Debate Continues Over Class Action Waivers in Consumer Contracts

by Christine A. Scheuneman, Brian D. Martin, Kevin M. Fong, Bruce A. Ericson, Amy L. Pierce and Nathaniel R. Smith

Within days of the U.S. Supreme Court issuing its groundbreaking AT&T Mobility LLC v. Concepcion et ux. *decision, clearing the way for class arbitration waivers in consumer agreements, industry publications speculated as to whether the Bureau of Consumer Financial Protection will act under the Dodd-Frank Act to undo* Concepcion. *Within weeks, Congress reacted, introducing H.R. 1873 and S. 987, which declare unenforceable pre-dispute arbitration agreements if they require arbitration of consumer disputes.*

On April 27, 2011, the U.S. Supreme Court, ruling in a five-to-four decision in *AT&T Mobility LLC v. Concepcion et ux*., held that California's *Discover Bank* rule—a rule that largely invalidated class action waivers in arbitration provisions in consumer contracts in California and other states following similar rules—is preempted by the Federal Arbitration Act because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." The ruling gives the green light to class arbitration waivers in consumer arbitration agreements within the FAA's scope. Within days, various industry publications speculated as to whether Section 1028 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (also known as the "Dodd-Frank Act") may pave the way for undoing *Concepcion*. Independently, two weeks later, on May 11, 2011, H.R. 1873 – Arbitration Fairness Act of 2011, sponsored by Rep. Henry Johnson (D-GA), and, on May 12, 2011, S. 987 – Arbitration Fairness Act of 2011, sponsored by Sen. Al Franken (D-MN), were introduced. These bills would prohibit predispute arbitration agreements that require arbitration of an employment, consumer, or civil rights dispute.

Various industry publications asserted that Section 1028 of the Dodd-Frank Act (Pub. Law 111-203, H.R. 4173) gives the Bureau of Consumer Financial Protection the authority to prohibit or impose conditions or limitations on the use of an arbitration agreement between a covered person and a consumer for a consumer financial product or service. To do so, the Bureau is required to find that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers after it conducts the study required by Section 1028(a) and after it reports to Congress. Section 921 of Dodd-Frank also gives the Securities and Exchange Commission similar authority regarding agreements between consumers and brokers.

In the wake of *Concepcion*, Rep. Henry Johnson and others re-introduced[1] legislation that would prohibit predispute arbitration agreements that require arbitration of an employment, consumer, or civil rights dispute. The Official Summary of H.R. 1873[2] states that it:

> Declares that no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment, consumer, or civil rights dispute. Declares, further, that the validity and enforceability of an agreement to arbitrate shall be determined by a court, under federal law, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement. Exempts from this Act arbitration provisions in a contract between an employer and a labor organization or between labor organizations. Denies to any such arbitration provision, however, the effect of waiving the right of an employee to seek judicial enforcement of a right arising under the U.S. Constitution, a state constitution, a federal or state statute, or related public policy.

If the recently introduced legislation becomes law, it could effectively nullify the *Concepcion* decision and indeed substantially narrow the scope of the FAA.

In addition, Click here to read the official text of H.R. 1873 – Arbitration Fairness Act of 2011

In addition, Click here to read the official text of S. 987 – Arbitration Fairness Act of 2011

Click here to read the Pillsbury Client Alert – *US Supreme Court Gives Green Light to Class Action Waivers in Consumer Contracts*, April 28, 2011

If you have questions, contact the Pillsbury attorney with whom you regularly work or the authors:

Christine A. Scheuneman (bio)
Los Angeles
+1.213.488.7487
christine.scheuneman@pillsburylaw.com

Brian D. Martin (bio)
San Diego
+1.619.544.3204
brian.martin@pillsburylaw.com

Kevin M. Fong (bio)
San Francisco
+1.415.983.1270
kevin.fong@pillsburylaw.com

Bruce A. Ericson (bio)
San Francisco
+1.415.983.1560
bruce.ericson@pillsburylaw.com

Eric Fishman (bio)
New York
+1.212.858.1745
eric.fishman@pillsburylaw.com

Michael Evan Jaffe (bio)
Washington, D.C.
+202.663.8068
michael.jaffe@pillsburylaw.com

Amy L. Pierce (bio)
Sacramento
+1.916.329.4765
amy.pierce@pillsburylaw.com

Nathaniel R. Smith (bio)
San Diego
+1.619.544.3210
nathan.smith@pillsburylaw.com

[1] On April 29, 2009, S. 931 – Arbitration Fairness Act of 2009 was co-sponsored by Sen. Russell Feingold (D-WI).

[2] H.R. 1873 also responds to Rent-A-Center West, Inc. v. Jackson, 120 S. Ct. 2772 (2010), providing courts with authority to decide the enforceability of arbitration agreements irrespective of whether the resisting party challenges the arbitration clause specifically or in conjunction with other terms of the contract.