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COMMENTARY

Supreme Court shuts down latest challenge to class-waiver provisions

Edward Berbarie of Littler Mendelson discusses the U.S. Supreme Court’s recent decision in favor of contract waivers mandating individual arbitration and considers the ruling’s impact, particularly on enforcement of arbitration clauses in employment contracts.

(See page 3)

GENDER DISCRIMINATION

U.S. judge denies class certification sought by women suing Wal-Mart

(Reuters) – In another setback for women suing Wal-Mart, a U.S. judge in San Francisco on Aug. 2 rejected an attempt to bring reformulated sex discrimination claims against the company as a class action.


U.S. District Judge Charles Breyer of the Northern District of California denied a motion for class certification brought by plaintiffs seeking to represent 150,000 women in Wal-Mart’s California offices who alleged the world’s largest retailer denied them pay raises and promotions because of their gender.

The claims were filed as a reformulated lawsuit after the U.S. Supreme Court threw out a larger class-action sex discrimination against Wal-Mart Stores Inc. in 2011 that claimed female employees at 3,400 Wal-Mart stores nationwide were underpaid and given fewer promotions. Wal-Mart v. Dukes, 131 S. Ct. 2541 (2011).

The California lawsuit was part of a broader strategy by women Wal-Mart workers to bring more narrowly tailored class actions in an attempt to seek damages, targeting Wal-Mart’s employment practices in regions throughout the country.

Instead of relying on nationwide statistical patterns and anecdotal evidence provided by plaintiffs, the California lawsuit had alleged specific discriminatory statements made by the district and regional managers that have decision-making authority over pay and promotions.

(Continued on page 2)
Judge Breyer said in his ruling that the women could not bring their allegations as a class action because they had not established that their claims of the company’s employment practice were linked to a class-wide policy.

But he said: “This order does not consider whether plaintiffs themselves were victims of discrimination as alleged in their complaint; those individual claims shall proceed in this litigation.”

Still, Judge Breyer took issue with some of the merits of the plaintiffs’ case. For one, he said that the women did not identify statistically significant disparities in pay and promotion decisions throughout the California regions at issue.

Judge Breyer also noted that the women said they had anecdotes reflecting stereotyped views expressed by a number of regional managers, but only offered evidence of bias exhibited by about 5 percent of the top level management that they say guided lower-level decisions.

“Though plaintiffs succeeded in illustrating attitudes of gender bias held by managers at Wal-Mart, they failed to marshal significant proof that intentional discrimination was a general policy affecting the entire class,” Judge Breyer said.

A Wal-Mart spokesman said in a statement that the company has had a strong policy against discrimination in place for many years, and that the allegations from the plaintiffs were not representative of the positive experiences of other women working at Wal-Mart.

“Judge Breyer gave the plaintiffs every opportunity to offer any evidence they wanted, and their evidence comes up short,” said Theodore Boutrous, a lawyer representing Wal-Mart. “We are gratified.”

Randy Renick, a lawyer for the plaintiffs, said in a statement that plaintiffs were “deeply disappointed” with the court’s decision and intended to appeal the ruling.

“While this court decision does not in any way negate the merits of the pay and promotion discrimination case against Wal-Mart, it does create yet another hurdle for these women to at long last have their day in court,” he said.

(Reporting by Casey Sullivan and Dan Levine; editing by Gary Hill, Eric Walsh and Bill Trott)


- Sex discrimination; applicability to class actions - 19:798
- Effect of EEOC guidelines - 12:1670.1
- Certification of class actions; FRCP requirements - 19:771.1
COMMENTARY

Supreme Court shuts down latest challenge to class-waiver provisions

Courts must rigorously enforce arbitration agreements according to their terms

By Edward Berbarie, Esq.
Littler Mendelson

The U.S. Supreme Court has closed a potential loophole to the enforcement of class-action waiver provisions in arbitration agreements, a loophole that could have made enforcing these provisions much more costly and difficult.

The high court, in American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (June 20, 2013), held that a class-action waiver provision in an arbitration agreement governed by the Federal Arbitration Act, 9 U.S.C. § 1, is enforceable, even if the plaintiff’s costs of individually arbitrating the claim exceed the potential individual recovery.

