Recent Supreme Court Decision on Arbitration of Class Action Claims Presents Significant Opportunities for Employers

May 3, 2011

On April 27, 2011, the Supreme Court of the United States issued its opinion in *AT&T Mobility LLC v. Concepcion*, 563 U.S. ___ (2011). In that decision, in the context of a consumer agreement that generally required all customer claims to be arbitrated but prohibited class claims in arbitration, the Court held that California may not require that arbitration agreements subject to the Federal Arbitration Act (the "FAA") permit the maintenance of class arbitration claims, because the FAA displaces the state law rule and forbids such state restrictions on the content of arbitration agreements. Simpson Thacher & Bartlett issued a memorandum the next day describing the facts before the Supreme Court in the *AT&T Mobility* case, the holding of the majority, the points raised in the dissent and the implications of this decision. This memorandum can be found by clicking here and provides detailed background information, knowledge of which will be assumed in this note.

We write separately to our friends and clients with an interest in labor and employment law because of the significance of the decision in *AT&T Mobility* to this specific area of our practice. Beyond the content of the Simpson Thacher memorandum on the *AT&T Mobility* decision, we make the following points and observations which may be helpful to you in understanding the importance of this decision to employers and assessing an appropriate response to the opportunities presented by this decision.

- The *AT&T Mobility* decision does not alter the view that employers requiring arbitration of all employment claims may often experience more (but less expensive) losses in arbitration than might be expected on the same claims in court litigation, albeit while not being subject to the vagaries of large and unpredictable jury damage awards that would tend to significantly increase the total cost of all employment claims against the employer. Employers still need to weigh the desirability of mandatory arbitration of all employment claims against this experience, and employers that, due to their size or the nature of their business, are less likely than others to be subject to class-based litigation may logically choose not to adopt any employment arbitration procedures at all.

- On the other hand, those employers that generally are more susceptible to class employment litigation (*e.g.*, employers with a large workforce, those that have experienced class employment litigation in the past, those with significant retail or sales operations, *etc.*) and have already put into place mandatory pre-dispute employment arbitration procedures should give serious consideration now to specifying expressly in those procedures that they do not permit the aggregation of individual claims or the maintenance of class claims in arbitration. Such employers that do not now require

arbitration of all employment claims, may find significant benefits in implementing mandatory arbitration of employment claims in order to take advantage of the restrictions on class procedures that have been made available through the *AT&T Mobility* decision.

- The Court's decision in *AT&T Mobility* does not necessarily mean that *all* class employment claims can be prohibited in employment arbitration, as some courts have held that certain statutory claims (*e.g.*, those brought under the Fair Labor Standards Act) – especially those where the individual has a modest amount of alleged damages – can only be vindicated effectively in class settings. Although the Court's decision in *AT&T Mobility* may call such holdings into question, there may be countervailing principles of *federal statutory* law that need to be assessed to determine if the FAA's policy favoring arbitration and the parties' ability to fashion their own arbitral procedures must give way in some circumstances.

- Apart from the question of class procedures being available in arbitration, one of the significant problems with employment arbitration in recent years is that the quick, inexpensive and informal process that was familiar to employers in the union context has become encrusted with many of the same costs and time-consuming procedures that are involved in judicial resolution of claims. In recent years, some states, notably but by no means exclusively California, have sought to impose substantive restrictions on pre-dispute agreements to arbitrate employment claims which generally have resulted in such agreements guaranteeing to claimants the same level of discovery and pre-trial procedures, as well as the full panoply of remedies, that they would enjoy had they brought their claim in court. Essentially, the material differences between resolving employment claims in arbitration and in a judicial forum are that (a) the case is tried to an arbitrator rather than to a judge or jury, and (b) the scope of appellate review of an arbitration award is significantly narrower than that of review of the judgment of a trial court. Thus, as employers have been compelled by state law developments to include more procedural protections in employment arbitration agreements (or adopt standard rules, such as those maintained by the American Arbitration Association and other similar bodies), the costs associated with arbitrating employment cases approach the costs associated with defending against such claims in court, thereby obviating the major historical benefit to employers of mandatory arbitration.

  The decision in *AT&T Mobility* appears to largely nullify those state law procedural protections that have accreted to the employment arbitration process, subject to a potential federal challenge under FAA Section 2 that an arbitration agreement may be declared unenforceable and invalidated as a matter of federal law by application of general contract defenses such as fraud, duress or unconscionability.

  Because, in part, of the potential for future challenges to arbitration agreements as unconscionable under *federal* law, employers should not rush to remove all procedural safeguards from arbitration agreements and policies. However, the language of the Court's majority in *AT&T Mobility* appears to provide a basis for courts to swing the pendulum substantially to the other side in allowing significant restrictions on the

procedures that might otherwise be available to a plaintiff in court in exchange for more efficient and less formal adjudication of the claim in arbitration.

- Employers that seek to require arbitration of all employment claims, and prohibit class claims in arbitration, should continue to be thoughtful about including procedural elements of the arbitration agreement that provide a fair process to claimants. AT&T Mobility included a number of such provisions in its arbitration agreements, such as allowing claims to be heard in small claims court and not just in arbitration, as well as providing a minimum $7,500 payout (and double attorneys' fees) if a claimant in arbitration recovered more than the company's last settlement offer (which could be a significant windfall under the AT&T Mobility agreement since the individual claim at issue in that case was worth approximately $30). Ensuring that claimants do not have to front expenses for bringing the claim to arbitration, or attend hearings far from home, likewise may be important aspects of avoiding or defeating arguments under federal law that mandatory employment arbitration agreements are unconscionable and should be invalidated, while still permitting the employer to impose reasonable restrictions – such as on the conduct of pre-hearing discovery, and the number of depositions that are allowed – that were beyond the pale in some states under the law prior to *AT&T Mobility*.

- Although the split between Republicans and Democrats in the United States Congress at the present time makes it unlikely that any legislation will be enacted prior to 2013 to overturn the *AT&T Mobility* decision, this could be an issue in a future Congress and employers should not be surprised by those sorts of legislative attempts to undo the Supreme Court's holding once interest groups mobilize and contend that many businesses now have a roadmap to become largely immune to class litigation.

For further information about this decision, please feel free to contact members of the Firm's Labor and Employment Group, including:

New York City:

J. Scott Dyer
212-455-3845
jdyer@stblaw.com

Julie Levy
212-455-2569
jlevy@stblaw.com

* * *

UNITED STATES

New York
425 Lexington Avenue
New York, NY 10017-3954
+1-212-455-2000

Los Angeles
1999 Avenue of the Stars
Los Angeles, CA 90067
+1-310-407-7500

Palo Alto
2550 Hanover Street
Palo Alto, CA 94304
+1-650-251-5000

Washington, D.C.
1155 F Street, N.W.
Washington, D.C. 20004
+1-202-636-5500

EUROPE

London
CityPoint
One Ropemaker Street
London EC2Y 9HU
England
+44-(0)20-7275-6500

ASIA

Beijing
3919 China World Tower
1 Jian Guo Men Wai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong
ICBC Tower
3 Garden Road, Central
Hong Kong
+852-2514-7600

Tokyo
Ark Mori Building
12-32, Akasaka 1-Chome
Minato-Ku, Tokyo 107-6037
Japan
+81-3-5562-6200

SOUTH AMERICA

São Paulo
Av. Presidente Juscelino Kubitschek, 1455
12th Floor, Suite 121
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000