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Settle Down, and Settle

Six steps you should take to ward off costly class actions.

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At the end of April 2011, the U.S. Supreme Court issued its crucial decision in AT&T Mobility v. Concepcion, which upheld AT&T Inc.'s arbitration program and prevented a class action from moving forward. Since that decision, federal district courts have scrutinized 82 arbitration clauses in would-be consumer class actions, and the majority of the courts have followed the lead set by Concepcion.

Companies that face a large volume of consumer complaints should consider developing a robust arbitration program as a strategy to prevent costly class actions. How will this stop lawyers from filing expensive class action lawsuits whenever anything appears to go wrong? Take a look at the AT&T arbitration agreement that the Supreme Court upheld in its 5-to-4 decision in the Concepcion case.

AT&T created a simple but fair arbitration agreement for its millions of mobile phone customers. The program begins with an easy-to-fill-out customer claim form and requires AT&T to make a speedy response. If the customer is not satisfied with AT&T's response, the customer may go to arbitration as an individual, not as a class action. AT&T is responsible for paying the arbitrator's expense. And AT&T promises to pay the customer $10,000, plus double attorney fees, if the arbitrator awards more than AT&T offered to resolve the dispute.

While this $10,000 incentive may sound high, it provided a strong grounding for AT&T's program to receive the high court's support. In the decision, Justice Scalia wrote: "The Concepcions were better off under their arbitration agreement with AT&T than they would have been as participants in a class action, which could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars." Instead of funding class actions and runaway verdicts, AT&T is paying money directly to customers who have legitimate claims.

From the Concepcion decision through early April, 82 federal district court decisions have reviewed an arbitration clause in a would-be consumer class action. In 50 of these cases, the court mirrored Concepcion and enforced the arbitration clause and barred a consumer class action. In 14 cases, the court rejected the arbitration clause and kept a class action in court. In four cases, the plaintiffs lawyers sought to represent a class of consumers in an arbitration proceeding. In 14 cases, the court did not decide between arbitration and a class action.

While the majority of courts agreed with Concepcion, the minority courts have raised some interesting questions, including whether the arbitration clause is binding on both sides, and whether the customer will get a fair process.

In January 2012, the U.S. District Court for Maryland rejected an arbitration clause on the ground that only the customer was required to go to arbitration, while the company was free to bring suit in court. Because the arbitration clause was not mutual, the court held it was not binding under Maryland law.

On a related point, one way a company can help make its arbitration clause enforceable is by giving the customer the ability to opt out of arbitration within some fixed period of time (such as 30 days) after purchasing the product. Where the customer does not opt out, some courts have cited this fact as indicating consent to the arbitration clause.

In February the U.S. District Court for the District of Northern California struck down the arbitration clause of a debt servicing company called American Debt Services Inc. and ruled that a class action could proceed. The court found that the company's provisions for dispute resolution were unfair because under them the customer could not recover

more money than she had paid to the company; the customer would have to pay the company's attorney fees if the company prevailed; the arbitration would take place in Tulsa (far away from the plaintiff's California home); and the company had the unilateral right to select the arbitrator.

According to the court, these four provisions contradicted rights established by the federal Credit Repair Organizations Act and the California Consumers Legal Remedies Act.

While the American Debt Services case may be an outlier, the ruling offers some important lessons to be learned. A company's arbitration clause should ensure that the customer can recover the full range of remedies provided by any industry regulations.

With the turn of the year 2012, the plot began to thicken. In February a panel of the U.S. Court of Appeals for the Second Circuit evaded Concepcion in an antitrust case brought by supermarkets and other merchants against American Express Company. In order to gain access to the popular American Express cards (which merchants wanted to carry), American Express required merchants to accept a new set of mass-market credit cards as well, cards that the merchants did not want to carry because American Express charged the merchants a high fee that they felt was not justified by the expected volume of sales. The merchants allege that this "honor all cards" requirement is an unreasonable restraint of trade. In order to support this allegation, the merchants need to conduct a market analysis study, which their economist said would cost as much as $1 million. This expense is so high, the plaintiffs argued, that any one merchant on its own could not afford to enforce the antitrust laws.

American Express sought to compel arbitration, but the Second Circuit panel accepted the plaintiffs' argument and ruled that their antitrust claim may proceed as a class action so that multiple plaintiffs can share the expenses. The panel's reasoning: The Federal Arbitration Act does not overrule federal antitrust laws.

This ruling appears to be an end run around Concepcion, and it seems unlikely that the current Supreme Court would uphold the American Express decision. In fact, a March 2012 ruling by the Ninth Circuit expressly disagreed with the American Express decision. Although American Express petitioned for the full Second Circuit to review the case, this request was denied on May 29. One judge wrote that "the matter can and should be resolved by the Supreme Court."

The U.S. Congress has also been asked to overturn the Concepcion ruling. A bill titled "The Arbitration Fairness Act of 2011" would provide that a consumer cannot be forced to bring a dispute to arbitration.

Despite the challenges discussed above, the Concepcion decision presents a real opportunity for companies that grapple with frequent consumer claims. A strong consumer arbitration program can be developed from the customer's point of view. The following are some elements you should consider including:

- Bind the company to arbitration.
- Allow the customer to opt out of arbitration within 30 days after purchase.
- Pay the arbitration fees.
- Allow a location reasonably convenient for the customer.
- Require the company to respond promptly to the customer.
- Consider providing an incentive, such as paying a defined sum if the arbitrator awards more than the company offered.

Arbitration programs can be a powerful weapon in the fight against expensive class actions. Putting money in the hands of customers who have legitimate claims—and keeping money out of class actions—stands to benefit both your company and your customers.

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