

Corporate Counselor

WINTER 2012

Published by
The Corporate
Law
Departments
Section of the
Los Angeles
County Bar
Association

ROUNDTABLE EVENINGS

January 31,
February 15 & 28
and March 13
WESTIN
BONAVENTURE
HOTEL
see page 4 for details



REVIEW YOUR ARBITRATION PROVISIONS NOW !!!

PRACTICAL CONSIDERATIONS AFTER THE
U.S. SUPREME COURT DECISION IN
AT&T MOBILITY LLC v. CONCEPCION

By: *David A. Battaglia, Esq.*
Gibson, Dunn & Crutcher

In what some have characterized as the most significant decision affecting business litigation in recent years, the United States Supreme Court issued its 5-4 decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. ___, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (April 27, 2011), holding that the Federal Arbitration Act of 1925 ("FAA") preempts state laws that prohibit contracts from disallowing class action lawsuits. In so doing, it reinforced the importance of enforcing arbitration agreements and their terms. The ruling effectively reversed the decision of the California Supreme Court in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005).

The Supreme Court's decision affects a wide range of consumer and employee arbitration contracts in almost every industry. Since the ruling, many businesses have sought counsel about whether to add or amend their arbitration provisions, and what issues they should consider. While the law remains in flux and your business likely requires individual attention, here are our Top Ten issues and suggestions:

1. Include An Express Clause Adopting The Holding Of *AT&T Mobility*.

This seems obvious, but many arbitration contracts and terms do not have the necessary language, or were crafted with the *Discover Bank* rule in mind. Provide that the parties expressly agree that any dispute between them may only be resolved through an individual arbitration, and shall not be brought as a class

action, a class arbitration, or any other proceeding where a person serves as the representative of any other person or persons. Also, provide that the parties agree that there is no right to a jury trial, and that the arbitration provision will be governed both substantively and procedurally by the FAA to the maximum extent permitted by law. Consider providing further that the arbitrator is without jurisdiction to conduct a class arbitration or other representative proceeding, and may not consolidate one person's claims with another.

2. Describe Generally What An Arbitration Proceeding Is And Highlight The Provision.

The goal is to make the provision evident and understandable to a consumer or employee. Describe arbitration as the referral of a dispute to one or more impartial persons for a final and binding determination, and include that there shall not be a jury and that the rules of the proceeding will be conducted in accordance with established arbitration rules of a selected agency (such as the AAA or JAMS). Making those rules readily available is beneficial, such as by providing a telephone number and address of the arbitration agency selected, providing a link to the website of the arbitration agency and its rules, or even making the rules available by mail.

Moreover, albeit in a footnote, the Supreme Court referred to States as free to take steps to require class action waiver provisions to be

“highlighted” without further elaboration. It thus is advisable to include a provision at the beginning of an agreement stating that it contains an arbitration provision to resolve disputes in a section that follows, and to state that no class or representative court action or jury trial is permitted. Placing this language in larger type in ALL CAPS and in a ***bold underlined and italicized*** font both at the beginning of an agreement and where the arbitration provision is contained assists in ensuring that the provision is sufficiently highlighted.

3. Offer To Resolve The Dispute Informally First.

Obviously, it would be best for everyone if the dispute is resolved at minimum expense and maximum satisfaction. Hence, in the section of the arbitration provision, encourage a party to contact you first to resolve any dispute in as easy a fashion as possible, while permitting

the consumer or employee to proceed directly to arbitration if they so desire.

4. Compensate For Arbitration Costs.

The best rule of thumb is to try to make arbitration no more expensive than a court proceeding. In this respect, offer to pay for the costs of arbitration, at least in excess of any court filing fee. Your costs can be minimized by providing that the consumer arbitration rules of the selected agency apply, which generally provide for expedited

arbitrations of one day or less.

