AMERICAN BANKER®
THE FINANCIAL SERVICES DAILY
Wednesday, October 20, 2010

VIEWPOINT

If AT&T Loses Case, So Do Consumers

BY ALAN S. KAPLINSKY

On Nov. 9 the U.S. Supreme Court will hear oral argument in **AT&T** Mobility v. Concepcion, a case whose outcome will help determine an issue of critical importance to the banking industry and consumers — whether companies dealing with consumers may enforce agreements requiring individual arbitration of claims when state policy favors class actions.

The case has pitted the banking and other industries against an array of self-styled consumer advocacy groups that claim a win for AT&T would strike a serious blow to consumer protection. These groups have it backward — a loss for AT&T would be harmful to consumers, who stand to benefit from arbitration over class-action litigation.

To reduce costs and provide a simpler means of resolving disputes with their consumers, many banks have included arbitration provisions in their consumer contracts for several years. These provisions give the bank or the consumer the right to elect arbitration in the event of a dispute. Empirical data has confirmed that consumers who go through arbitration like it, are treated fairly, do at least as well in arbitration as they do in court and get their disputes resolved much more quickly than would be the case if they went to court.

So, why does arbitration draw the ire of self-appointed consumer advocates? It is because plaintiffs' attorneys, particularly those who make a living out of suing banks and other companies in class actions, are worried that a win for AT&T will put a severe crimp in their economic well-being. AT&T's arbitration provision, like those of all banks that are using arbitration, contains a "class-action waiver" — language which states that by consenting to arbitrate disputes the company and the consumer agree not to be part of a class action in court or in arbitration. During the past decade, there have been hundreds of cases in which courts have determined the validity of class-action waivers. Many federal and state appellate courts, including those in New York, Maryland and Texas, have upheld the validity of class-action waivers. Several other appellate courts, most notably including California, have invalidated them.

In the Concepcion case, the U.S. Court of Appeals for the Ninth Circuit ruled that AT&T's arbitration provision in its cellphone agreement is unconscionable because of the class-action waiver. The court reached that conclusion based on a perceived California public policy supporting class actions, even as it recognized that the AT&T arbitration provision fully allowed AT&T customers to vindicate their rights in the event of a dispute. In fact, AT&T's arbitration agreement specifies that the AT&T customers may arbitrate for free and are entitled to a minimum recovery (regardless of the size of their claim) of $7,500 plus double attorneys' fees, if the arbitrator awards them more than AT&T's final settlement offer. This is sometimes called a "bump-up" feature. The Ninth Circuit also rejected AT&T's argument that the Federal Arbitration Act preempts California law invalidating the arbitration provision. The Supreme Court granted review in order to determine whether the act precludes states, such as California, from conditioning the enforceability of an arbitration agreement on the availability of classwide arbitration when this is unnecessary to ensure that the parties to the arbitration agreement are able to vindicate their claims.

Our firm filed an amicus brief on behalf of a consortium of bank trade associations. We asserted that the Ninth Circuit's decision, if allowed to stand, would adversely affect many existing

arbitration agreements which provide for individual arbitration and disallow class proceedings. Such a result would subvert the practical value of arbitration to resolve disputes swiftly and inexpensively in accordance with private arbitration agreements. In fact, banks cannot afford the risks of class arbitration, since class arbitration involves potentially huge amounts in controversy, gives the loser limited appeal rights and might not bind class members who have not received the full measure of procedural protections applicable in court.

While plaintiffs' class-action lawyers will be popping champagne corks if AT&T loses its appeal, this would be a horrible result for consumers, who would face higher prices for their goods and services and would be relegated once again to the courts as the only forums for resolving disputes.

A win for AT&T will not be the death knell for consumer protection. Customers of AT&T and other companies that are using arbitration provisions will be able to vindicate their claims in arbitration much more effectively than they can in court. Federal and state government agencies, armed with a strengthened arsenal of enforcement remedies given to them by the Dodd-Frank Act, will be available to deal with any systemic wrongdoing by banks and other companies.

Alan S. Kaplinsky chairs the consumer financial services group at Ballard Spahr LLP in Philadelphia.