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Arbitration

Political Mood Is Shifting on Arbitration: Will the Courts Come Along Too?

BY PERRY COOPER

Consumer and worker advocates have argued over the last few years that mandatory arbitration clauses stack the deck in favor of big business.

It's been a real fear: Many companies rushed to add arbitration clauses and class action bans to their service contracts and website agreements after a series of favorable decisions from the U.S. Supreme Court.

But the tide may be changing, attorneys tell Bloomberg BNA.

''Something has really shifted in the mood on arbitration in the past year or two,'' plaintiffs' attorney Deepak Gupta says.

''It will depend on the composition of the court, but I am looking forward to the day when the court is actually looking to reverse some of the trends we've seen,'' said Gupta, founding principal of Gupta Wessler PLLC, a Washington public interest law firm representing consumers and workers.

''And that day I think might happen sooner than we thought,'' he told Bloomberg BNA.

As evidence that their movement against mandatory arbitration is gaining traction, plaintiffs' lawyers point to rules currently being weighed by the Consumer Financial Protection Bureau and other federal agencies to ban arbitration clauses in consumer contracts.

And with Justice Antonin Scalia off the bench, plaintiffs' attorneys are hopeful that the newly-composed U.S. Supreme Court will be willing to reconsider its anti-class action rulings of recent years.

But defense attorneys say a reversal of such recent precedent is very unlikely. They also argue the anti-arbitration push isn't about protecting consumers or workers—it's just an attempt by the plaintiffs' bar to increase their attorneys' fees by increasing the number of class actions.

''It seems clear that the plaintiffs' bar has put a target on the back of arbitration because of its interest in pursuing class actions,'' defense attorney Archis A. Parasharami of Mayer Brown in Washington told Bloomberg BNA.

''It's no surprise that it's been active and indeed collaborating with others who have been critical of arbitration in trying to push a story line that arbitration is problematic,'' Parasharami said.

No Safety Valve. The plaintiffs' bar argues that the Roberts Court has been generally hostile to class actions and pushing a pro-business agenda.

But Samuel Issacharoff, professor of civil procedure and complex litigation at New York University School of Law, New York, told Bloomberg BNA that arbitration is the ''only area where the Supreme Court has significantly changed the law.''

There's no safety valve with arbitration, he said. ''If you don't have a collective method, it's a get out of jail free card for any alleged wrongdoing.''

He referred to the court's trio of arbitration decisions that opened the door to the broad use of arbitration and class action waivers in consumer and employment contracts.

The trio culminated in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (12 CLASS 362, 5/13/11).

There, in a 5-4 opinion written by Scalia, the court nullified state law requiring the availability of classwide arbitration in some cases, saying it was inconsistent with the Federal Arbitration Act.

Rise of Arbitration Provisions. ''I believe a huge number of people in the legal community and the policy community were stunned by *Concepcion* and *American Express* and that the court was trying to wipe out people's ability to enforce their rights,'' Arthur Bryant, chairman of Public Justice, a consumer advocacy organization in Oakland, Calif., told Bloomberg BNA.

He referred to another decision in the arbitration trio: *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (14 CLASS 739, 6/28/13). There, the court held 5-3 that a would-be class of merchants' antitrust claims against American Express Co. must be arbitrated individually, even though the cost of individual arbitration far exceeded the potential recovery.

Since *American Express* and *Concepcion*, most arbitration clauses in contracts for consumer services and goods have been upheld and enforced by the courts.

Many consumers and employees agree to mandatory arbitration every time they sign a contract or agree to a website's terms of service—and there hasn't been much they can do to fight it if they later wanted to bring class claims in court, according to the plaintiffs' bar.

Consumer and worker advocates have fought against these clauses for years, saying mandatory arbitration

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results in smaller payouts and denies would-be plaintiffs collective access to the courts.

Plaintiffs' Bar Is Self-Interested. But Parasharami, the defense lawyer, takes a cynical view of the anti-arbitration fight, arguing its all about maximizing class counsel fees. He also says the actual data doesn't bear out the argument by plaintiffs' attorneys that arbitration is a real problem.

He pointed to the Consumer Financial Protection Bureau's 2015 arbitration study.

''Even by the CFPB's own analysis, class actions are an extraordinarily poor way to get relief to consumers,'' he said.

The court is unlikely to support the plaintiffs' bar if their answer for arbitration is more class actions, he said.

But Bryant said the study, which formed the basis for the CFPB's proposed rule banning mandatory arbitration clauses from financial services contracts (17 CLASS 506, 5/13/16), shows the opposite—that companies don't get held accountable in arbitration.

''Class actions make them pay for what they do and make them change their conduct,'' he said. ''So of course companies say, 'We aren't really down on class actions because we don't want to be held accountable, it's because it's all about attorneys' fees.' ''

Mood Has Shifted. Gupta, the consumer attorney, is optimistic the tide will shift on arbitration in part because of the vote breakdown in the Supreme Court's arbitration cases—with the now-deceased Scalia at the helm of the five-justice majority opinions.

He also notes the rhetoric in the dissents in those cases as a sign that the court may be interested in reversing the pro-arbitration trend.

The most notable of those dissents was written by Justice Elena Kagan in *American Express*.

