

81006-1

NO. 243991

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

---

AT&T CORP.,

Appellant,

v.

MICHAEL McKEE,

Respondent.

---

APPEAL FROM THE SUPERIOR COURT  
FOR CHELAN COUNTY  
HONORABLE JOHN E. BRIDGES

---

**APPELLANT'S STATEMENT OF ADDITIONAL AUTHORITIES**

Daniel M. Waggoner  
Cassandra L. Kinkead  
Davis Wright Tremaine LLP  
Attorneys for Appellant AT&T Corp.

1501 Fourth Avenue, Suite 2600  
Seattle, Washington 98101-1688  
(206) 622-3150 Phone  
(206) 628-7699 Fax

Howard Spierer, Esq.  
Counsel for AT&T Corp.

Pursuant to Rule of Appellate Procedure 10.8, Appellant AT&T Corp. submits this statement of additional authorities to provide this Court with seven recent decisions in which courts in other jurisdictions have upheld class action waivers in consumer arbitration clauses.

For example, in Tillman v. Commercial Credit Loans, Inc., -- S.E.2d--, 2006 WL 1526826 (N.C. Ct. App. June 6, 2006), the North Carolina Court of Appeals held that a financing agreement that contained an arbitration clause prohibiting class actions was not substantively unconscionable because "the consumer protection statute underlying plaintiffs' claims provides for recovery of plaintiffs' costs and attorney's fees if plaintiffs prevail." Therefore, the "trial court's conclusion that plaintiffs would be deterred from bringing their claims against defendants due to the class action waiver [was] erroneous." Id. at \*8-9.

In Forness v. Cross Country Bank, Inc., 2006 WL 726233 (S.D. Ill. March 20, 2006), the District Court for the Southern District of Illinois applied Delaware law pursuant to a choice-of-law provision and concluded that, under Edelist v. MBNA Am. Bank, 790 A.2d 1249, 1261 (Del. Super. Ct. 2001), a class action waiver in a credit card agreement was not unconscionable because numerous jurisdictions enforce such waivers, plaintiffs failed to prove prohibitive costs associated with arbitration, and arbitration would be a "fair and equitable forum for

Plaintiff to pursue their claims." The court also suggested that the provision would be valid under Illinois law. Id. at \*2, n.5.

Similarly, in In re Am. Express Merchants Litig., 2006 WL 662341 (S.D.N.Y. March 16, 2006), the District Court for the Southern District of New York held that a credit card acceptance agreement that contained a class action waiver clause was not unconscionable and did not "give Amex a 'free pass'" because "the very statute [Clayton Act] under which [plaintiffs] bring suit provides sufficient financial incentive to pursue their claims" and plaintiffs' "attack on the enforceability of the collective action waivers is not an argument against arbitrability, but an argument against enforcing the collective action waiver provisions, whether the claims proceeded in arbitration or court." Consequently, "plaintiffs' opposition to arbitration because of the collection waiver provisions ... is unpersuasive." Id. at \*5.

In Hayes v. County Bank, 26 A.D.3d 465, 811 N.Y.S.2d 741 (N.Y. App. Div. Feb. 26, 2006), the court held that loan agreements that contained arbitration provisions with class action waivers were not unconscionable, citing Ranieri v. Bell Atl. Mobile, 304 A.D.2d 353, 759 N.Y.S.2d 448 (2003) with approval.

In Lux v. Good Guys, Inc., 2006 WL 357820 (C.D. Cal. Feb. 8, 2006), the District Court denied plaintiff's motion for reconsideration of the court's order granting Good Guys, Inc.'s Motion to Compel Arbitration because the agreements did not "violate a fundamental policy of California" and the "court was correct in analyzing the enforceability of ... the provision under Nevada law in accordance with the choice of law provision." Under Nevada law, the "arbitration provision and class action waiver [do not] make the agreement so one-sided that it is substantively unconscionable."

In Kahn v. Option One Mortgage Corp., 2006 WL 156942 (E.D. Pa. Jan. 18, 2006), plaintiffs sued their mortgage lender, alleging that they were charged improper fees. The court observed, "[a]s a threshold matter, it appears that Plaintiffs have expressly waived their right to bring a class action against Defendant" because the "Arbitration Agreement, signed by both parties, states that the required arbitration 'may not address any dispute on a class action basis.'"

Finally, in Copeland v. Katz, 2005 WL 3163296 (E.D. Mich. Nov. 28, 2005), the court held that a class action waiver in a retail installment contract was not unconscionable.

These holdings are all relevant to and support Appellant's argument that a class action waiver in an arbitration agreement is not unconscionable and that "[m]ost state and federal courts routinely and rigorously enforce agreements that prohibit class actions." See, e.g., Appellant's Br. at 46, 46 n.21.

RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of June, 2006.

Davis Wright Tremaine LLP  
Attorneys for Appellant AT&T Corp.

By 

Daniel Waggoner, WSBA # 9439  
Cassandra Kinkead, WSBA # 22845  
1501 Fourth Avenue, Suite 2600  
Seattle, Washington 98101-1688  
(206) 622-3150 Phone  
(206) 628-7699 Fax

Howard Spierer, Esq.  
Counsel for AT&T Corp.