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U.S. Supreme Court Allows Waiver of Class Action Rights and Compels Arbitration of Individual Consumer Complaints in AT&T Mobility v. Concepcion

By LGC Partner Thomas J. Lincoln

A recent case decided by the U.S. Supreme Court upheld an arbitration clause in a cellular telephone contract that required all disputes to be arbitrated and did not allow class actions. (*AT&T Mobility LLC v. Concepcion*, 130 S. Ct. 3322.) Many business owners were very happy because: 1) the Supreme Court reinforced the idea of enforceable arbitration terms; and 2) more importantly, the Supreme Court allowed an arbitration provision to eliminate the right to pursue class actions. While arbitration can be useful, and certainly limiting the potential for class actions is very important to any business, it is important to understand arbitration does not necessarily cost less nor does it necessarily result in a more favorable (or even as fair) judgment compared to traditional litigation.

Background: An arbitration clause is a clause in a contract that basically says any dispute between the parties must be submitted to arbitration. There are many variations, such as the number of arbitrators, who arbitrates, where the matter is arbitrated, whether it must be preceded by settlement efforts, who pays, whether the prevailing party gets fees and costs, and, now, under certain circumstances, whether the dispute can be the basis for a class action.

Popularity of Arbitration: Over the past ten years or so, arbitration has become a very popular way of settling disputes. Arbitration's popularity is the result of a perception that litigation is too expensive and juries are unpredictable. Also, companies that provide arbitration services have done a good job of conveying the benefits of arbitration. Finally, there are simply not many experienced trial lawyers who can evaluate the pros and cons of arbitration, and many parties default to standard litigation rather than risking trying something new.

Pros and Cons of Arbitration: More and more, we are dealing with clients who had arbitration clauses and are now questioning the use of them. Arbitration is not necessarily less expensive. Some arbitration companies charge thousands of dollars to file a claim and then thousands of dollars per day, paid in advance, for the arbitration hearing. Arbitration companies typically demand payment up front for all fees estimated for a complete trial. Moreover, contrary to the perception created by the media and some interest groups based upon a few bizarre verdicts (i.e., million dollar verdict for spilled coffee at McDonalds), some studies have shown that juries of lay people tend to be more fair than one person (i.e., an arbitrator), regardless of the complexity of the case, and that jury verdicts have actually gone down significantly over the past 5 years or so.

Arbitration in the Future: The *Concepcion* case is an important case for businesses. *Concepcion* upholds the concept that parties can agree to limit remedies, including the remedy of a class action, and the courts will uphold

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Thomas J. Lincoln
Partner

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LGC California Prevails on Motion for Summary Adjudication

LGC California Associates Katie McCurdy and Jordan Nager successfully won a Motion for Summary Adjudication in a San Jose construction defect case. Working under the guidance of LGC Partners Randy Gustafson and Karl Sorenson, Katie and Jordan represented the general contractor in the case, and filed a *Crawford* motion. The San Jose court granted the motion, which ordered the concrete subcontractor to contribute to pre-trial defense fees of the general contractor. The granted motion resolved an on-going debate regarding the subcontractors' unpaid defense contributions and paved the way for a favorable settlement which was finalized just two weeks after the court granted the motion.

Great job, Katie and Jordan!

LGC Nevada Moves to the Hughes Center!

LGC Nevada has moved to the Hughes Center in Nevada's Business District in Las Vegas, Nevada. The new office is located at 3960 Howard Hughes Parkway, on the second floor. The office is almost 10,000 square feet, and includes 18 attorney offices and 12-14 administrative or paralegal offices, as well as state of the art conferencing and video capabilities, which will aid in client meetings, witness depositions, and much more. Additionally, the suite contains a reception area, conference and break rooms, and a large file room. (Continued on Page 2.)

California Supreme Court Rules for the Defense Regarding Recovery of Medical Expenses

By Associate Monica Yoon

As previously reported in the January & April 2011 issues of LGC Quarterly, an important issue has been pending before the California Supreme Court regarding whether a personal injury plaintiff may recover the full amount of medical expenses billed by a medical provider even if the provider accepted a reduced amount from the plaintiff's health insurer. The CA Supreme Court has now ruled: ***the plaintiff may not recover more in medical expenses than the amount actually paid through insurance***.[1]

Historically in California, defendants file post-trial "Hanif" motions requesting plaintiff awards be reduced to the amount of medical expenses actually paid.[2] Defendants argue without such a reduction, plaintiffs receive windfalls since they recover monies billed but not paid, as well as pain and suffering based on inflated medical bills.