Note that the arbitration agreement in *AT&T Mobility* went much further than most arbitration agreements by guaranteeing a significant recovery of at least \$7,500 (later increased to \$10,000) and twice the claimant’s attorneys’ fees if the award was greater than the last settlement offer made by AT&T before an arbitrator was selected. With the interests of not encouraging more disputes in mind, serious consideration must be given as to whether to include such a clause. The wording of the majority opinion of the Supreme Court does not seem to require similar provisions in an arbitration agreement, although the Court did observe that the district court concluded that the guaranteed amounts would put the plaintiffs in a better position than if they were participants in a class action. A compromise could be to provide that it is in the arbitrator’s discretion as to whether to award

attorneys’ fees to the consumer or employee, although it is questionable whether any term regarding attorneys’ fees is required at all.

5. Make The Place Of The Arbitration Convenient.

The arbitration provision at issue in *AT&T Mobility* provided that the arbitration would take place in the county where the customer was billed. Making the provision “consumer-friendly” is desirable. Thus, a term similar to that in AT&T is sensible, or at least at the closest location of the chosen arbitration agency (assuming that it is at least national in scope). In addition, allowing the parties to appear by telephone or by submission of written claims instead of in person, if the dispute is below a designated amount, is helpful. Most companies opt for a choice of law provision of its company headquarters or principal place of business, apart from having the FAA govern the arbitration provision itself.

6. Avoid Terms That Are One-Sided And Unfavorable To The Consumer/Employee.

Provisions that are overtly onerous on a claimant are not advisable because they could jeopardize an arbitration provision and the benefits of a class action waiver. Providing that a claimant must pursue arbitration but that the company can pursue an action in court is non-mutual and hence problematic. Stating that a claimant cannot pursue certain claims or cannot seek certain types of actual damages are generally discouraged, except in situations where the rights of both parties are mutually preserved -- such as where a business desires to retain its rights to have intellectual property claims resolved in federal court. Mandating that a company is entitled to discovery but that a claimant is not, or that the claimant has to bear all the costs of arbitration, are the types of provisions that cause overt difficulties in enforcing the arbitration clause. While not an excuse to include these types of provisions, having a severability clause in the arbitration agreement is essential so a court can enforce arbitration but strike other terms that may in the future be considered beyond the pale.

7. Consider Whether To Include A Small Claims Court Option Or Not.

The AT&T agreement had an option allowing a consumer to proceed to small claims court if he or she desired to do so, instead of arbitration. This does not appear to be a basis for the Supreme Court’s decision that the FAA preempts class action waiver provisions. Having such an option poses potential concerns. Recent publicity has brought attention to coordinated individual actions being filed in small claims court. Moreover, there is the very real prospect that such actions against a single defendant could be combined by the court under current law, thereby becoming a mass action of plaintiffs, without

GIBSON DUNN & CRUTCHER

Los Angeles Office
333 South Grand Avenue
Los Angeles, CA 90071-3197
Telephone: 213.229-7000
Facsimile: 213.229-7520
website: www.gibsondunn.com

Gibson Dunn is a full-service international law firm with more than 1,000 lawyers in 17 offices throughout the United States, Europe, Asia and South America. For an unprecedented second time in a row, *The American Lawyer* named the firm the 2012 Litigation Department of the Year. The publication also named Gibson Dunn the winner in the Labor and Employment category.

the civil procedural rights to legal counsel and discovery, and generally relaxed evidentiary rules. While it initially may seem beneficial for a company to preserve the small claims option to collect outstanding debts, rules in California at least provide that no person may file more than two small claims actions in a calendar year anywhere in the State. Thus, a company is limited in using this option for collection purposes in any given year. The risks of having a small claims option in an agreement should be duly considered and balanced against the opportunity for an expedited proceeding with limited damages (a natural person is limited to a claim of \$7,500) without the costs of arbitration. If such a provision is included, then the option should be mutual, available to both parties.

