

Third Thursday
**Arbitration of Employee and
Consumer Disputes – Enforcement
and Compliance Issues in 2016**

January 21, 2016

The webinar will begin shortly. Please stand by.

Today's Presenters



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Today's Discussion

- Supreme Court Developments
- Consumer Financial Protection Bureau
- Enforceability Challenges – Collateral Litigation Update
- Regulatory Update
- Pros and Cons

Supreme Court Decisions

- *DirectTV v. Imburgia* (December 14, 2015)
 - Enforceability of “blow up” provision in consumer contract under California law
 - 6-3 decision by Justice Breyer
 - Justice Ginsburg dissent

Supreme Court Decisions

- *MHN Govt. Services v. Zaborowski*
 - Severability of unconscionable provisions under California law
 - FLSA collective action; motion to compel arbitration
 - Does FAA preempt California law?
 - Case withdrawn from February oral argument calendar

Consumer Financial Protection Bureau

- Background of the CFPB
- Regulated Entities
 - “Consumer financial products or services”
- Rulemaking Authority
 - CFPB may “prohibit or impose conditions or limitations” on arbitration agreements

CFPB Proposal

- Based on CFPB study data
- Proposes prohibiting arbitration clauses containing class action waivers
- If any arbitration clause is used, it would need to contain explicit disclaimers about class actions
- CFPB would monitor arbitration claims and awards
 - Possible publication

Challenges to CFPB Proposal

- CFPB regulatory authority vs. FAA and Supreme Court precedent
 - Did the Dodd-Frank Act amend the FAA?
- Constitutionality of delegating to executive agency
- Compliance with the requirements in the Dodd-Frank Act

Forecast for CFPB Proposal

- Late 2016 or early 2017
- Prospective
 - Grandfathers in existing arbitration clauses
- Test cases likely
- If the rule survives challenge:
 - Less frequent use of arbitration clauses
 - Increased costs passed on to consumers through prices of goods or services

Regulatory Update

- Franken Amendment (2009)
 - Precludes certain **defense contractors** from imposing mandatory arbitration of any claim under Title VII or any tort related to or arising out of sexual assault or harassment

Regulatory Update

- Fair Pay and Safe Workplaces (E.O. 13673, Final Regulations expected in 2016)
 - Controversial; sweeping compliance and disclosure requirements related to violations of labor laws
 - Expands the Franken Amendment to contractors and subcontractors with contracts over \$1 million

Regulatory update

- Prohibits mandatory pre-dispute arbitration clauses for Title VII claims or any tort related to or arising out of an incident of sexual harassment or a sexual assault
- A few exceptions apply
 - Any opportunities for contractors who want to retain mandatory arbitration?

Pending Legislation

- The Arbitration Fairness Act
 - Introduced by Sen. Al Franken (D-MN) and Rep. Hank Johnson (D-GA) on 4/29/15
 - Would amend the FAA by invalidating pre-dispute agreements requiring arbitration of employment, consumer, antitrust, or civil rights disputes

Pending Legislation

- Would also empower federal courts, rather than arbitrators, to determine the validity and enforceability of arbitration agreements.

Recent legislative action

- California - AB 465 passed in the legislature, but was vetoed by Governor Brown
 - Would have prohibited employers from requiring mandatory arbitration of any provision of the California Code.
 - Legislative efforts likely to continue

Continued Legal Challenges

- NLRB v. Federal Courts
 - D.R. Horton
 - Class/collective action waivers violate the NLRA
 - Fifth Circuit overturned
 - Use of class actions procedures is not a substantive right.
 - NLRB undeterred
 - See, e.g., *Murphy Oil, Professional Janitorial Services of Houston, Bristol Farms*

Continued Legal Challenges

- Continued “unconscionability” challenges
 - Payment of arbitration costs
 - Scope of discovery
 - Consideration (is “at will” employment enough?)
 - Standards evolving – *Sanchez v. Valencia*
- Challenges to consent
 - “click” is likely enough
 - Mere “delivery” may not be enough

Continued Legal Challenges

- Continued fights over “delegation clause”
 - Who decides enforceability of class action waiver
 - *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC* (3rd Cir. 2016) – courts decide
- Is the FAA Unconstitutional
 - *Katz v. Cellco Partnership* (2d Cir. 2015)
- State courts resisting class action arbitration
 - E.g., California – *Iskanian* decision

Continued Legal Challenges

- Creative/new challenges – federal law
 - *Roberts v. AT&T Mobility*
 - *Espinoza v. Gallardi South*
- Creative/new challenges – state law
 - *McLellan v. Fitbit*

Practical Considerations – Pros and Cons

Examples:

PROS	CONS
Class action waivers	Collateral litigation
Confidentiality	Costs of arbitration
Picking the decision maker	More claims
Perhaps faster to resolution	Less opportunity for summary judgment (arbitrators' conflict)
Avoiding the runaway jury	No appeal

Citations

- *DirectTV v. Imburgia*, 136 S.Ct. 463 (Dec. 14, 2015)
- *MHN Gov't Servs., Inc. v. Zaborowski*, 601 F. App'x 461 (9th Cir. 2014), cert. granted, 136 S. Ct. 27 (Oct. 1, 2015)
- *Roberts et al. v. AT&T Mobility LLC*, No. 3:15-cv-03418 (N.D. Cal.)
- *Espinoza v. Gallardi South Enters. et al.*, No. 1:14-cv-21244 (S.D. Fla.)
- *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 2016 WL 53806 (3d Cir. Jan 5, 2016)
- *McLellan v. Fitbit Inc.*, No. 3:16-cv-00036 (N.D. Cal.)

Citations

- *Galen v. Redfin Corp.*, No. 14-cv-05234 (N.D. Cal., Dec. 1, 2015)
- *Katz v. Cellco Partnership, d/b/a Verizon Wireless*, (2d Cir., No. 14-138, July 28, 2015)
- New York Times “Beware the Fine Print” Series (November 2015)
 - <http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html? r=0>
 - <http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html? r=0>
 - <http://www.nytimes.com/2015/11/03/business/dealbook/in-religious-arbitration-scripture-is-the-rule-of-law.html>

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