SILVERMAN | ADVISORS
ATTORNEYS AT LAW

CLIENT ALERT

THE PATH TO AVOID REALLY EXPENSIVE CUSTOMER DISPUTES: The US Supreme Court and Massachusetts SJC have empowered retailers to strengthen their contracts and avoid dreaded class actions.

BY SCOTT A. SILVERMAN **August 2013**

Scenario: To increase your sales, you offer a free upgrade to everyone who buys a new car during Presidents' Day week - "Buy now, and receive a free portable GPS system." Several weeks later, however, your new customers cry foul when the FTC cites you for violating rules that prohibit "free" offers as part of your sales promotion. The upgrades are not really "free" as advertised, they claim, and worse yet, these several hundred new customers file a class action against you in federal court, each seeking to recover the few hundred dollars they paid for the free product. The claim individually would never interest any plaintiffs' attorney, but the opportunity to make the claim on behalf of hundreds of your customers has the attorney seeing a big payday - after triple damages and attorney's fees the liability could exceed $500,000.

You and your lawyers huddle and review your standard sales contract for defenses - and thankfully, there is a provision requiring that all disputes be arbitrated and, further, that the customers waive their ability to bring a class action. Game, set, and match, right? Until the Supreme Court's recent decisions upholding class action waivers in arbitration agreements, the enforceability of those waivers was far from certain.

Below is a brief discussion on how the law evolved, and most important, how this change should impact your business practices.

Consumer groups have long argued that class actions are necessary to avoid individually low-value claims from falling through the cracks. In the past, Massachusetts's highest court had supported this view, holding class action waivers in arbitration agreements invalid and unenforceable as a matter of public policy. However, in its August 1, 2013 decision of *Feeney v. Dell, Inc.,* the SJC dramatically changed course, acknowledging that arbitration agreements should be enforced despite the Court's obvious interest in protecting consumers' ability to prosecute low-value claims. In short, the decision stands for the proposition that no matter how unfair a class action waiver is to individual consumers, the courts cannot ignore it.

The above scenario with "free" stuff is not far-fetched. The Supreme Court's *AT&T Mobility v. Concepcion* decision from April, 2011 began when two customers complained that AT&T's offer of "free" cell phones was false because of the $30.22 in sales tax customers were required to pay. Despite the minimal value of damages to the Concepcions themselves, they filed false advertising and fraud claims in the California federal courts on behalf of a large class of AT&T customers who purchased the supposedly "free" phones. When AT&T moved to enforce the arbitration clause in their contracts, the trial court and the appeals court both rejected the effort and ruled California law precluded the class action waiver because it was "unconscionable," a legal term meaning a contractual provision is particularly unfair. The Supreme Court overturned the decision that gave similar claims an out from boiler-plate class waiver provisions.

In *American Express v. Italian Colors* a group of merchants who had accepted American Express charges brought suit despite a clause within the agreement between that required arbitration of all claims brought against American Express and prohibited merchants from bringing any class actions.

The policy issues in this case centered on precisely how much deference courts owe to arbitration agreements. The short answer is a lot.

In a June 2013 decision the Supreme Court held that courts couldn't invalidate class waiver clauses based on the cost of individual arbitration exceeding the potential recovery. The Supreme Court upheld the district court's decision to dismiss the case and require arbitration even though this would essentially protect American Express from liability because the cost of individual merchants pursuing the claim in arbitration far outweighs the potential recovery of damages.

What Does This Mean to Retailers (and Employers!)?

What do *Amex* and *Concepcion* mean going forward, and, more particularly, how will it affect retailers? The decisions provide predictability. Individual consumers may be less likely to pursue valid claims that they have been wronged because the amounts of money at issue are relatively small for the effort required to recover it. As Justice Breyer put it, "Only a lunatic or a fanatic sues for $30" when a class action is the more appropriate vehicle for vindicating the rights of an entire group.

Action Points:

Tune up your documents. If your dealership's basic documents - sales and service invoices and the like - don't already have them, speak with your lawyer about adding provisions which broadly require all customer disputes to be resolved by arbitration. If you already have those provisions, now is a good time to have them reviewed to make sure they are as broad as possible under *Amex* and *Concepcion*.

Make sure that your arbitration procedures are fair. A large part of the majority's opinion in *Concepcion* centered around the fairness of the AT&T arbitration provisions for consumers: AT&T agreed to pay all costs for nonfrivilous claims; arbitration takes place in the county in which the customer is billed; for claims of $10,000 or less, the customer may choose whether the arbitration proceeds in person, by telephone, or based only on submissions; claims may be brought in small claims court rather than in arbitration; full relief, including injunctions, is available in the arbitration; and when the customer receives an arbitration award greater than AT&T's latest offer to settle, AT&T must pay a minimum of $7,500 and twice the amount of the customer's attorneys fees. Not that your documents must provide the same generous (or, to some, overly generous) provisions, but you should make sure that arbitration is not so onerous that a customer is effectively discouraged from using those procedures altogether.

Continue to review the documents you sign. Whether it's a purchase order with a computer vendor or your contract with a lead-generation software company, always review (preferably with legal counsel) what you are asked to sign before you sign it. Chances are these same arbitration class action waivers will appear in contracts you sign with your vendors. While there may be some room to negotiate more favorable terms for your company, there likely will not be. In any event, you should know what procedures you will have to follow if a dispute arises between you and your vendor.

Employment issues. Do any of your employees sign employment agreements? Nondisclosure or non-solicitation agreements? If you don't know what these are, you should speak with a lawyer and consider whether they may be of use to your company. If you have a large number of employees, disputes arising from wage and hour issues; over- time pay; theft of trade secrets; and claims of age, gender, or racial discrimination are always likely. Though you try to make sure these don't occur, your employee agreements - or your employee handbook if your employees don't have agreements - should adequately protect you to the full extent allowed by the *Amex* and *Concepcion* decisions.

Websites. Do you operate a website, provide information through a website or the Internet, or sell goods or services over the Internet? If you do, you may already use what are called "click-wrap" agreements, where customers "click" their acceptance to terms of usage before viewing information or completing a transaction on a website. During periodic review of these agreements with your lawyers, make sure that you consider using arbitration class action waiver provisions that are consistent with *Amex* and *Concepcion*.

To arbitrate or not to arbitrate. Arbitration rights were strengthened by the enactment of the FAA in the 1920s, and this was done because of the hostility of state courts and legislatures to arbitration generally. While arbitration rights have surely been strengthened by the Supreme Court's *Amex* and *Concepcion* decisions, you should step back and ask whether arbitration meets your company's goals and whether your

customers' waiver of arbitration class action rights is in your best interest to resolve widespread customer disputes in the most efficient way. As with most laws, rarely does one size fit all.

Summary

Did the Supreme Court's recent decisions in *Amex* and *Concepcion* effectively kill class actions in the consumer arena? While consumer class actions are unlikely to become extinct, *Amex* and *Concepcion* certainly will cut back greatly on a consumer's ability to claim large damages under the threat of joining hundreds or thousands of plaintiffs in one massive lawsuit. The bottom line for any company dealing regularly with consumers is to review with your counsel the *Amex* and *Concepcion* decisions and how you may use them to better define the rights between you and your customers.