Class Action Litigation Trends Post-Italian Colors

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Many practitioners believed the U.S. Supreme Court's decision enforcing a class action waiver in American Express Co. v. Italian Colors Restaurant[1] spelled the death knell to consumer and employment class action litigation arising out of a contractual relationship. There, the Supreme Court held that a class action waiver was enforceable to preclude an antitrust class action. Supreme Court Justice Elena Kagan summed up the projected impact of American Express in her strongly worded dissent: "The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse. And here is a nutshell version of today's opinion, admirably flaunted rather than camouflaged: Too darn bad."[2]

American Express certainly has foreclosed a number of arguments that plaintiff's counsel traditionally raised against class action waivers in arbitration agreements, namely that the costs of pursuing remedies in arbitration, such as attorneys' fees and expert expenses, were so high that only a class action would be a feasible way to bring the lawsuit. Class action plaintiffs, however, have sought to argue for exceptions to the enforcement of class action waivers and have created new areas for argument post-American Express. Below we will discuss the recent trends in the enforcement of class action waivers and identify these new battleground issues.

Will High Costs of Arbitration Preclude Enforcement of a Class Action Waiver?

In American Express, the plaintiff argued that the class action waiver was unenforceable because it required a plaintiff to incur prohibitive costs if compelled to arbitrate individually. The plaintiff submitted evidence that expert witness costs would be "at least several hundred thousand dollars, and might exceed $1 million" in comparison to "the maximum recovery for an individual plaintiff [which] would be $12,850, or $38,549 when trebled."[3]

The plaintiff argued, and the Second Circuit agreed, that the waiver was unenforceable because it prevented the plaintiff from effectively pursuing federal statutory claims.[4] The Supreme Court reversed, holding that a class action waiver is not unenforceable simply because it is not worth the expense of proving the statutory remedy. The Supreme Court noted, however, that class action waivers may be unenforceable if there was "a provision in an arbitration agreement forbidding the assertion of certain statutory rights" or "perhaps" if "filing and administrative fees attached to an arbitration" were "so high as to make access to the forum impracticable."[5]

One key issue after American Express, therefore, is whether courts will invalidate the arbitration agreement on the basis of high forum or administrative fees. The results so far have been mixed. The Ninth Circuit invalidated an arbitration agreement on this basis in Chavarria v. Ralphs Grocery Co., holding that daily arbitration fees between $3,500 and $7,000 would make bringing

many claims "impracticable."[6] On the other hand, the Sixth Circuit enforced an arbitration agreement in Reed Elsevier Inc. ex rel. LexisNexis Div. v. Crockett that it considered "one-sided … favor[ing the defendant] at every turn" by requiring arbitration in a location where the defendant was headquartered, the plaintiff to "split the tab for the arbitrator's fee" and precluding attorneys' fee shifting even if the plaintiff succeeded.[7]

Notably, courts appear to be routinely enforcing class action waivers when the arbitration provision provides for the defendant to bear most or all of the arbitrator's costs or permits the arbitrator or court to allocate costs.[8] Thus, parties looking to minimize litigation over their arbitration agreements should consider having the company bear some or all of the costs of arbitration.

Does a Class Action Waiver Preclude a Statutory Right?

In a second post-American Express trend, class action plaintiffs have seized on the language from American Express that an arbitration agreement may be impermissible to the extent it "forbid[] the assertion of certain [federal] statutory rights." The developing case law, however, indicates that this will be a difficult hurdle for plaintiffs to overcome in most cases. Several courts have held that even if a statute, such as the Fair Labor Standards Act, explicitly permits class or collective action, this does not render the class action waiver unenforceable.[9] Rather, the class action waiver must result in the total inability to bring the statutory claim.[10]

There have been a few notable exceptions. For one, despite being overruled by every circuit court of appeals to address the issue, including the Fifth Circuit in the D.R. Horton decision,[11] the National Labor Relations Board has repeatedly held that class action waiver provisions run afoul of the National Labor Relations Act. The NLRB reasons that such waivers prevent employees from engaging in concerted activities.[12] In a recent decision involving Leslie's Poolmart, Judge Lisa D. Thompson held that until the D.R. Horton decision was overturned by the Supreme Court, she was bound to apply it.[13] The NLRB, however, decided not to seek a writ of certiorari of the D.R. Horton decision, thus leaving this issue in a potential state of limbo.

