

Brief Update on Enforcement of Arbitration Agreements Under The Federal Arbitration Act



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We have previously presented a few articles outlining the importance of the Federal Arbitration Act (FAA) governing arbitration agreements. As we have previously noted, FAA can present a *saving lifeline* for arbitration agreements generally. This article looks at a recent Federal Ninth Circuit Court

of Appeals (Ninth Circuit) decision impacting arbitration agreements in California.

In 2011, in *AT&T Mobility LLC v. Concepcion* (“AT&T”), the U. S. Supreme Court reversed the California Supreme Court and held that the FAA operated to *trump* conflicting state law public policies that would purport to preclude arbitration of certain claims. Specifically, the High Court said that the FAA preempted state policies requiring litigation, rather than arbitration, of *consumer class action suits*. The holding of AT&T on arbitration became the law of the land.

But, on September 28, 2015, the Ninth Circuit issued its contrary decision in *Sakkab v. Luxottica Retail North America, Inc.* (Sakkab) holding that the FAA **does not** operate to pre-empt a bar to waiver of California’s Private Attorney General Act (PAGA) under California law. The move by the Ninth Circuit surprised many legal experts who anticipated that the Ninth Circuit would follow a growing federal precedent under AT&T, that such policies should be pre-empted by the FAA because they impugn on the stated purpose of FAA: to permit parties to select by contract arbitration as the means to resolve a potential future disputes.

Many proponents of FAA pre-emption view *Sakkab* as a major setback. However, there is a good potential that the US Supreme Court will ultimately take this case up on review to once again confirm its policy that the FAA *pre-empts any state policy that impugns upon the clear purpose the FAA*. We see the *Sakkab* case as having minimal impact on the AT&T’s well-reasoned holding given the current makeup of the High Court. Stay tuned!

Notwithstanding the *Sakkab* case, FAA based Arbitration Agreements are preferable for use at your MHC because they increase the odds of being enforced and avoiding court actions. Hart King has drafted numerous FAA Arbitration Agreements for its clients. Naturally, review of your arbitration agreement should be done in consultation with your legal advisor.

The above commentary is not intended as legal advice. Our observations of the current trend of FAA’s effectiveness in compelling arbitration are interpretive and may differ from that of other counsel’s interpretations and the appropriate provisions to include in, or exclude from an arbitration agreement.

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