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Post AT&T Mobility, New Jersey Appellate Court Rejects Class Waiver Provision Based on Contract Formation Principles

In recent years, New Jersey courts, like many others, developed a body of law that denied enforcement of class action waivers in arbitration provisions as being unconscionable and against principles of public policy in certain circumstances. *See, e.g., Muhammad v. County Bank of Rehoboth Beach*, 189 N.J. 1, 20-22 (2006). Earlier this year, the United States Supreme Court turned the tide on this issue by striking down California authority that similarly prohibited such class action waivers in consumer contracts of adhesion as unconscionable. *Concepcion v. AT&T Mobility*, *LLC,* 179 L. Ed. 2d 742, 759 (2011). Now, a New Jersey appellate court has dutifully followed the mandate of the Supreme Court, while at the same time seizing upon the rationale of Justice Thomas' concurring opinion in *AT&T Mobility* in order to deny enforcement of the class waiver and arbitration provisions at issue under traditional contract defenses relating to the formation of the parties' agreement.

The Supreme Court's Recent Holding in *AT&T Mobility*

</bin style="mso-bidi-font-style: normal" In *AT&T Mobility*, 179 L. Ed. 2d at 759 the Supreme Court, in a 5-4 vote, overturned a 9th U.S. Circuit Court of Appeals decision, which had declared a class action waiver in an arbitration provision unenforceable under California law for public policy reasons. The case involved a dispute resolution provision in a consumer cellular telephone contract that the district court had described favorably as a "quick, easy to use" dispute resolution procedure that was likely to "promp[t] full or... even excess payment to the customer without the need to arbitrate or litigate." *Id.* at 750. The district court refused to enforce the dispute resolution provision nonetheless because it included a class action waiver that was deemed unconscionable under California's *Discover Bank* rule, which required invalidation of class action waivers in consumer adhesion contracts under certain circumstances. *Id.* at 759 (citing *Discover Bank v. Superior Court,* 36 Cal. 4th 148, 162 (2005)). The 9th Circuit affirmed.

The Supreme Court reversed the 9th Circuit and held that the *Discover Bank* rule is pre-empted by the Federal Arbitration Act. *Id.* The Supreme Court expressly rejected the policy argument that class actions are necessary to prosecute small claims that "might otherwise slip through the legal system," noting that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* at 758. Justice Thomas cast the fifth and deciding vote in a concurring opinion, in which he stated that the FAA requires an arbitration agreement to be enforced "unless a party successfully asserts a defense concerning the formation of the agreement to arbitrate, such as fraud, duress, or mutual mistake." *Id.* at 760 (Thomas, J., concurring).

Background of the New Jersey Case

NAACP of Camden County East v. Foulke Management Corp.,New Jersey state court opinion to address *AT&T Mobility*. In *Foulke*, the consumer-plaintiff signed a "stack of form documents" in connection with the purchase of a car from the defendant's dealership. 2010 N.J. Super. LEXIS 151 at *3. Among the documents were a retail installment contract ("RIC"), an addendum to the RIC (the "Addendum"), and a separate arbitration document (the "SAD"). *Id.* at *4. Each of these documents contained arbitration and class action waiver provisions. *Id.* at *6. The consumer alleged the dealership misled her into believing she would be paying nearly $6,000 less than she was actually charged for the car. *Id.* at *16. The dealership moved to dismiss a class action filed by the consumer and a civil rights organization based on the arbitration provisions. *Id.* at *17.

After a hearing to assess plaintiffs' claims of unconscionability, the trial court upheld the class action waiver, dismissed the complaint, and referred the case to arbitration. *Id.* at *24. Although the trial court found some inconsistencies within the arbitration provisions, it severed the offending provisions rather than invalidating the arbitration agreement. *Id.* at *21. During the pendency of plaintiffs' appeal, the Supreme Court issued its decision in *AT&T Mobility*. Applying *AT&T Mobility*, the Appellate Division agreed with the trial court that the arbitration and class waiver provisions at issue should not be voided on public policy or unconscionability grounds. *Id.* at *51, 52. However, describing *AT&T Mobility* as a "discrete ruling," the court nonetheless refused to enforce the arbitration agreement and class waiver, finding the provisions at issue were "too confusing, too vague, and too inconsistent." *Id.* at *2, 55.