8. Include A Confidentiality Clause.

One of the benefits of arbitration is that an agreement to keep the dispute confidential is generally enforceable. Confidentiality has benefits to both parties. For the claimant, it prevents public disclosure of the dispute and other potentially personal information. For a business, it can prevent one arbitration result from potentially infecting another (since a decision has no collateral estoppel effect and should not be permitted to be shared between arbitrations and arbitrators if confidential). When combined with an option to permit enforceability by injunctive relief (mutual to both parties), it can discourage a claimant or counsel from using an award detrimental to the company to recruit others to bring similar claims. A leading decision regarding the enforceability of a confidentiality provision in the consumer context is *ITT Educational Services, Inc. v. Arce*, 533 F.3d 342 (5th Cir. 2008), which I argued. But since there is the possibility that confidentiality may not always be enforceable in every jurisdiction, it is recommended that the qualifier be added “to the maximum extent permitted by law.”

9. Do Whatever You Reasonably Can To Establish The Existence Of An Agreement.

Many recent battles are being waged over whether an agreement was established between the parties, and thus whether an arbitration provision is enforceable. The FAA and the holding of the Supreme Court are dependent on a finding that an agreement between the parties exists, although the Court rejected the notion that preemption by the FAA did not include adhesion contracts, noting that “the times in which consumer contracts were anything but adhesive are long past.” The Court further observed that agreements to arbitrate where parties are in positions of unequal bargaining power (such as investors in securities cases and employees in discrimination disputes) have been held to be enforceable.

The more a business can do to demonstrate that a customer or employee was aware of the arbitration provision and assented to it, the better off it will be in meeting any potential challenge. Prominently displaying the presence of an arbitration provision in written

materials or a website accompanying a sale is useful. Having a customer or employee actually sign an agreement, or “point and click” provisions assenting to terms and conditions (after mandating a scroll down), is good practice where reasonably available. Packaging also can be used to make the presence of an arbitration provision a condition of purchase where possible, and shipping materials can be used when combined with an offer to accept a returned product and grant a full refund for a limited period of time if there is no assent to the arbitration clause.

10. Consider Separate Provisions Limiting The Limitations Period Or Liability “To The Maximum Extent Permitted By Applicable Law.”

While such clauses are not dependent on the enforceability of the arbitration provision itself, and hence should be included in other sections or paragraphs, many jurisdictions enforce agreements to narrow limitations periods, particularly in contract actions, from four years or more to a year or less. This obviously would serve to reduce any outstanding exposure and ensure claims are timely addressed and resolved. Many States also allow certain limitations on liability, such as excluding punitive damages and potentially limiting contract claims to the costs of the product or service.

Including provisions of this nature in your agreement should be considered with the express qualification that it is only “to the maximum extent permitted by applicable law.” Without the qualifier, it is possible that the limitations could cause the arbitration clause to be questioned, although the severability term alone properly should address this.

The bottom line is that companies and employers should review the terms in their consumer and employment contracts promptly and make necessary modifications to take advantage of the Supreme Court’s decision in *AT&T Mobility*. There may of course be circumstances where a class action is preferable to an individual action for business or expense reasons (such as the benefits of a class settlement), but of course the parties could always consent later to a class procedure if there is interest in doing so.

Just as each business is different, arbitration provisions require individual attention and business decisions in consultation with experienced counsel. Hopefully, these thoughts assist in outlining issues to commence that process. ♣



David Battaglia is a partner at Gibson Dunn with a focus on commercial arbitration and trial work.

2012 Round Table Dinner Programs

LACBA Corporate Law Departments Section Annual Evening Dinner Program Series

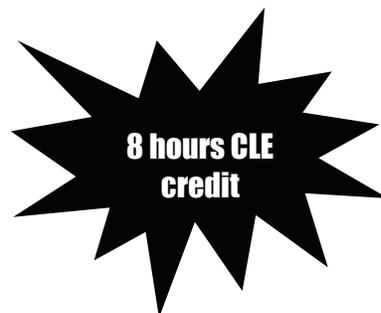
January 31, February 15 & 28 and March 13

Westin Bonaventure Hotel
"Tsubaki" Room, 12th Floor
404 South Figueroa Street
Los Angeles, CA 90071

6:00 Registration & Reception

6:30 Dinner

7:00—9:00 Program



This program series features a roundtable discussion of practical guidance that every in-house counsel needs in areas of current interest to in-house counsel.

