



## U.S. Supreme Court Sustains Enforceability of Arbitration Provisions Forbidding Classwide Arbitration

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The Supreme Court recently issued a decision that may provide significant legal protection for many tax-exempt organizations, particularly for membership organizations and their members. In *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), a sharply divided United States Supreme Court reversed a Ninth Circuit decision that had deemed arbitration provisions that disallowed class action proceedings as unconscionable and unenforceable under California law. As a result of the Supreme Court decision, entities that are concerned about the potential for class action suits would be advised to include language in their contracts mandating that disputes be resolved through arbitration and specifying that classwide arbitration is barred.

In a 5-4 decision, with Justice Clarence Thomas' concurring opinion providing the deciding vote, the Supreme Court held that, because federal law deems arbitration agreements valid and enforceable except under limited circumstances, states (and state courts) cannot adopt laws or procedures limiting arbitration on policy grounds. The California Supreme Court previously had held that class waivers in arbitration agreements are unenforceable if the agreement is an adhesion contract (a form contract drafted by the party with superior bargaining), the disputes between the parties are likely to involve small amounts of damages, and the party with inferior bargaining power alleges a deliberate scheme to defraud. The Supreme Court held that enforcement of the state law interfered with the Federal Arbitration Act's overarching purpose of enforcing arbitration agreements according to their terms, so as to facilitate informal, streamlined proceedings. The Court further noted that the switch from arbitration between two parties (bilateral arbitration) to class arbitration sacrifices arbitration's informality and makes the process slower, more costly and more likely to result in a procedural morass. In Justice Thomas' concurring - - and ultimately deciding - - opinion, he noted that he would enforce all arbitration agreements unless the complaining party could establish that the arbitration agreement was procured by fraud or under duress.

The dissenting Justices argued that an individual state's decision prohibiting provisions that would bar class action arbitrations does not stand as an obstacle to the Federal Arbitration Act's primary objective. They contended that as a practical matter, in many instances barring class actions would foreclose the possibility of recovery by consumers because rational lawyers

would not bring actions on behalf of individual consumers for claims for relatively small amounts of money.

### **Consequences of Decision**

As a result of the Supreme Court's decision, associations that represent an industry or profession that may be subject to class actions should recommend to their members that they insert language into their contracts stating that all disputes must be arbitrated and classwide arbitration is barred.

For additional information or if you have questions or comments about the proceeding article, please contact:

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