''To a hammer, everything looks like a nail,'' Kagan wrote. ''And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled.''

The four *Concepcion* dissenters—Justices Kagan, Stephen G. Breyer, Ruth Bader Ginsburg and Sonia Sotomayor—will have opportunities to reconsider arbitration as important cases bubble up through the circuit courts, Gupta said.

Specifically, the court could get the chance to review a May ruling from the U.S. Court of Appeals for the Seventh Circuit that created a circuit split with the Fifth Circuit.

The Seventh Circuit, in an opinion by Chief Judge Diane Wood, held that a software company can't enforce an agreement that would require an employee to individually arbitrate his wage and hour claim because doing so would violate his right to engage in concerted activity under the National Labor Relations Act (17 CLASS 584, 6/10/16).

Gupta also suggested that the court could see challenges as administrative agencies like the CFPB issue rules on arbitration and class actions.

Political Moment. Defense attorney Liz Kramer points to the current political moment that seems to be turning against arbitration.

A 2015 New York Times series on arbitration created a broader awareness of what the Supreme Court's rigid enforcement of arbitration clauses has meant for different groups, she told Bloomberg BNA.

Kramer represents businesses in complex litigation for Stinson Leonard Street LLP in Minneapolis, and writes for her firm's blog Arbitration Nation.

Gupta said the CFPB's study and rule proposal really changed the discussion on arbitration.

''The fact that that agency was moving forward so clearly gave people across the government the feeling that they could do the same thing or something similar,'' he said.

Agency Action. The Department of Education has followed up with a proposed rule of its own that would prohibit for-profit colleges from using mandatory predispute arbitration agreements or class-action waivers.

The DOE acted really quickly, Gupta said. ''It's not something that has been discussed for longer than a year but it seems like it's happening.''

Gupta said similar proposals are being considered by agencies across the government including the Department of Labor, the Department of Health and Human Services' Centers for Medicare & Medicaid Services, and the Federal Communications Commission.

But Kramer said that these agencies ''can each only affect things in their own purview.''

There are going to be pockets left where people are still subject to class action waivers in arbitration agreements, she said.

It all fits into the broader political mood, Gupta said.

''A sort of suspicion of institutions, concerns about economic inequality,'' he said. ''Suddenly, this issue is now in the mainstream of the Democratic Party in a way that it wasn't a year or two ago, so that's very encouraging.''

Stare Decisis Roadblock. But defense attorney Parasharami said it's wrong to assume that the Supreme Court will get swept up in this moment.

''The court has consistently rejected efforts by the lower courts to resist its arbitration precedent,'' he said.

He pointed to the most recent example, last term's *DIRECTV Inc. v. Imburgia*, 135 S. Ct. 1547 (2015) (16 CLASS 1409, 12/25/15).

There, the court rejected a California court's attempt to circumvent *Concepcion*. The court—in an unusual lineup that joined liberal justices Breyer and Kagan with the court's conservative wing—held that the FAA preempts the California Court of Appeal's interpretation that state law rendered class-action waivers unenforceable.

Breyer and Kagan take stare decisis seriously and are hard-pressed to depart from court precedent, he said. Stare decisis is the doctrine that courts are bound by their precedent.

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''That is an explanation for Justice Breyer's decision for the court in *DIRECTV*,'' Parasharami said.

The court has a strong interest in protecting its integrity by not shifting too aggressively, Professor Issacharoff said.

The institutional weight of precedent means it's unlikely that any individual justice is going to say, ''Aha, now we've got the votes! Time to reverse on arbitration!'' Issacharoff said.

Gutting Without Overruling. Gupta agreed that this is a court that cares about stare decisis. He's not expecting an immediate reversal of recent precedent.

''Instead what we could see is limiting the effect of that precedent by limiting the reach of arbitration in ways that you can credibly claim is consistent with that precedent,'' he said. ''Upholding the various things that the Administration has done would be an obvious way of doing that.''

He said similar changes happen when there's a big shift on the court.

''Chief Justice Rehnquist was always the expert at this,'' Gupta said, referring to William H. Rehnquist, who served as chief justice from 1986 to 2005. ''You can gut decisions without overruling them.''

Breyer and Kagan's votes in *DIRECTV* are an example of this, he said. The case was granted because of the perception that the lower court decision was an obvious circumvention of *Concepcion*.

''The court broadly wants there to be respect for their decisions but I don't see that as an indicator that suddenly Justice Kagan or Justice Breyer think that *Concepcion* was rightly decided,'' he said.

Change Will Be Slow. Kramer said it's too early to call this a watershed moment. Any changes in arbitration law will happen slowly.

''It's going to take more big stories to get it on the politicians' radar,'' she said. Ultimately, it's going to take a change in the FAA.

But ''it's going to be hard to get what is a very technical legal issue to most people to be a priority for Congress,'' she said.

Professor Issacharoff is skeptical of optimism by plaintiffs' attorneys that *Concepcion* will be overturned: ''Is Elvis coming back soon also?''

''People tell you things that they want to believe to be true,'' he said. ''It's in the nature of plaintiffs' lawyers to be over-optimistic, otherwise they couldn't take the risks that they do.''

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