Proskauer

AT&T Mobility LLC v. Concepcion

April 29, 2011

Recently, the United States Supreme Court issued a key decision regarding arbitration agreements, and to what extent these agreements control plaintiffs' access to court. Over the past several terms, the Supreme Court has consistently enforced arbitration agreements and promoted arbitration as a method of dispute resolution, in such decisions as *14 Penn Plaza LLC v. Pyett*, 129 S.Ct. 1456 (2009)—which was successfully argued by Proskauer—and *Rent-A-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772 (2010). In a close 5-4 decision, the majority held that the Federal Arbitration Act preempts a California rule of law that categorizes class arbitration waivers in consumer contracts as unconscionable. The factual background of the case, opinion of the Court and the implications of the case for employers are discussed below.

Background

In 2002, the defendant, AT&T Mobility (then Cingular), offered a promotion that advertised that customers would receive a free or substantially discounted phone if they entered into an agreement for cellular phone service. As a part of this service agreement, customers also agreed to the Wireless Service Agreement (WSA) that, among other things, required parties to resolve disputes through arbitration. When customers received their new phone and first bill, it turned out that the purchasers were charged sales tax on the full retail value of the phone, ranging from approximately $10-$30.

In 2005 and 2006 several groups of plaintiffs filed claims alleging that AT&T Mobility engaged in unfair competition and deceptive practices, in violation of California's Unfair Competition Law and False Advertising Law. After multiple suits were filed, they were consolidated in the Federal District Court for the Southern District of California, pursuant to the Class Action Fairness Act. In response, the defendant filed motions to compel the plaintiffs to individual arbitration, as required under the WSA. This disputed provision from the WSA states that, "no Arbitrator has the authority to. . .order consolidation or class arbitration."

While several California courts have held that class action waiver is unconscionable, AT&T argued that the plaintiffs are bound by the terms of the arbitration agreement contained in the WSA, and cannot try their cases in court.

Determining that the provision was unconscionable under California law, the district court invalidated AT&T's class waiver provision, and allowed the plaintiffs' class action claim to proceed. Accordingly, the court denied the motions to compel, and further found that the Federal Arbitration Act (FAA) did not preempt California law.

On appeal, the Ninth Circuit Court of Appeals affirmed the lower court and held that arbitration agreements containing class action waiver provisions were unconscionable, and therefore unenforceable, under California law. Additionally, the court held that the FAA did not expressly or impliedly preempt California law governing unconscionability, stating that the FAA "does not bar federal or state courts from applying generally applicable state contract law principles and refusing to enforce an unconscionable class action waiver in an arbitration clause."

The Supreme Court's Decision

The Supreme Court granted certiorari to answer the question of whether the FAA preempts states from conditioning the enforcement of an arbitration agreement on the availability of particular procedures—here, class-wide arbitration—when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims.

Justice Scalia, writing for the majority, joined by Chief Justice Roberts and Justices Thomas, Kennedy and Alito, reversed the Ninth Circuit's decision and held that because the California rule of law "stands as an obstacle to the accomplishment and execution of the full purposes of objectives" of the FAA, it is preempted. As an initial matter, the court noted that the FAA creates a liberal policy favoring arbitration. Additionally, arbitration issues are a matter of contract and, therefore, "courts must place arbitration agreements on equal footing with other contracts, and enforce them according to their terms." With this foundation laid, it is not surprising that the five-justice majority sought to defer to the language in the arbitration agreement between the class of plaintiffs and AT&T.

Section 2 of the FAA contains a savings clause, which permits arbitration agreements to be invalidated only by “generally applicable contract defenses,” and not by other defenses that only apply specifically to arbitration agreements. With this in mind, the Court had to decide whether the California rule stating that most class arbitration waivers contained in consumer contracts are unconscionable was in conflict with the principles in the FAA.

As stated above, under California law, class waivers in consumer arbitration agreements are unconscionable in most circumstances. The plaintiffs argued that this rule applies to any contract, not just arbitration, and should therefore not be preempted by Section 2 of the FAA. However, the majority held that “[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: the conflicting rules is displaced by the FAA.” Further, even when a doctrine is generally applicable to all contracts, it cannot be “applied in a fashion that disfavors arbitration.” The bottom line is that no state law can “stand as an obstacle to the accomplishment of the FAA’s objectives” and the strong federal policy favoring arbitration.

The Court also expressed concerns about class arbitration, stating that “[a]rbitration is poorly suited to the higher stakes of class litigation,” and that class claims sacrifice arbitration’s informality, speed and cost-effectiveness. The majority opinion noted that class arbitration unfairly exposes defendants, depriving them of the ability to appeal class certification or have the decision reviewed, which is “unacceptable” when “thousands of claimants are aggregated and decided at once.”

Justice Thomas wrote a separate concurring opinion to focus on the language of Section 2 of the FAA stating that an arbitration provision “shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” Justice Thomas found it important to discuss the limits of Section 2, and that Section 2 requires more than “only that a defense apply to ‘any contract.’” The concurrence stated that “if Section 2 means anything, it is that courts cannot refuse to enforce arbitration agreements because of a state public policy against arbitration, even if the policy nominally applies to ‘any contract.’”

Justice Breyer authored a dissenting opinion, joined by Justices Ginsburg, Sotomayor and Kagan. The four Justices comprising the dissent concluded that the California rule of law was consistent with the FAA's language and primary objective. The crux of the dissent's argument is that the California rule is applicable to all contracts, not just arbitration agreements, and is therefore consistent with Section 2 of the FAA. Justice Breyer characterized the California rule as representing the "application of a more general unconscionability principle." Further, he wrote, the California rule was not a blanket policy against arbitration and California courts have upheld class action waivers where they have met general unconscionability standards. The dissent also noted that federal arbitration law normally leaves contract defenses to the states (e.g., duress and unconscionability), and California's "common law is of no federal concern so long as the State does not adopt a special rule that disfavors arbitration."

Implication for Employers

Employers with arbitration agreements should consider adding an appropriate class action waiver to their agreements. For those without arbitration agreements with their employees (or their customers), the prospect of a vigorously enforced class action waiver may be sufficient incentive to overcome some of the disadvantages of arbitration and adopt that approach for the resolution of a broad range of disputes.

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