Join with in-house colleagues from other corporations and businesses in an informal setting to discuss the issues facing counsel every day.

DISCUSSION TOPICS WILL INCLUDE

Preparing for a Corporate Crises

Corporate Governance Issues

The Latest on Employment Law Issues

Cloud Computing Risks and Rewards

The Paperless Corporation and Legal Department



Speakers

Susan Miller, Senior Vice President, General Counsel & Secretary of Avery Dennison Corporation

Ed Summers, Counsel for Avery Dennison Corporation & former Vice President and General Counsel of Harman International Industries, Inc.

Mary Courtney Burke, Senior Vice President, Labor Relations, Sony Pictures Entertainment.

Bruce Carpenter, Managing Attorney, Cooperative of American Physicians

Kevin Steele, VP of Alliances and Advocacy, Stone Cobra

Participation is limited to in-house lawyers who are senior counsel or equivalent corporate counsel of a corporation, other business or government entity. To facilitate open discussion among attendees, registration is limited to a maximum of thirty participants.

To register, call LACBA Member Services Department at (213) 896-6560

Follow us on facebook

Become a "Fan" of the Corporate Law Departments Section at:

[facebook.com/pages/los-Angeles-County-Bar-Association-Corporate-Law-Departments/183124038391123](https://www.facebook.com/pages/los-Angeles-County-Bar-Association-Corporate-Law-Departments/183124038391123)

From the Chair

By: *L. Michael Russell*
AquaNano, LLC

Dear Fellow Corporate Counselors:

I am pleased to report that the 30th Anniversary Institute for Corporate Counsel, held on December 7th, was a resounding success. I thank all of the illustrious moderators, panelists and speakers who participated in this year's Institute; the firms and companies who were the Institute's Sponsors; and all of you who you who attended and otherwise supported the Institute. I offer special thanks to Steven B. Stokdyk of Latham & Watkins, this year's Chair of the Institute, and Dean Leeanna Izuel of the USC Gould School of Law, who is the Executive Director of the Institute. For those who do not know, the Institute is a joint venture of the Corporate Law Departments Section of the Los Angeles County Bar and the USC Gould School of Law.

Our Section has several upcoming programs and events that you will not want to miss.

Roundtable Evenings: The 2012 Corporate Roundtable, which is Co-Chaired this year by Linda Barker, Managing Director and Deputy General Counsel, Trust Company of the West, and Alan Fox, Senior Vice President and General Counsel of Westland Construction, Inc. will be held at the Westin Bonaventure Hotel. It will consist of four evening sessions. See page 4 for more details. The Corporate Roundtable provides an opportunity for no more than 30 senior in-house counsel to discuss and share ideas about legal topics of current interest. Some of the topics that will be the focus of the Roundtable sessions are planning for a corporate crisis, corporate governance, issues involving cloud computing, and current issues in employment law. Each session will begin at 6:00 p.m., with a wine

reception and dinner followed by a roundtable discussion. If you have suggestions or questions regarding the Roundtable, please contact Linda D.

Barker (*linda.barker@tcw.com*), this year's Chair of the Roundtable Committee.

Networking Reception for New In-House Counsel and Section Members:

Our next networking reception will be held in February at a place and location to be determined. Please stay tuned for more information on date, time and place.

Outstanding Corporate Counsel Award

Dinner: Our annual Outstanding Corporate Counsel Award Dinner will take place on March 21, 2012 at the Millennium Biltmore Hotel. I am pleased to announce that this year we have two awardees, Dian Ogilvie, Senior Vice President and Secretary of Toyota Motor North America, Inc., and Christopher Reynolds, Group Vice President and General Counsel of Toyota Motor Sales, U.S.A., Inc. This is our Section's major annual networking and fundraising event. Each year approximately 500 of the leaders of the Los Angeles legal community attend to honor one of their own. We are delighted to be honoring Dian and Christopher this year and know that you will want to join us.



