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News Story

Plaintiffs wrestle with class action arbitration bans

By *Nora Lockwood Toohar* Staff writer

Consumer rights lawyers are challenging corporate efforts to avoid class action arbitration.

A 2003 U.S. Supreme Court ruling opened the doors to class action arbitrations. The Court held that if an arbitration clause is silent regarding class actions, it's up to the arbitrator (applying state law) to decide whether class arbitration will proceed. (*Green Tree Financial Corp. v. Bazzle*, 123 S.Ct. 2402).

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Since then, however, banks, credit companies and employers have been adding waivers to arbitration contracts specifically exempting class actions from arbitration.

Consumer lawyers have responded by challenging the waivers in both state and federal court.

The result is a legal quagmire that has bogged down efforts to expedite class action proceedings through arbitration.

"Before 2003, leading defense attorneys thought class actions could never go to arbitration, so *Bazzle* totally shocked companies," said Paul Bland, a staff attorney with Public Justice, a consumer rights organization in Washington, D.C.

But the shock didn't last long.

Immediately after the *Bazzle* decision, Bland said, "Every big company rewrote their arbitration clauses to ban class actions."

'An acceptable alternative'

Historically, consumer rights lawyers have opposed clauses in consumer and employment contracts that mandate arbitration to resolve disputes, claiming that the binding nature of arbitration violates plaintiffs' due process rights.

But if the choice is between no class action and class action arbitration, "then arbitration is an acceptable alternative," commented Ira Rheingold, executive director of the National Association of Consumer Attorneys in Washington, D.C.

Stuart Widman, a partner in Miller, Shakman & Beem in Chicago and an arbitrator, is currently involved in his fourth class action arbitration, an employee wage and hour case. Widman has already ruled that the matter can proceed as a class action, and the case is heading into its second stage - certification.

"An arbitrator like me or others can devote more consistent attention and more hours perhaps to a class action case [than a court]," he said. "The other thing is that we in arbitration are not governed by the Class Action Fairness Act, so it can be a fertile ground for class action lawyers representing plaintiffs to go to us as a first shot to try to get nationwide class certification."

But several plaintiffs' lawyers said that while class action arbitration may be attractive in theory, the reality is that very few cases make it through all four stages of arbitration.

"Unfortunately, companies are using these arbitration clauses not to make dispute resolution quicker and more efficient, but to shield themselves from liability," commented Boston labor lawyer Shannon Liss-Riordan. "So the cases end up taking longer because we end up litigating these clauses [that ban class action arbitration]."

Liss-Riordan, a partner with Pyle, Rome, Lichten, Ehrenberg & Liss-Riordan, has spent the past two years challenging an employment arbitration agreement containing a "no class actions" clause.

A U.S. District Court in Massachusetts last year held that the clause was unconscionable and therefore unenforceable. (*Skirchak v. Dynamics Rsearch Corp.*, 432 F. Supp. 2d 175). The defendant appealed, and the case was recently heard by the 1st Circuit.

Of 190 class actions that have been filed with the American Arbitration Association, the nation's leading arbitration organization, only 19 have reached a certification decision, according to Liss-Riordan. Eleven cases were certified for arbitration and eight were denied certification, she said.

"These numbers show that the parties are really getting held up with all these procedural issues," she said. "In theory, it should be a good place to be, but I'm afraid it is working to companies' advantages because they're able to use these not fully settled issues to slow the process down."

According to Jon Sheldon, an attorney with the National Consumer Law Center in Boston, "corporations don't really want to arbitrate. What they're trying to do is avoid class-wide relief."

Bland agreed: "Companies like banks and cellphone companies do not care at all about arbitration. All they want is the class action ban."

Inconsistent rulings

Consumer lawyers have successfully challenged class action bans in several states:

- The California Supreme Court held earlier this year held that a class action arbitration waiver might be contrary to public policy (*Gentry v. Superior Court*, 165 P.3d 556).
- The Washington Supreme Court last year struck down Cingular Wireless's class action arbitration ban as "unconscionable" under state law. (*Scott v. Cingular Wireless LLC*, 161 P.3d 1000).
- The New Jersey Supreme Court held in 2006 that a provision in an arbitration agreement prohibiting class action was unconscionable, but severable, so that the plaintiff may pursue class-wide arbitration. (*Muhammad v. County Bank of Rehoboth Beach*, 912 A.2d 88).

According to Public Justice, arbitration clauses have been struck down as unconscionable by myriad courts, including the 9th Circuit; U.S. District Courts in Arizona, California, Florida, Massachusetts, Michigan, Missouri, and Washington; state high courts in Alabama, California, Illinois, New Jersey, Washington, and West Virginia; and state appellate courts in Florida, Missouri, Ohio, Oregon, Pennsylvania, and Wisconsin.

But P. Christine Deruelle, a litigation associate at Weil, Gotshal & Manges's Miami office who has studied the issue, noted that state courts in Colorado, Delaware, Georgia, Hawaii, Louisiana, Maine, Maryland, Michigan, Mississippi, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Utah and the District of Columbia have upheld class arbitration prohibitions.

And federal courts have also been inconsistent in enforcing class arbitration waivers when the case involves federal statutory claims, she said.

Last year, for example, the 1st Circuit found a class action arbitration waiver unenforceable in an antitrust case (*Kristian v. Comcast Corp.*, 446 F.3d 25). But in 2006 the 6th Circuit, while refusing to enforce an arbitration agreement in a Fair Labor Standards Act case, suggested that class arbitration prohibition might be enforceable (*Walker v. Ryan's Family Steak House*, 400 F.3d 370).

Over the past four years, there have been more than 50 rulings in state and federal courts dealing with class action arbitration waivers. While many decisions say such clauses are unconscionable, others have upheld the waivers.

"It's all over the place," Deruelle said. "You're seeing more and more of these cases, but it's very much unsettled."

Sheldon agreed: "There's a zillion cases out there, and every week there's another one. It really depends on the state, the state law and the facts of the case."

Both sides expect that either Congress or the U.S. Supreme Court will eventually have to step in to determine the legality of class action arbitration bans.

Questions or comments can be directed to the writer at: nora.tooher@lawyersusaonline.com

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