United States Supreme Court reaffirms use of class action waivers in arbitration agreements: next stop – employment contracts

Employment Alert

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The United States Supreme Court has issued its decision in *DIRECTV, Inc. v. Imburgia*, No. 14-462, 577 U.S. ___, 2015 WL 8546242 (2015), in which it once again held that class action waivers contained in arbitration agreements are enforceable under the Federal Arbitration Act (FAA) and cannot be invalidated on state law grounds inapplicable to any other contract.

This is the most recent in a line of Supreme Court decisions affirming the validity of such waivers. With several high-profile appeals of employee class actions looming in the wings, and the National Labor Relations Board pressing its agenda to invalidate class action waivers, employers should take care and seek guidance where needed in drafting and enforcing such agreements.

*DIRECTV*, issued on December 14, arose from a putative consumer class action in the Superior Court of California in 2008, in which the plaintiffs sought damages relating to an early termination provision contained in the company’s services agreement. *DIRECTV’s* services agreement required that any claims be resolved in “binding arbitration,” and further waived the customer’s right to “join or consolidate claims in arbitration.”

*DIRECTV*, 2015 WL
8546242, at *3. The class action waiver, however, contained a caveat stating it would be “unenforceable” if it was contrary to the “law of your state.” Id. Previously, the California Supreme Court had held that class action waivers were “unconscionable” and unenforceable under California law.

While the case was pending, the Supreme Court issued its decision in AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 131 S.Ct. 1740 (2011), expressly rejecting California’s “unconscionability” standard and holding that class action waivers are enforceable under the FAA. DIRECTV moved to compel arbitration. The California Superior Court, however, denied the motion and the Court of Appeal affirmed, finding the provision invalid because it was contrary to the “law of your state.” Specifically, the court determined that since class action waivers were “unconscionable” under California law, “the waiver provision was unenforceable.” Imburgia v. DIRECTV Inc., 2012 WL 7657788 (Cal. Super. Feb. 26, 2012), aff’d, 225 Cal. App. 4th 338 (Cal. App. 2014). DIRECTV appealed the decision to the United States Supreme Court.

On December 14, 2015, the Supreme Court issued its decision finding the class action waiver enforceable, and arbitration required under the FAA. The Supreme Court expressly rejected the state court’s view that the phrase “law of your state” required application of California’s “unconscionable” standard, citing, among other reasons, its
decision in Concepcion that held that standard to be “invalid.” DIRECTV, 2015 WL 8546242, at *6. The Court cautioned that arbitration agreements must be interpreted consistently with ordinary rules of contract interpretation and cannot be subject to special considerations due to concerns invoked by waiver of class rights. Id.

DIRECTV and Concepcion form part of a growing body of Supreme Court precedent holding that class action waivers contained in arbitration agreements are enforceable, and that state courts cannot single out and apply different standards to invalidate such waivers. See Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp. , 559 U.S. 662, 683, 130 S. Ct. 1758, 1774 (2010) (“A party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.”); Am. Exp. Co. v. Italian Colors Rest., __ U.S. __, 133 S. Ct. 2304, 2310, 186 L. Ed. 2d 417 (2013) (class action waivers are enforceable and do not deny a plaintiff any substantive right simply because individual claims of nominal value would more effectively proceed on a class basis).

Despite the Supreme Court’s DIRECTV decision, there is little doubt the plaintiff’s employment bar will continue to attack the enforceability of class action waivers. And these attorneys are not without support as the National Labor Relations Board continues to press its pro-employee agenda, consistently finding that class action waivers infringe on an individual’s rights under Section 7 of the National Labor Relations Act (despite recent reversals by the governing courts of appeal). See Murphy Oil USA, Inc. v. NLRB, No. 14-60800, 2015 WL 6457613, at *4 (5th Cir. Oct. 26, 2015); D.R. Horton, Inc. v. NLRB, 737 F.3d 344 (5th Cir. 2013). The issue of whether such waivers are enforceable in the employment arena, however, is now making its way through the courts and may soon reach the Supreme Court. Indeed, employers and employment practitioners alike are closely watching the pending appeal in Mohamed v. Uber Techs., Inc., an employee misclassification putative class action in which the district court recently held unenforceable – based on the “unconscionability” standard – an arbitration agreement and class action waiver contained in Uber’s services agreement with for-hire drivers under California law. No. C-14-5200 EMC, 2015 WL 3749716, at *29 (N.D. Cal. June 9, 2015), appeal filed, No. 15-16250 (9th Cir.).

Employers can find encouragement in DIRECTV and the Supreme Court’s consistent position as of late regarding the enforceability of arbitration agreements and class action waivers under the FAA. While arbitration agreements and class action waivers may not be suitable in all circumstances, they can provide significant protection to employers and companies who engage independent contractors. When properly drafted, such provisions can dissuade meritless claims susceptible to class treatment and serve as a cost-efficient, low-burden mechanism for limiting expenses and exposure with the added benefit of confidentiality. Such agreements potentially can be implemented by inclusion in employment agreements, offer letters or employee handbooks, or through the creation of a formal in-house arbitration program.

There are important factors to consider in examining arbitration agreements and class action waivers, whether as a condition of employment or in connection with independent contractor relationships. Before doing so, we recommend speaking with a qualified employment attorney. Should you wish to do so, we also encourage you to reach out any of the partners in DLA Piper’s Employment group with any questions, among them Michael Sheehan, Eric Wallach, Maria Rodriguez, Rachel Cowen, Brian Kaplan or Joseph Piesco.
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