The Court's Application of *AT&T Mobility*</bthe style="mso-bidi-font-style: normal"

The Appellate Division rejected plaintiffs' claim that the arbitration provisions were unconscionable and therefore unenforceable on public policy grounds, but it did so based upon *AT&T Mobility*, rather than the evidential hearing relied upon by the trial court. As the court reasoned, "in light of the United States Supreme Court's supervening opinion in *AT&T Mobility*, plaintiffs' unconscionability and public policy arguments must fail for a legal reason, regardless of how one views the testimony adduced at the *Muhammad* hearing." *Id.* at *51. The court further rejected a litany of arguments by plaintiffs seeking to distinguish or limit the application of *AT&T Mobility*, including plaintiffs' effort to confine the Supreme Court's holding to cases involving consumer-friendly arbitration procedures such as those at issue in the California case, plaintiffs' contention that the FAA did not apply to the dispute, and plaintiffs' further contention that the policy arguments in *AT&T Mobility* did not apply to the specific facts of this case. *Id.* at *52-56.

The Arbitration Provisions Nonetheless Found Unenforceable

</beven style="mso-bidi-font-style: normal" *Even before declaring the unconscionability and public policy arguments ineffective under AT&T Mobility*, the *Foulke* court acknowledged that the Supreme Court's decision left the door open to challenge arbitration provisions and class waivers based on contract formation principles. Citing both a footnote in the majority opinion and a broader discussion in Justice Thomas' concurring opinion, the New Jersey court explored what it referred to as a caveat to the principle holding in *AT&T Mobility*. *Id.* at *32-33. The court wrote that "in the aftermath of *AT&T Mobility*, state courts remain free to decline to enforce an arbitration provision by invoking traditional legal doctrines governing the formation of a contract and its interpretation." *Id.* at *33. Accordingly, the court set out to determine whether the consumer in the case before it assented to the various arbitration clauses by examining "whether the terms of the provisions were stated with sufficient clarity and consistency to be reasonably understood by the consumer who is being charged with waiving her right to litigate a dispute in court." *Id.* at *33-34.

</spanin style="mso-bidi-font-style: normal" of the and that were provisions arbitration Division Appellate held (*In its analysis, the Appellate Division held that the RIC, the Addendum, and the SAD all included arbitration provisions that were "plagued with confusing terms and inconsistencies." Among those inconsistencies were the nature of the arbitration procedure (e.g.,* rules to be utilized, arbitrator or arbitrators to be used, and method of selection), locale of the arbitration, the costs of the arbitration and who is to bear them, the class waiver provisions, and time limitations. *Id.* at *38-45. For example, the RIC did not address statutes of limitation; the Addendum addressed statutes of limitation but stated they would not be affected by arbitration; and the SAD stated in one paragraph that the statutes of limitation would not be affected and, in another paragraph, that the purchaser was required to bring claims within 180 days. *Id.* at *40-41. Moreover, both the Addendum and the SAD stated that they superseded any conflicting agreements, leaving uncertain whether the SAD or the Addendum should control. *Id.* at *43.

</spanwhile w_st="on" of While recognizing that "an especially prudent purchaser" could gain "a generalized sense" that disputes would be arbitrated, the Appellate Division found the arbitration provision to be unenforceable for lack of mutual assent: "In sum, the cumulative effect of the many inconsistencies and unclear passages in the arbitration terms within the RIC, the Addendum, and the SAD compel us to declare them unenforceable for lack of mutual assent." Id. at *50. The court also refused to sever the provisions, finding that the terms of the arbitration agreement would be too uncertain without the severed portions. Id. at *49-50. Accordingly, the court reversed the trial court's dismissal, finding the arbitration and class waiver agreements to be unenforceable. *Id.* at *50. The court also refused to sever the provisions, finding that the terms of the arbitration agreement would be too uncertain without the severed portions. *Id.* at *49-50. Accordingly, the court reversed the trial court's dismissal, finding the arbitration and class waiver agreements to be unenforceable. *Id.* at *50.

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