In a 5-3 decision, the Supreme Court reiterated that courts “must rigorously enforce” arbitration agreements according to their terms, including those that “specify with whom [the parties] choose to arbitrate their disputes.” Relying on its decision last year in CompuCredit Corp. v. Greenwood, 132 S. Ct. 665 (2012), the court stated this was true even for claims brought under a federal statute, “unless the FAA’s mandate has been overridden by a contrary congressional command.”

Finding no such contrary congressional command in the federal antitrust laws at issue in the American Express case, the court next considered whether the class-action waiver precluded the plaintiffs from effectively vindicating their federal statutory rights because of the high cost of individually arbitrating their claims.

Writing for the majority, Justice Antonin Scalia rejected the 2nd U.S. Circuit Court of Appeals’ analysis, saying parties’ rights are not eliminated simply because it would be expensive to prove a claim. Holding otherwise would be contrary to the Federal Arbitration Act and Supreme Court precedent, he said.

BACKGROUND

The road to the high court’s opinion has been a long one. The plaintiffs are merchants who accept American Express cards. They signed agreements requiring that all disputes with Amex be resolved by arbitration and that “there shall be no right or authority for any claims to be arbitrated on a class basis.”

Despite this waiver provision, the plaintiffs brought a class action alleging federal antitrust claims under the Sherman Act, 15 U.S.C. § 1, and Clayton Act, 15 U.S.C. § 12. Amex moved to compel individual arbitration of the plaintiffs’ claims. The plaintiffs resisted, arguing that expert testimony to support their claims would cost anywhere from several hundred thousand dollars to more than $1 million, while the maximum recovery for any individual plaintiff would be $38,549.

The trial court granted Amex’s motion and dismissed the lawsuit. The 2nd Circuit reversed it, concluding the class-action waiver provision was unenforceable because the plaintiffs “would incur prohibitive costs if compelled to arbitrate under the class action waiver.”

In 2010 the Supreme Court vacated that opinion and remanded the case for further consideration in light of its ruling in Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 559 U.S. 662 (2010), which said a party cannot be compelled to submit to class arbitration in the absence of an agreement to do so.

However, the 2nd Circuit stood by its decision two more times. First, it found that Stolt-Nielsen was not implicated by its earlier ruling because it had not ordered class arbitration.
Then, in light of the Supreme Court’s ruling in AT&T Mobility v. Concepcion, 131 S. Ct. 1740 (2011), the 2nd Circuit sua sponte reconsidered its ruling. But it nevertheless refused to enforce the arbitration agreement, finding the practical effect of enforcing the waiver would preclude the plaintiffs from being able to vindicate their statutory rights under federal antitrust laws.  

The 2nd Circuit concluded the cost of arbitrating each plaintiff’s individual dispute would be cost-prohibitive and would deprive them of federal statutory protections.

THE SUPREME COURT’S RULING

Rejecting the 2nd Circuit’s analysis, the Supreme Court distinguished situations where a right to pursue a claim is eliminated (e.g., a provision forbidding the assertion of certain statutory rights or “perhaps” a high filing fee that makes access to the forum impracticable) from situations, such as in the Amex case, where it may not be worth the expense to pursue a statutory remedy.

The court also noted that antitrust statutes existed before class actions were available, and individual suits were considered adequate to ensure effective vindication of rights before the adoption of class-action procedures.

The court then relied upon reasoning from two cases that distinguished situations where a right to pursue a claim is eliminated: Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 6 (1991), the court enforced a class-waiver provision in an arbitration agreement even though the Age Discrimination in Employment Act, 29 U.S.C. § 623, permitted collective actions.

Justice Scalia then compared the respondents’ arguments to those made in Vimar Seguros y Reaseguros S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995), in which the court said requiring arbitration in a foreign country was compatible with a federal statute prohibiting any agreement “relieving” or “lessening” liability.

In doing so, the court rejected the argument that the “inconvenience and costs of proceeding abroad lessen[ed]” the defendants’ liability and found “[i]t would be unwieldy and unsupported by the terms or policy of the statute to require courts to proceed case by case to tally the costs and burdens to particular plaintiffs in light of their means, the size of their claims, and the relative burden on the carrier.”