Separately, in a decision rejecting the NLRB's D.R. Horton decision, the California Supreme Court nonetheless invalidated a class action waiver to the extent it prevented the plaintiff from pursuing a claim under the Private Attorney General Act, which permitted private plaintiffs to enforce the California Labor Code through representative actions.[14] As a result, the plaintiff's individual claims were referred to arbitration, whereas the PAGA representative claims would be resolved in "some forum" (i.e., either in court or in consensual arbitration on a representative basis).[15] Thus, there will likely be greater attempted use of the private attorney general/representative action statutes in California and states with similar statutes.

Renewed Emphasis on Assent

A third trend after American Express has been a greater emphasis on whether a plaintiff has knowingly assented to the arbitration contract. For instance, recently in Nguyen v. Barnes & Noble Inc., the Ninth Circuit addressed a browsewrap agreement where the user can use the site "without visiting the page hosting the … agreement or even knowing that such a webpage

exists."[16] The court held that without evidence that the plaintiff had actual or constructive notice of the terms of the agreement, there was no valid agreement to arbitrate (and thus waive class arbitration).[17] Following Nguyen, several district courts within the Ninth Circuit have found that no agreement to arbitrate exists based on a lack of assent.[18] In light of these cases, parties seeking to enforce arbitration agreements should secure objective manifestations of assent, such as "clickwrap" agreements.

Who Decides Whether a Class Action Waiver Is Enforceable?

Shortly after American Express, the Supreme Court issued its decision in Oxford Health Plans LLC v. Sutter, which held that an arbitrator had not exceeded his authority in construing an arbitration agreement to permit classwide arbitration.[19] As a result, the question of whether a court or arbitrator decides whether a class action waiver is enforceable has become quite important. Absent an express provision in the contract, courts are split on the issue.[20] Some courts, including the Third and Sixth Circuits, have held that the issue is a gateway question that should be answered by the court.[21] Other courts have held that the question is a procedural one reserved for the arbitrator.[22]

In other cases, courts have looked to the applicable arbitration rules to determine whether the parties have agreed on this issue (e.g., American Arbitration Association rules permit the arbitrator to make this gateway decision).[23] Parties wishing to avoid this uncertainty should explicitly specify in their arbitration agreements that they agree the court will make this threshold determination. Moreover, parties wishing not to arbitrate on a classwide basis should also specify that the arbitrator has no power to conduct a classwide or consolidated arbitration.[24]

Will an Unavailable Arbitrator Invalidate the Arbitration Agreement?

Arbitration agreements often identify specific arbitration organizations, such as AAA or Judicial Arbitration and Mediation Services Inc., to serve as the arbitral forum. There has been a significant amount of recent litigation about what happens when an arbitral forum is unavailable, specifically with respect to: (1) the National Arbitration Forum, which recently stopped accepting consumer arbitrations in July 2009 as a result of a consent decree with the Minnesota Attorney General; and (2) the Cheyenne River Sioux Tribe, which was the "arbitral forum" named in a number of agreements with payday lenders.

