Supreme Court ruling attacks class actions
By Jerry Crimmins
April 28, 2011

The U.S. Supreme Court's decision Wednesday upholding consumer contracts that ban class-action arbitration is pro-business and greatly limits class-action litigation, in the view of several local lawyers.

In a 5-4 ruling, the high court said a California law invalidating contracts that ban class-action arbitration with businesses was pre-empted by the Federal Arbitration Act.

The ruling arose out of a dispute between AT&T Mobility and a California couple who objected to being charged about $30 in sales tax for a "free" cellphone.

The couple's contract with AT&T Mobility called for arbitration of disputes and prohibited class-action arbitration.

The couple sued and sought class-action arbitration anyway on the grounds that California case law says arbitration agreements banning class actions could be considered unconscionable, thus invalid and unenforceable.

Writing the majority decision for the Supreme Court, Justice Antonin G. Scalia said the California case law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in the Federal Arbitration Law and thus federal law pre-empts California law.

Scalia was joined in that judgment by Chief Justice John G. Roberts Jr., and Justices Anthony M. Kennedy, Clarence Thomas and Samuel A. Alito Jr.

The case is AT&T Mobility v. Concepcion , No. 09-893.

"The decision is surprising in terms of its breadth and its likely impact," said Gerald L. Maatman Jr., a Chicago partner of Seyfarth, Shaw LLP.

"It sure seems to suggest that this applied across the board with any arbitration agreements, which would include workplace agreements between a company and its employees."

Maatman and David B. Ross of Seyfarth, who typically represent corporations, wrote on the Workplace Class Action Blog that the AT&T arbitration agreement was "consumer friendly, cost free ... and essentially guaranteed that AT&T would make whole any aggrieved customer who filed a claim."

"The pains taken by AT&T to craft a fair and user-friendly agreement undoubtedly influenced the majority of the Supreme Court" in their decision, Maatman and Ross said.
However, Todd A. Smith, president of the Illinois Trial Lawyers Association, called this "a very disturbing opinion that is very anti-consumer, anti-regular citizen, heavily weighted towards those who have all the financial power," including "oligopolies" such as big cellphone companies.

Contract clauses to compel individual arbitration of consumer complaints, Smith said, "are eliminating the ability of consumers to have anything even remotely close to a level playing field and eliminating (companies') responsibility when they defraud us out of relatively small amounts of money, but as a group, perhaps millions at a time."

Smith said the Federal Arbitration Act explicitly says arbitration agreements are valid "save upon such grounds as exist at law or in equity for the revocation of any contract."

Through this "savings clause," Congress wanted to preserve contract rights in state law, Smith said, but the majority opinion is contorted to avoid this clause. Smith is name partner in Power, Rogers & Smith P.C.

Professor Margaret L. Moses at Loyola University Chicago School of Law said Wednesday's ruling "is consistent with prior Supreme Court animosity towards class arbitration" as seen in Stolt-Nielsen SA et al. v. Animalfeeds International Corp., No. 08-1198.

But Wednesday's decision "is not consistent with the Federal Arbitration Act," said Moses, who teaches international commercial arbitration.

"The court is asserting that class arbitration is not arbitration, essentially, and that therefore class arbitration waivers cannot be barred by contract defenses such as unconscionability."

The Federal Arbitration Act does not support this interpretation, Moses said. Also, she said the American Arbitration Association "does handle class arbitration."

"What the Supreme Court has done essentially, they have pre-empted state contract law on unconscionability," Moses said. "And that seems a radical step by the supposed Federalists on the court.

"And it's really another step by the Supreme Court to favor businesses and disfavor consumers."

Lawyers on both sides of labor relations matters also saw the decision as potentially impacting relations between employers and workers.

Douglas M. Werman, of Werman Law Office P.C., said, "It's an extremely aggressive, pro-business decision that is sure to have very severe adverse consequences in the labor and employment law area.

"In my opinion, it will make it virtually impossible for working people with small individual claims to adjudicate their statutory claims. Many of those cases will simply be abandoned.

"What is also frustrating is that it's another hypocritical decision from the majority members of the court who so often chant federalism principles. Very disappointing."
Alejandro Caffarelli of Caffarelli & Siegel Ltd., president of the Illinois chapter of the National Employment Lawyers Association, said, "This is the direction that the court has been headed for quite some time, both in regard to its class-action jurisprudence as well as its arbitration jurisprudence."

"I wouldn't call the decision shocking or radical," Caffarelli said, "but from my perspective, it's unfortunate. … It's just an unfortunate continuation of the diminution of consumer rights generally."

Caffarelli also said, "We have seen an increase in the employment law arena of mandatory arbitration clauses in employment agreements. And now I won't be surprised to see limitations on class actions in those agreements as well."

"I think the battleground is now going to shift to Congress and we'll have a debate about whether the majority decision is good policy or bad policy," Maatman said, "and whether should Congress amend the Federal Arbitration Act to allow an exception for class actions for consumer fraud, employment discrimination or wage and hour claims."