Leaving no room for doubt, Justice Scalia wrote that Concepcion had already resolved the issue and had specifically rejected the argument that class arbitration was necessary to prosecute claims “that might otherwise slip through the legal system.”

THE DECISION’S IMPACT

The high court’s opinion is perhaps most significant for removing what would have been a major hurdle in enforcing arbitration agreements. Had the court accepted the 2nd Circuit’s analysis, it could have dramatically changed the landscape of enforcing class-action waiver provisions in FAA-governed arbitration agreements, potentially leading to mini-trials every time a party wanted to enforce a class-action waiver.

As Justice Scalia recognized, the 2nd Circuit’s approach would have required a court to “determine the legal requirements for success on the merits claim-by-claim and theory-by-theory, the evidence necessary to meet those requirements, the cost of developing the evidence, and the damages that would be recovered in the event of success.”

This approach would be completely unworkable, inconsistent with the Federal Arbitration Act and Supreme Court precedent and, as the court stated, “destroy the prospect of speedy resolution that arbitration … was meant to secure.”

As a result of the court’s opinion, both employers and employees should expect that valid arbitration agreements will be enforced as written and cases can be moved into arbitration more expeditiously.

The court’s holding — that class-action waiver provisions in arbitration agreements cannot be invalidated because individual arbitration of the claims would be too costly — should apply equally to employment law claims brought under federal statutes, such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and the Equal Pay Act, 29 U.S.C. § 206.

The court’s opinion also appears to cut off attempts by state courts to extend the “effective vindication” rule to cases asserting state law claims brought as class actions.

The court’s decision should resolve whether a class-action waiver provision is enforceable to prevent collective actions brought under the Fair Labor Standards Act, 29 U.S.C. § 201. Before the court’s ruling, there was some debate as to whether this issue was resolved years ago by the decision in Gilmer. In a 2011 decision in the Amex case, the 2nd Circuit said Gilmer did not resolve whether collective action rights could be waived “because a collective and perhaps a class action remedy was, in fact, available in that case.” In re Am. Express Merchants’ Litig., 634 F.3d 187, 196 (2d Cir. 2011). The 3rd Circuit, however, in Johnson v. West Suburban Bank, 225 F.3d 366, 378 (3d Cir. 2000), said Gilmer resolved whether collective action claims were waivable.
The Supreme Court’s opinion appears to end any further debate on this subject. Justice Scalia cites Gilmer for the proposition that the court “had no qualms in enforcing a class waiver in an arbitration agreement,” even though the law involved in Gilmer, the Age Discrimination in Employment Act, permits collective actions. Because the right to collective actions under the ADEA arises from the rights created by Section 216(b) of the Fair Labor Standards Act, there does not appear to be any room for argument that the Supreme Court views collective action rights any differently from rights arising under Federal Rule of Civil Procedure 23; both are waivable in an FAA-governed arbitration agreement.

The opinion further calls into question the viability of other theories erecting barriers to the enforcement of class-action waivers. For example, the National Labor Relations Board held in D.R. Horton, 357 NLRB No. 184 (2012), that class-action waivers violate the National Labor Relations Act right to engage in concerted activity. Also, the California Supreme Court ruled in Gentry v. Superior Court, 42 Cal. 4th 443 (2007), that a class-action waiver was unenforceable based on several factors, including a party’s inability to vindicate statutory rights.

It is easy to foresee how the Supreme Court would react to those arguments, given its steadfast message over the years: Absent a clear pronouncement from Congress specifically excluding a certain claim from the reach of the Federal Arbitration Act, a valid arbitration agreement governed by the FAA must be enforced according to its terms.

In other words, once a finding is made that a valid agreement governed by the FAA exists, the agreement should be enforced as written.

As strongly as the court has rejected challenges to the enforcement of agreed-upon terms in valid FAA-governed arbitration agreements, parties seeking to avoid the enforcement of class-action waiver provisions or arbitration agreements may now focus their arguments on the validity of the agreements in the first instance. They can rely on more traditional contract defenses like fraud, duress or unconscionability, rather than arguing that the terms or provisions in the agreements are unenforceable.

However, courts must be wary of applying these defenses more harshly to arbitration contracts than to other contracts. The Supreme Court has signaled that it will be watching, pointing out in Concepcion that even generally applicable contract defenses cannot be applied in a fashion that disfavors arbitration, and noting that California courts “have been more likely to hold contracts to arbitrate unconscionable than other contracts.”