In the case of NAF, the plaintiffs argued that the selection of the NAF was integral to the agreement and its unavailability prevented sending the case to arbitration. Some courts addressing the issue have found that, under Section 5 of the Federal Arbitration Act, a court should appoint a substitute arbitrator and not invalidate the arbitration agreement.[25] However, others have held that the selection of the particular arbitral forum was so integral to the agreement that, without that arbitrator or forum's rules, the arbitration agreement is void.[26]

In the context of the payday lending agreements, the defendants drafted an arbitration agreement that appointed the Cheyenne River Sioux Tribe as the arbitrator and required arbitration to proceed under that tribe's rules even though it never previously served as an arbitrator.[27] The

Seventh Circuit held that the arbitration agreements were void because the arbitral forum never existed, which prevented the plaintiffs from ascertaining "the dispute resolution processes and rules to which they were agreeing."[28] Similarly, the Eleventh Circuit held that Section 5 could not be invoked to substitute an arbitrator because the arbitral forum is integral to the arbitration agreement and "arbitration can only be compelled if that forum is available."[29]

Even well-recognized forums are not immune to this issue. In one case, a court found an arbitration agreement void because AAA had a policy that it would not handle the type of matter that was at issue (i.e., a health care arbitration with an individual patient and a predispute arbitration agreement).[30]

These cases demonstrate that companies should be cautious in overreaching in their arbitration agreements, even after American Express — the selection of an obviously biased forum may lead a court to strike an arbitration agreement entirely. Drafters of arbitration provisions should consider adding savings clauses specifying the parties' intention to arbitrate, regardless of whether the particular forum may no longer exist or be accepting arbitrations at the time litigation arises.[31]

Renewed Emphasis on Nonsignatories

In light of the significant precedent enforcing properly drafted class action waivers in arbitration agreements, plaintiffs appear to be looking for ways to assert claims against nonsignatories to the arbitration agreement to find a potential defendant that is not subject to a class action waiver.

For instance in In re Wholesale Grocery Products Antitrust Litigation, the Eighth Circuit expressly acknowledged that, "In an effort to avoid arbitration, each retailer brought claims only against the wholesaler with whom they did not have a supply and arbitration agreement."[32] The court held that the defendants could not compel arbitration as nonsignatories based on the theory of equitable estoppel.[33] Several other cases have also denied motions to compel arbitration where nonsignatories sought to compel arbitration to gain the benefit of the terms of the class action waiver.[34]

While a number of doctrines would allow a nonsignatory defendant to compel arbitration and benefit from the class action waiver, such as agency, third party beneficiary, incorporation by reference and equitable estoppel, parties drafting arbitration agreements should anticipate continued efforts by plaintiffs to sue third parties to avoid the class action waivers. Therefore, to the extent that parties drafting an arbitration agreement are concerned about litigation brought against specific third parties, they should make those parties express third-party beneficiaries of the arbitration agreement and draft the arbitration clause broadly to pick up all related claims.

In sum, while American Express removed many arguments against the enforcement of arbitration agreements, there are still many issues left unanswered and that will be the continued subject of class action litigation. As explained above, many of these issues can be addressed through careful drafting of arbitration provision.

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[1] Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309 (2013).

[2] Id. at 2313.

[3] Id. at 2308.

[4] See id.

[5] Id. at 2310-11.

[6] 733 F.3d 916, 926-27 (9th Cir. 2013) ("The Supreme Court's recent decision in [American Express] does not preclude us from considering the cost that Ralphs' arbitration agreement imposes on employees in order for them to bring a claim. ... In this case, administrative and filing costs, even disregarding the cost to prove the merits, effectively foreclose pursuit of this claim. Ralphs has constructed an arbitration system that imposes nonrecoverable costs on employees just to get in the door.").

[7] 734 F.3d 594, 600 (6th Cir. 2013).

[8] Coram v. Shepherd Commc'ns Inc., No. 3:14CV-298-JHM (W.D. Ky. Sept. 24, 2014) (provision provides that arbitrator would allocate costs and fees of arbitration); Sherman v. RMH LLC, No. 13-CV-1986-WQH-WMC (S.D. Cal. Jan. 2, 2014) (provision required defendant to advance a consumer's arbitration fees); In re Sprint Premium Data Plan Mktg. & Sales Practice Litig., No. 10-CV-6334 (D.N.J. Sept. 4, 2013) (defendant had practice and policy of paying for arbitral costs); Damata v. Time Warner Cable Inc., No. 13-CV-994 (E.D.N.Y. July 31, 2013) (noting that AAA's procedures permitted significantly lower filing fees for consumer-related disputes).

