ENFORCING ARBITRATION PROVISION IN CONTRACTS: WHAT'S THE LAW TODAY?

It is hard to keep track of the differing opinions coming out of the Federal Court of Appeals and the Supreme Court on the issue of the enforcement of arbitration provisions in different types of contracts as well as the ability to include a class action waiver as part of that arbitration dispute remedy.

In 2011, the United States Supreme Court ruled in AT&T Mobility v. Concepcion that the Federal Arbitration Act (FAA) makes arbitration agreements valid, including those with class action waivers. The court ruled similarly in the case of CompuCredit Corp. v. Greenwood in 2012 and in American Express Co., v. Italian Colors Restaurant in 2013. Both those cases appeared to strengthen the policy supporting arbitration provisions in contracts. It would have seemed then that the issue regarding the enforceability of those arbitration agreements with class action waivers had been resolved.

But in 2012, the National Labor Relations Board rendered an opinion in the case of D. R. Horton that arbitration provisions with class action waivers violated section 7 of the National Labor Relation Act (NLRA) which protects a worker's ability to "engage in other concerted activities". That language, the NLRB claims, would arguably include the ability of employees to participate in class action litigation as compared to having to file individual arbitration claims to resolve their disputes.

Until recently, the D.R. Horton rule had been rejected by every appellate court to consider it. For example, the Fifth Circuit Court of Appeals (covering Texas, Louisiana, Mississippi) in the case of NLRB v. Murphy Oil, USA (2015) held that the NLRB was wrong to determine that arbitration provisions with class actions waivers violated the NLRA. Similarly, the Second Circuit Court of Appeals (covering New York, Connecticut and Vermont) in the case of Sutherland v. Ernst & Young (2013) and the Eighth Circuit (covering Arkansas) in the case of Cellular Sales of Missouri v. NLRB (2016) rejected the NLRB's reasoning and chose to enforce the class action waivers in the arbitration agreements presented to the Court.

But the Seventh Circuit Court of Appeals (covering Illinois, Indiana, Wisconsin) in the case of Epic Systems v. Lewis (2016) and the Ninth Circuit Court of Appeals (California, Arizona, Alaska) in the case of Ernst & Young v. Morris (2016) reached decisions *agreeing* with the NRLB and concluded that the requirement to arbitrate disputes between employers and employees was unenforceable.

The Supreme Court granted certiorari in three of the cases, Murphy Oil, Epic Systems and Ernst and Young, since there was a split of opinion among the circuit courts on this one issue. Oral arguments were held on October 2, 2017.

Certainly, it is clear why arbitration agreements are desired by employers. There has been a significant growth in class action litigation over the last few years, both in the employment and consumer contexts. Arbitration agreements, with class action waivers, provide a strategy to avoid the expense and risk of class action disputes. Employers see arbitration as a quicker and more efficient method of resolving disputes since matters can be handled on an individual basis compared to class actions which may include hundreds if not thousands of alleged parties. Also, arbitrations can be handled privately compared to court and often with faster results, which employers argue benefits both sides. Further, there is less risk of appeal and more control by the individual plaintiffs, who might otherwise, in class action litigation, be limited in their rights of settlement. All of this is in addition to the arguments that class actions are known for abuse such as parties receiving little recovery while counsel for the cases

receive substantial fees. There is also the concern that class actions may obscure the rights of individual parties who may have stronger cases then the plaintiff class as a whole.

But there appears more at stake than just whether arbitration is a better option than court litigation. The bigger question, especially in the cases being heard by the Supreme Court, is whether the NLRA can supersede the enforceability of the Federal Arbitration Act. The NLRB, in following the NLRA, contends that the action of enforcing an arbitration provision with a class action waiver against an employee seeking redress against its employer is patently an "unfair labor practice". As it stands now, parties with an arbitration agreement would be compelled to arbitrate their dispute unless the FAA's rules have been "overridden by contrary congressional command" (one of the exceptions in the FAA). In the cases now being argued before the Supreme Court, the defense has been that there no demonstration of any congressional command that would outweigh the enforceability of these companies' arbitration agreements. It's also interesting to note that even where the court might suggest that these arbitration agreements with class action waivers might be violative of public policy or fairness, the court has still found that those arguments do not overcome the "direct, controlling authority" that such agreements, including class action waivers, must be enforced under the law. Essentially, since the creation of the Federal Arbitration Act in 1925, arbitrations have been recognized as an efficient, cost effective and faster method of dispute resolution compared to the judicial jury system.

As this dispute continues, and all parties anxiously await the Supreme Court's ruling on these three cases, there are certain things that can be done to minimize the argument that the employer is acting with an unfair advantage when it comes to employee dispute resolution. First, the provisions dealing with dispute resolution should be highlighted or even drafted as a standalone document to avoid an argument that the arbitration provision was not clear and obvious. Second, the arbitration agreement should be mutual, so that both parties are similarly obligated to handle their disputes through arbitration. Third, employers or businesses should agree to pay for the cost of the arbitration. Since arbitration is private and not public there is a cost to the process which is not required in court matters. As such, without financial support, the likelihood of a claim being filed by an individual litigant may be impracticable. Arbitration provisions may be seen to be more favorable if the employer or business involved agrees to pay the fees and costs for the benefit of both parties.

Other recommendations include allowing the employee or consumer to opt of the arbitration agreement when the contract is signed or including specific clarity as to what type of claims would fall under the arbitration provision or may be classified as matters that would be better suited for court resolution. One such example is to permit court actions where the dispute involved falls under the jurisdictional level of the smalls claims courts for the state where the dispute occurs.

The pundits assume, especially with the current make up of the Supreme Court, that the previous decisions favoring the FAA will prevail. But even with that hopeful mindset, it makes sense for employers and businesses selling to the public to review their current arbitration provisions to ensure that they are presented clearly and fairly.

For almost thirty years, Scott Zucker has acted as outside legal counsel to a variety of privately held and publicly traded businesses involved in multiple industries. His legal services have ranged from employment, real estate, construction and corporate consulting to representation of companies in the litigation of their financial and business disputes. Scott's goal is to utilize his legal and business. experience to foster the use of Alternative Dispute Resolution to help parties reach resolutions

without the time, effort and cost of court litigation. Scott can be reached at Scott@wzlegal.com. His ADR website is WZdisputes.com