However, if parties ultimately are careful to use well-drafted agreements with reasonable terms, very few challenges to the enforcement of class-action waiver provisions specifically, or FAA-governed agreements generally, will be able to survive the Supreme Court’s latest pronouncements.

NOTES

1. Justice Clarence Thomas joined the majority opinion “in full” and also issued a concurring opinion, relying upon the text and plain meaning of the Federal Arbitration Act. As he explained in AT&T Mobility v. Concepcion, 131 S. Ct. 1740, Justice Thomas believes the FAA requires enforcement of an agreement to arbitrate unless a party successfully challenges the formation of the agreement. Because the plaintiffs in the Amex case did not provide any grounds for the revocation of any contract as required under Section 2 of the FAA, he found the agreement must be enforced. Justice Sonia Sotomayor did not participate in the decision.

2. In re Am. Express Merchants’ Litig., 554 F.3d 300, 315-16 (2d Cir. 2009).


4. See In re Am. Express Merchants’ Litig., 634 F.3d 187 (2d Cir. 2009).

5. See In re Am. Express Merchants’ Litig., 667 F.3d 204 (2d Cir. 2012).

6. Id. at 536.

7. Concepcion, 131 S. Ct. 1740.

8. See, e.g., Feeney v. Dell Inc., 465 Mass. 470 (Mass. June 12, 2013) (invalidating an arbitration agreement containing a class-action waiver provision because the plaintiffs demonstrated they could not pursue their state law claims individually, given the complexity of the case, costs to pursue it and small damages).


**COMPENSATION**

**Ex-workers sue Apple, seek overtime for daily bag searches**

(Reuters) – Two former Apple Inc. employees have accused the iPhone maker in a lawsuit of subjecting hourly store workers to daily searches while they were off-the-clock, arguing they should be compensated.


The “screenings” or bag searches, designed to discourage theft, are conducted every time sales reps leave the store, including for meal breaks, the plaintiffs alleged in a lawsuit filed July 25 in a San Francisco federal court.

They are seeking unpaid wages, overtime compensation and other penalties related to what they say is a customary practice across Apple’s U.S. showrooms. The two plaintiffs said they worked for Apple over a number of years, from California to Georgia and Florida.

Lawsuits from within Apple’s ranks are rare, in part because the company is known to command loyalty amongst its workers. In 2011 however, a part-time employee at an Apple store in San Francisco sought to form a union to fight for better wages and benefits and to address what he called unfair practices within the company’s showrooms.

Both plaintiffs, who are seeking class-action status on behalf of every current and former Apple hourly employee, estimated in their lawsuit that they often waited in line for roughly five to 10 minutes or more before undergoing each check.

It is unclear whether the policy extends beyond Apple’s home shores. The company has more 400 stores around the world.

“This work, done primarily for the employer’s benefit, is time which Apple hourly employees should be, but are not compensated for, both straight hours and overtime hours worked in excess of 40 hours a week,” the lawsuit read.

Apple did not respond to requests for comment.

(Editting by Michael Urquhart)

- Compensation; governing law - 11:2Wage payments during employment; hourly employees - 11:474-477
- Class actions - 1:48; 19:303.5; 19:770

**DISABILITY DISCRIMINATION**

**Placement company accused of wrongfully displacing its own employee**

A company that specializes in providing staffing for other firms is accused of discriminating against its own disabled employee, refusing to accommodate her, harassing her, retaliating against her and ultimately forcing her to quit.


Misty Lecompte says she worked for Volt Management Corp. as a senior technical recruiter in its San Diego office for nine years. She sued Volt and related companies July 3 in the San Diego County Superior Court.

Lecompte says Volt had offered her a reasonable accommodation of flex-time after she was diagnosed with multiple sclerosis in 2006, but it abruptly rescinded that accommodation more than five years later.

In 2011, Lecompte was assigned a new manager who knew about her MS and her need for flex-time, particularly in the morning, but who issued her warnings when she was not at work at 8 a.m. At the same time, that manager allowed another recruiter to arrive after 8 a.m. so that she could get her children to school, the complaint says.