Recently, however, several plaintiffs argued in *Yanez v. SOMA Environmental Engineering, Inc.*, *King v. Willmett*, and *Howell v. Hamilton Meats & Provisions, Inc.,* that the collateral source rule (providing generally that a plaintiff's damages should not be reduced merely because the plaintiff received a benefit from a "collateral" source, such as insurance) precludes post-trial reduction of damages.[3]

The CA Supreme Court in *Howell v. Hamilton Meats* has now weighed in, ruling plaintiffs may only recover amounts paid by the insurer (and accepted by the medical provider as payment in full).[4] Furthermore, post-trial "Hanif" motions to seek reductions in fees may not be necessary because evidence of the amounts actually paid for medical expenses will be admissible (without mention of insurance, of course).[5]

The *Howell* ruling is expected to impact not only the recovery of past medical damages but also awards for pain and suffering since such awards are often based on total monetary damages. The ruling also raises interesting questions about when to raise these issues. One option may be to try to exclude evidence of the full amounts billed (but not actually paid) through pre-trial motions in limine. Another option may be for the parties to stipulate before trial (if possible) to the amounts actually paid for past medical expenses. We will continue to monitor these issues and keep you apprised of noteworthy developments as they occur.

1 *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal. 4th 541.
2 *See Hanif v. Housing Authority* (1988) 200 Cal. App. 3d 635.
3 *See, e.g., Yanez v. SOMA Envtl. Eng'g, Inc.* (2010 185 Cal. Ap. 4th 1313; *King v. Willmett* (2010) 187 Cal. App. 4th 313; *Howell v. Hamilton Meats & Provisions, Inc.* (2009) 179 Cal. App. 4th 686.
4 *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal. 4th 541.
5 *Id.*

Associate Spotlight: Harry J. Rosenthal

Harry Rosenthal is an associate in our Las Vegas office. Born in Wagner, South Dakota, Mr. Rosenthal received a Bachelor of Science degree in Entrepreneurship from the Kelly School of Business at Indiana University in 1999. Harry spent three years in retail sales management with Enterprise Rent-A-Car in Chicago, Illinois. He then received his J.D. from Michigan State University in 2005. Mr. Rosenthal litigates construction defect and personal injury cases.

LGC Nevada Moves to the Hughes Center, Continued:

The Hughes Center, owned by Crescent Real Estate Equities Limited Partnership, is home to Las Vegas' most distinguished companies in this sector of the state, and has the valley's highest concentration of law firms, professional, and corporate services. The Hughes Center has excellent accessibility to McCarran International Airport, the Las Vegas Strip, and the valley's highways. Moreover, both JAMS Inc. and Litigation Services recently signed leases in the Hughes Center, both of which provide mediation and deposition services. The new location will bring LGC closer to our clients, the courthouse, and other legal services companies.

Please stop by LGC Nevada's new offices if you are in Las Vegas!

Milestones

Congratulations to Lucia Diaz De Leon who celebrated her Quinceañera (15th birthday) on August 27, 2011. Lucia's mother, Leticia, works in the billing department of our San Diego office.

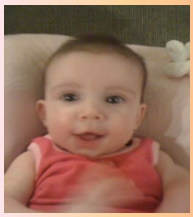
We Appreciate Your Referrals

We would like to thank our many clients who continue to refer colleagues, friends, and family to our offices for legal services. We take pride in knowing that you have confidence in our ability to provide legal representation.
THANK YOU!

BABY NEWS

LGC is happy to announce the arrival of the newest members of the LGC family:

Stella Hayes Knutson was born on August 13, 2011 to LGC California Associate Lucy Knutson. She weighed 8 lbs, 7 oz and was 22 inches long. Congratulations to both Lucy and her husband Kolter!



LGC Nevada Partner Shannon Splaine (formerly Rooney) and her husband, Mike Splaine, are happy to announce the birth of daughter Teagan Rooney Splaine. She was born on May 17, 2011 at 9:17 p.m. and weighed 7 lbs, 4 oz. Both mom and baby are doing well.

