



Supreme Court Dims The Light On Class Arbitration

Insights

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By a 5-to-4 vote, the Supreme Court ruled today that the Federal Arbitration Act does not allow a court to compel class arbitration when the agreement does not clearly provide for it. As a result, employers whose valid arbitration agreements do not contain an explicit class action waiver (assuming they do not expressly consent to class arbitration) can rest easy knowing that the agreements allow them to compel alleged class claims to individual arbitration (*Lamps Plus Inc. v. Varela*).

SCOTUS Says Parties Must Consent To Class Arbitration Class Claims—But What Is “Consent”?

In recent years, arbitration agreements have found increasing popularity among employers who seek to rein in the high costs associated with litigation by requiring employees to arbitrate any employment-related disputes. Many employers incorporate the Federal Arbitration Act (FAA) into their arbitration agreements. Arbitration under the FAA, however, is a creature of contract; both parties have to consent before a court can order arbitration. Moreover, the scope of arbitration is constrained by what claims the parties have agreed to arbitrate.

In April 2010, the Supreme Court held in *Stolt-Nielsen S.A. et al. v. AnimalFeeds International Corp.* that class claims could not be compelled to arbitration when the parties had only agreed to arbitrate their individual claims. Underlying the Supreme Court’s decision was the matter of consent, or the lack thereof: both parties agreed that the arbitration agreement did not encompass class claims.

In rejecting that an agreement to arbitrate on a class basis could implicitly be found on the basis of agreeing to arbitrate in the first place, the Supreme Court explained that “class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their dispute to an arbitrator.” However, the Supreme Court punted the issue of what could be considered consent.

Fast-forward to last term; the SCOTUS held in *Epic Systems Corporation v. Lewis* that mandatory class action waivers in employment-related arbitration agreements are enforceable. This decision overturned a National Labor Relations Board ruling that implicitly held that arbitration agreements must encompass an agreement to individually arbitrate class claims in order to be valid and enforceable. Which means that employers have been left to thread the needle of what constitutes “consent” to class action arbitration—and whether they so consent absent an express class action waiver. Enter the *Lamps Plus* case.

***Lamps Plus* Dispute Illuminates The Need For Clear Drafting**

In 2016, Lamps Plus was the victim of a phishing attack, and employee data maintained by the company allegedly fell into the wrong hands. One of the employees who claims he was a victim of the attack, Frank Varela, filed a class action lawsuit shortly thereafter, and Lamps Plus moved to compel arbitration. The district court compelled arbitration pursuant to an arbitration agreement Varela entered into as a condition of his employment, but it also allowed Varela to proceed with his class claims.

Lamps Plus appealed the order, arguing that the arbitration agreement only allowed for individual arbitration; the 9th Circuit Court of Appeals disagreed. While the arbitration agreement itself did not explicitly mention class arbitration, the 9th Circuit concluded that the arbitration agreement could reasonably be read to either include or exclude class action arbitration and was thus ambiguous. Because California contract principles require that the ambiguity be resolved against the drafter—which in this case was Lamps Plus—the appellate court held that there was a contractual basis for class arbitration and upheld the lower court’s ruling.

Lamps Plus appealed once more, this time to the Supreme Court, which resolved the matter once and for all with today’s decision.

Supreme Court Finds Presumption Against Class Arbitration

The employer asked the Supreme Court if the FAA “forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreement.” Today, the Supreme Court ruled that a state-law contract interpretation rule to resolve ambiguous provisions against the drafter “cannot be applied to impose class arbitration in the absence of the parties’ consent.”

In doing so, the Supreme Court reiterated that the agreement to arbitrate claims on an individual basis is the type of arbitration proceeding envisioned by the FAA. The Court borrowed language from the *Stolt-Nielsen* opinion to explain that when arbitrating on an individual basis, arbitration provides a tradeoff where the “‘parties forgo procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.’” However, given the cumbersome nature of class actions, those benefits are absent in class arbitrations. Therefore, courts cannot infer consent to class arbitration.

While the Supreme Court accepted the 9th Circuit’s determination that the agreement was “ambiguous” as to the class arbitration question, it made clear that, like silence, ambiguity in an arbitration agreement is not enough to evidence consent to class arbitration. Further, the Supreme Court declined to go further in answering the question left open by *Stolt-Nielsen* of what is needed in an arbitration agreement to evidence consent to class arbitration. However, the Court’s opinion indicates that anything short of clear, express consent to class arbitration in the agreement will not suffice.

source.

In reaching its decision, the Supreme Court reinforced the rule stated in AT&T Mobility LLC v. Concepcion that “state law is preempted to the extent it ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives’ of the FAA.” Thus, the Supreme Court held that, under the FAA, ambiguity in an arbitration agreement cannot be interpreted to infer consent to class arbitration. In doing so, the Supreme Court rejected the use of a state interpretative rule that any ambiguity in the contract as to whether the parties consented to class arbitration can be interpreted against the drafter.

What This Means For Employers

This holding is a clear win for employers whose arbitration agreements do not contain express class action waivers. However, in order to compel alleged class claims on an individual basis, the arbitration agreement itself must still be enforceable. You can expect that employees will continue to challenge the enforceability of arbitration agreements.

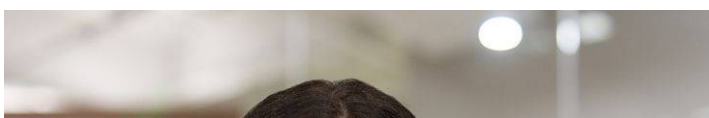
This holding highlights that it is important for you to work with your labor and employment attorneys to ensure that your business needs are addressed in your arbitration agreements. To have the best chance at prevailing in a motion to compel individual arbitration, an arbitration agreement must be enforceable.

Before last year’s Epic decision, some employers did not include mandatory class action waivers for fear their arbitration agreement would be stricken for violating the National Labor Relations Act. Many employers either omitted class action waivers altogether or attempted to work around the NLRB’s ruling by allowing employees to opt-out of the class action waiver. It is therefore important that you revisit your arbitration agreement to ensure that your arbitration agreement does not contain an unwanted opt-out provision and applies to all employees. Moreover, while not strictly necessary anymore, it is still good practice to include an unambiguous class action waiver in order to make clear that there is no consent to class arbitration.

Even if your class action waiver is clear and applies to all employees, you should regularly evaluate all of the language in your arbitration agreement with your counsel to ensure that it is both clear and enforceable under current law. If you need assistance in reviewing your arbitration agreements to ensure that they meet the new standards set by the Supreme Court, please contact your Fisher Phillips attorney.

This Legal Alert provides an overview of a specific Supreme Court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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Darcey M. Groden, CIPP/US

Associate

858.597.9627

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