In January 2012, after Lecompte reported her new manager’s refusal to accommodate her MS to other managers, a meeting was called in which a company director told Lecompte that if she could not work from 8 a.m. to 5 p.m., she should get another job, according to the complaint.

At that same meeting, another manager told Lecompte that her recruiting commissions would be taken away if she challenged the company on its position, the complaint says.

Lecompte alleges she was later passed up for a promotion in retaliation for complaining about the company’s unlawful employment practices. She says she was finally forced to quit June 4, 2012.

Lecompte says Volt discriminated against her and harassed her because of her physical disability and medical condition, failed to offer her a reasonable accommodation, failed
to take reasonable steps to prevent discrimination, and retaliated against her for complaining about its actions, in violation of Cal. Gov’t Code § 12940.

She says the company also refused to grant her applicable medical leave and even retaliated against her for requesting medical leave, in violation of Cal. Gov’t Code § 12945.2. She says Volt’s actions violated California public policy and the state’s unfair-competition law, Cal. Bus. & Prof. Code § 17200.

Lecompte also alleges negligent and intentional infliction of emotional distress. Finally, she says the company refused to pay her the wages she earned, in violation of Cal. Labor Code §§ 201 and 202.

Lecompte seeks general, special and punitive damages; prejudgment interest; attorney fees and costs; a public apology; and mandated anti-discrimination, anti-harassment and anti-retaliation training for Volt employees.

Lecompte filed the suit after receiving a right-to-sue notice from the California Department of Fair Employment and Housing.


- Disability discrimination - 7:315; 9:1
- Disability-based harassment - 10:294

RACIAL DISCRIMINATION

Suspended city employees’ discrimination suit lacks evidence, court says

The city of Hawthorne, Calif., did not discriminate against two black housing department employees when it put them on unpaid leave after they became targets of a bribery investigation, a state appeals court has ruled.


The 2nd District Court of Appeal affirmed a trial court’s judgment that the plaintiffs failed to present sufficient evidence to support their discrimination and other claims against the city.

“The city’s evidence on its face is sufficient to support summary adjudication of the discrimination claims,” the panel said.

According to the appeals court’s unpublished opinion, housing department employees Marjorie Mack and Shannon-Joy Gossett sued Hawthorne in the Los Angeles County Superior Court, alleging retaliation; race, gender and disability discrimination; a hostile work environment; and intentional infliction of emotional distress.

In 2008, Mack, a housing specialist, and Gossett, a Section 8 housing inspector, were investigated for allegedly taking bribes in return for moving candidates for government housing subsidies higher up on a waiting list, the opinion said.

The district attorney filed charges against them for allegedly moving family, friends and other candidates up on the waiting list in exchange for $500 gift certificates. The city put Mack and Gossett on unpaid leave nine days later. The charges were eventually dropped.

The plaintiffs alleged the criminal investigation was a pretext for race and gender discrimination and retaliation and that the city never established a legitimate reason for the investigation.
The Superior Court granted the city’s motion for summary judgment, finding that the plaintiffs had failed to provide evidence of the city’s “discriminatory intent.” The employees appealed.

Finding for the city, the appeals court said the criminal investigation was prompted by an informant’s call alleging Mack was engaged in a bribery scheme in subsidized housing and a landlord’s complaint that Gossett allegedly failed to inspect a subsidized apartment that the investigation found was to be rented by her boyfriend’s sister.

Mack and Gossett maintained that the city officials retaliated against them because they had been listed as witnesses in a discrimination suit brought by another housing employee, Rose McKinney.

The appeals court ruled there was no evidence to suggest the McKinney case motivated the bribery investigation because the investigation into the plaintiffs’ actions had begun eight months before McKinney filed the discrimination suit.

Mack and Gossett also argued the trial court erred when it barred testimony from nine other black female employees who also complained of discrimination and retaliation in the housing department.

The appeals court agreed with the trial court’s conclusion that the testimony would have been hearsay evidence and therefore inadmissible in court.


- Racial and “color” discrimination - 7:225
- Retaliation; summary judgment/adjudication based on - 19:753
- Intentional infliction of emotional distress; “extreme and outrageous” conduct requirement; discriminatory personnel decisions compared - 5:293
- Appeals and writ review - 19:1260