Wedding Announcement

Congratulations to LGC California Associate Darcie Frounfelter on her recent marriage to Jerry Colihan. Darcie and Jerry were married on August 13th. They went to Hawaii for their honeymoon. Aloha!

Supreme Court Rules in Favor of Wal-Mart in Class Action Case

On June 20, 2011, the U.S. Supreme Court threw out a class action suit against the world's largest private employer, Wal-Mart, that alleged the company's policies and practices systematically discriminated against as many as 1.5 million female workers.[1] Six employees filed a lawsuit on behalf of themselves and other employees for sex discrimination under Title VII of the Civil Rights Act of 1964 (which prohibits employment discrimination based on race, color, religion, sex, or national origin). The workers claimed local managers' discretion over pay and promotions was exercised disproportionately in favor of men, leading to an unlawful disparate impact on all female employees

The Court unanimously agreed the lawsuit could not proceed, reversing a decision by the Ninth U.S. Circuit Court of Appeals. The Court split 5-4, however, over whether the plaintiffs satisfied the commonality requirement of a class action suit. The majority concluded the women failed to prove there was a company policy of discrimination. The Court found Wal-Mart's announced — and enforced — policy against sex bias together with decentralizing actual workplace decisions on pay and promotions "is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices. It is also a very common and presumptively reasonable way of doing business." [2]

This ruling is a landmark decision, quashing what would have been the largest class action employment lawsuit in U.S. history. To obtain class action certifications in the future, employees will have to present strong evidence of a uniform company policy and/ or practice of discrimination. *See Partner Teresa Beck with questions.*

1 *Wal-Mart Stores, Inc. v. Dukes et al.*, No. 10–277 (June 20, 2011).
2 *Wal-Mart Stores, Inc. v. Dukes et al.*, No. 10–277 (June 20, 2011), 14 - 15.

AT&T Mobility, Continued from Page 1:

that agreement, unless there is fraud or some other viable defense. While taking steps to limit the potential for class actions should be considered by any company with more than a few employees and/or which deals with the general public, the use of arbitration clauses should be carefully weighed and drafted. Careful planning can lessen the risk of class actions and, if class allegations are made against your business, careful handling can mitigate the potential damages. As with most everything, there are many considerations that go into the selection of an arbitration clause to limit risk. For most businesses, it is very good news that the Supreme Court will uphold class action waivers. Companies need to be sure, however, that they are fully aware of the benefits and drawbacks of arbitration so they do not regret getting the arbitration they asked for.

California Supreme Court Enforces Strict Adherence to Mediation Confidentiality Statutes

By CA Associate Monica Yoon

California law provides that any discussions or writings made "for the purposes of, in the course of, or pursuant to" mediation are confidential and not subject to discovery (disclosure) in the litigation.[1] The purpose of California's mediation confidentiality statutes is to "encourage the mediation of disputes by eliminating a concern that things said or written in connection with such a proceeding will later be used against a participant."[2]

There are a few exceptions (*e.g.,* waiver or disclosure of certain settlement agreements reached during mediation), but otherwise strict adherence to mediation confidentiality is required.[3] A recent California Supreme Court case, *Cassel v. Superior Court*, serves as an example of just how broadly and strictly these statutes are applied.[4] In *Cassel*, the court held the mediation confidentiality statues, as currently drafted, apply not only to mediation-related communications between parties and/or with a mediator, but also to communications solely between a client and that client's own attorney during mediation.[5] Such communications (between a client and his/her attorney during mediation) were deemed confidential and therefore could not be used as evidence in the client's subsequent legal malpractice case against his attorneys.[6]

Whether or not you agree with the outcome of the *Cassel* case and whether or not the Legislature ultimately creates an exception for legal malpractice claims, this ruling reveals an important commitment (by the courts and the legislature) to foster mediation and the type of discussions needed in order to reach a successful settlement during mediation.

1 *See, e.g.,* Cal. Evid. Code 1119 (2011).
2 *Cassel v. Superior Court* (2011) 51 Cal. 4th 113, 124.
3 Id.
4 Id.
5 Id.
6 Id.
7 Id. at 136.

Happy Thanksgiving!

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