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# California Court of Appeal Decision Shows Lingering Hostility to Arbitration Agreements Despite Concepcion

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In a case that will test the limits of the recent U.S. Supreme Court decision in ***AT&T Mobility LLC v. Concepcion***, 563 U.S. __, 131 S.Ct. 1740 (2011) ("Concepcion"), a California Court of Appeal has issued a decision striking down an arbitration policy embedded in an organization's employee handbook.

In *Concepcion*, the Supreme Court overturned a line of cases in California that disallowed class-action arbitration waivers as unconscionable, pointing to the Federal Arbitration Act as favoring arbitration and as preempting contrary state law. As has been discussed often during the last year, some California courts have remained hostile to arbitration even after *Concepcion*.

The most recent example of this on-going hostility is *Sparks v. Vista Del Mar Child and Family Services*. In Sparks, the Court of Appeal acknowledged the applicability of *Concepcion*, but ruled that *Concepcion* left open attacks to arbitration provisions based upon state law notions of contract formation and unconcionability.

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Applying these state law notions, the California court held that the arbitration clause found in an employee handbook was insufficient to bind the employee because the clause was contained in a "lengthy employee handbook; the arbitration clause was not called to the attention of plaintiff, and he did not specifically acknowledge or agree to arbitration; the handbook stated that it was not intended to create a contract; the handbook provided that it could be amended unilaterally by defendant and thus rendered any agreement illusory; the specific rules referred to in the arbitration clause were not provided to plaintiff; and the arbitration clause is unconscionable."

The court found the arbitration to be both substantively and procedurally unconscionable, as it failed to provide employees with discovery rights while requiring the employee to give up his administrative and judicial rights under state and federal law (substantive unconscionability) and because it was a contract of adhesion (procedural unconscionability), which was not freely negotiated due to the economic inequalities of an employment offer.

While *Sparks* does highlight a continued hostility to arbitration by some California courts, it does not represent a consistent trend. In the past year, a number of California Court of Appeal decisions have upheld arbitration provisions. Most recently, a different California Court of Appeal upheld an arbitration agreement that was contained in an employee handbook rejecting challenges based upon unconscionability and public policy arguments. ***Nelsen v. Legacy Partners Residential, Inc.*** (7/18/12). *Sparks*, therefore, highlights the importance of a well-drafted arbitration provision and well-maintained procedures for documenting employee acknowledgement of those procedures. Employers doing business in California (and elsewhere) should discuss the implications of this important case with experienced counsel.

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