz* strictures will immediately change their agreements. That being said, these issues are bound to be raised eventually by employers. Some employers may decide to take the risk of running afoul of *Armendariz* given the high costs associated with availing themselves of arbitration. Also, employers may have compelling business reasons to frame the types of disputes covered by arbitration in their arbitration agreements more selectively. In addition, an employer may be motivated to test the continued viability of these provisions after the denial of a motion to compel arbitration where the employer failed to follow all the *Armendariz* factors. If they are to comport with *AT&T Mobility*, trial and appellate courts evaluating agreements will need to justify restrictions on grounds other than state public policy.