[9] Walthour v. Chipio Windshield Repair LLC, 745 F.3d 1326, 1334-35 (11th Cir. 2014) (the right to collective action under the Fair Labor Standards Act can be waived); Iskanian v. CLS Transp. Los Angeles LLC, 327 P.3d 129, 142 (Cal. 2014) (addressing NLRA).

[10] Johnmohammadi v. Bloomingdale's Inc., 755 F.3d 1072, 1075-76 (9th Cir. 2014) (noting that arbitration agreement permitted plaintiff to opt out of arbitration and therefore preserve her right to pursue a class action); Walthour, 745 F.3d at 1336; Iskanian, 327 P.3d at 149.

[11] See, e.g., D.R. Horton Inc. v. NLRB, 737 F.3d 344 (5th Cir. 2013); Owen v. Bristol Care

Inc., 702 F.3d 1050, 1053-54 (8th Cir. 2013); Sutherland v. Ernst & Young LLP, 726 F.3d 290, 297 n.8 (2d Cir. 2013) ("Like the Eighth Circuit, however, we decline to follow the decision in D.R. Horton."); Richards v. Ernst & Young LLP, 734 F.3d 871, 873-74 (9th Cir. 2013) ("We also note that the only court of appeals, and the overwhelming majority of the district courts, to have considered the issue have determined that they should not defer to the NLRB's decision in D.R. Horton because it conflicts with the explicit pronouncements of the Supreme Court concerning the policies undergirding the FAA, 9 U.S.C. §§ 1-16.").

[12] See, e.g., Leslie's Poolmart Inc., No. 21-CA-102332 (N.L.R.B. 2014); D.R. Horton Inc., 357 N.L.R.B. No. 184 (Jan. 3, 2012).

[13] See Leslie's Poolmart Inc., No. 21-CA-102332.

[14] Iskanian, 327 P.3d at 149.

[15] Id. at 155.

[16] 763 F.3d 1171, 1177-78 (9th Cir. 2014)

[17] See id.

[18] Norcia v. Samsung Telecomms. Am. LLC, No. 14-cv-00582-JD (N.D. Cal. Sept. 18, 2014); Olney v. Job.com Inc., NO. 1:12-CV-01724-LJO-SK (E.D.Cal. Sep 17, 2014); Anderson v. Xerox Corp., NO. 3:14-CV-00532-KI (D.Or. Aug. 21, 2014).

[19] 133 S. Ct. 2064, 2069-71 (2013).

[20] W.C. Motor Co. v. Talley, --- F. Supp. 2d ----, No. 12-C-2307 (N.D. Ill. Aug. 7, 2014); Cohn v. Ritz Transp. Inc., No. 2:11-CV-1832 (D. Nev. Apr. 17, 2014).

[21] Reed Elsevier Inc., 734 F.3d at 597-99; Opalinski v. Robert Half Int'l, Inc., 761 F.3d 326, 332-33 (3d Cir. 2014).

[22] In re A2P SMS Antitrust Litig., No. 12-CV-2656 (S.D.N.Y. May 29, 2014); Davis v. Wells Fargo Advisors LLC, No. CV-13-01963-PHX-NVW (D. Ariz. Apr. 8, 2014); Sandquist v Lebo Auto. Inc., 174 Cal. Rptr. 3d 672, 681-82 (2014); Lee v. JPMorgan Chase & Co., 982 F. Supp. 2d 1109, 1112-14 (C.D. Cal. 2013); Guida v. Home Sav. of Am. Inc., 793 F. Supp. 2d 611, 615-19 (E.D.N.Y. 2011) (collecting cases).