(Continued on page 7)

(Continued from page 5)

Registration details for the event will be available soon at the Section's LACBA website. In the meantime, please Save The Date, as we are counting on you to help us make this an entertaining and successful evening.

CLE Programs: Throughout the year we will make you aware of a robust menu of continuing education opportunities. Details will be forthcoming in email blasts and on our web site calendar at <http://www.lacba.org/showpage.cfm?pageid=174>. If you have information about programs that you would like to bring to the attention of our Section members, please contact the Chair of the Programs Committee, Lynne Brickner (lynne.brickner@ontic.com), General Counsel and Vice President, Contracts, BBA Aviation Legacy Support Group/Ontic, and a past Chair of the Section's Executive Committee.

We are in the planning stages for our **Annual Meeting and Reception**, which will take place

in the spring of 2011, and our **Section Seminar**, which will take place in the fall of 2012. If you are interested in being involved in planning any of these events, please communicate your interest to our Section Vice Chair, Debbie Feinerman

(Debbie_Feinerman@paramount.com), Deputy General Counsel of Paramount Pictures.

I wish all of you the best in the New Year and hope that you will share with us your ideas about how we can make the Section more helpful and relevant to you.

I look forward to seeing many of you at The Corporate Roundtable and all of you at the Outstanding Corporate Counsel Award Dinner on March 21, 2012 at the Millennium Biltmore Hotel.

Best regards,

L. Michael Russell

2011-12 Chair, Corporate Law Departments Section
lmichaelrussell@sbcglobal.net

Outstanding Corporate Counsel Award Dinner

March 21, 2012

Millennium Biltmore Hotel

LACBA
LOS ANGELES COUNTY BAR ASSOCIATION

Honoring:

Dian Ogilvie, Senior Vice President and Secretary of Toyota Motor North America, Inc.

Christopher Reynolds, Group Vice President and General Counsel of Toyota Motor Sales, U.S.A., Inc.

SAVE THE DATE!

Calendar of Events

LACBA

LOS ANGELES COUNTY BAR ASSOCIATION



ROUNDTABLE EVENINGS

Westin Bonaventure Hotel
January 31, February 15 & 28, March 13, 2012
(see page 4 for details)

OUTSTANDING CORPORATE COUNSEL AWARD DINNER

Millennium Biltmore Hotel
March 21, 2012
(see page 5 for details)

The Corporate Counselor is published quarterly by The Corporate Law Departments Section of the Los Angeles County Bar Association. No part of this publication may be reproduced without express permission from the publisher. Unsolicited material becomes the property of The Corporate Law Department Section of the Los Angeles County Bar Association and cannot be returned. *Editor* Randall R. Morrow (213) 244-2952

Welcome New Members

Todd B. Allen
Bolour Associates

Vikas Arora
Avery Dennison Corporation

Carla Bedrosian
WET Enterprises, Inc

Steve J. Brenner
APP Pharmaceuticals

Gabriela Garcia-Kornzwei
NBC Universal

Eric Bernard Hausner
Trust Company Of The West

Stephanie A.N. Karafilis
Wheels Financial Group, Inc.

Jamie Katzman
Raytheon

Michel C. LeClerc
North State Grocery, Inc.

Christopher Mardesich, JD, MPH
Molina Healthcare

Sarah Alexandra Mitchell
California Natural Products

Kent S. Pomeroy
K S Pomeroy Esq., CPA

Perry Roshan-Zamir

Matthew J. Saly
Forest Lawn

Stefanie L. Schaeffer
Imperial Toy, LLC

Steven C. Smith
Marsh

Robert B. Wernick
Ticketmaster

Vivian Junmin
Zou