[23] See, e.g., Terminix Int'l Co. LP v. Palmer Ranch Ltd. P'ship, 432 F.3d 1327, 1332-33 (11th Cir. 2005) (collecting cases that apply arbitration rules to permit arbitrator to decide questions of arbitrability); Chambers v. Groome Transp. of Ala., --- F. Supp. 2d ---, No. 3:14-CV-237-WKW (M.D. Ala. Aug. 26, 2014) (applying AAA Commercial Arbitrator Rule 8(a) permitting arbitrator to decide question of arbitrability); Emilio v. Sprint Spectrum LP, No. 11-CIV-3041 (S.D.N.Y. Feb. 11, 2014) (applying Rule 2 of JAMS Class Action Procedures permitting arbitrator to decide question of arbitrability).

[24] Hendricks v. UBS Fin. Serv. Inc., 546 F. App'x 514, 519, n. 4 (5th Cir. 2013) (no class arbitration because the parties agreed to arbitrate before FINRA which did not permit class arbitrations); Alakozai v. Chase Inv. Servs. Corp., 557 F. App'x 658, 659 (9th Cir. 2014) (permitting the class action to proceed in court because agreement did not waive class claims and class actions were not permitted under FINRA); Harrison v. Legal Helpers Debt Resolution LLC, No. 12-2145 (D. Minn. Aug. 22, 2014) (class arbitration permitted because the parties agreed to arbitrate per JAMS Rules).

[25] See, e.g., Green v. U.S. Cash Advance Ill. LLC, 724 F.3d 787, 792 (7th Cir. 2013); Torrence v. Nationwide Budget Fin., 753 S.E.2d 802, 805-07 (N.C. Ct. App. 2014); Anonymous M.D. v. Hendricks, 994 N.E.2d 324, 329-30 (Ind. Ct. App. 2013).

[26] See, e.g., Ranzy v. Tijerina, 393 F. App'x 174, 176 (5th Cir. 2010); Miller v. GGNSC Atlanta LLC, 746 S.E.2d 680, 689 (Ga. Ct. App. 2013); Riley v. Extendicare Health Facilities Inc., 826 N.W.2d 398, 411 (Wis. Ct. App. 2012).

[27] Inetianbor v. Cashcall Inc., --- F.3d ---, No. 13-13822 (11th Cir. Oct. 2, 2014); Jackson v. Payday Fin. LLC, 764 F.3d 765, 770 (7th Cir. 2014); Narula v. Delbert Serv. Corp., No. 13-15065 (E.D. Mich. July 30, 2014).

[28] Id. at 778.

[29] Inetianbor, --- F.3d ---, at *6. However, in an unpublished opinion, the Eastern District of Michigan came to the opposite conclusion, stating that an arbitrator could be appointed under AAA, JAMS or other mutually agreeable arbitration group. Narula, No. 13-15065.

[30] Crossman v. LifeCare Ctrs. of Am. Inc., 738 S.E.2d 737, 741 (N.C. Ct. App. 2013); but see Dean v. Heritage Healthcare of Ridgeway LLC, 759 S.E.2d 727, 736 (S.C. 2014) (reversing decision that arbitration agreement providing for AAA in healthcare arbitration was unenforceable).

[31] Of course, drafters should be careful not to make the identity of the arbitral association unclear or vague in some way.

[32] 707 F.3d 917 (8th Cir. 2013).

[33] Id. at 923 (holding that antitrust claims were not "so intertwined with the agreement containing the arbitration clause that it would be unfair to allow the signatory to rely on the agreement in formulating its claims but to disavow availability of the arbitration clause of that same agreement").

[34] Murphy v. DirecTV Inc., 724 F.3d 1218, 1229 (9th Cir. 2013); Kramer v. Toyota Motor Corp., 705 F.3d 1122, 1126-28 (9th Cir. 2013); In re Carrier IQ, Inc. Consumer Privacy Litig., No. C-12-md-2330 EMC (Mar. 28, 2014). But see, e.g., Denney v. BDO Seidmann LLP, 412

F.3d 58, 70-71 (2d Cir. 2005); Gunson v. BMO Harris Bank, N.A., --- F. Supp. 3d ---, No. 13-62321, *4-7 (S.D. Fla. Sept. 10, 2014).