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In an Arbitration Agreement, When is a Class Action Not a Class Action?

The answer is when it's a claim for public injunctive relief.

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In a lightly reported order by the U.S. Supreme Court on June 1st, the Court declined to grant certiorari to a Ninth Circuit case. The Ninth Circuit, in *McCardle v. AT&T Mobility*, No. 17-17246 (June 28, 2019), an unpublished opinion, and in a concurrent opinion in *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819 (9th Cir. 2019) had held that an arbitration agreement could not waive a party's right to seek public injunctive relief. To reach this conclusion, the court asserted that federal pre-emption by the Federal Arbitration Act (FAA) did not apply to a substantive right enacted by the State of California.

Supreme Court jurisprudence with respect to the waiver of class action claims in arbitration is well established. In *American Express Co. v. Italian Colors Restaurant et al.*, 133 S.Ct. 2304 (2013), vendors that accepted American Express credit cards claimed the company violated federal antitrust law by using its monopoly power to charge higher fees than competing cards. Vendors argued that the only feasible way to litigate their claim, which would require paying experts more than a million dollars, would be to band together in a class action. To be bound by the arbitration agreement in their contracts with American Express would effectively deny plaintiffs access to the courts to bring their claims. In rejecting the vendors' claims, the Court declared that Congress enacted the FAA in response to "widespread judicial hostility to arbitration," and that absent a congressional mandate overriding the FAA, it was the duty of the Court to enforce the contract to arbitrate. *American Express* firmly established the right of a party, even one with disproportionate power in the contractual relationship, to require arbitration that would preclude the assertion of class action claims.

Last year, the Supreme Court took the prohibition of class actions a step further. In *Lamps Plus, Inc. et al. v. Varela,* 139 S.Ct. 1407 (2019), the Court expanded the presumption in favor of the prohibition of class action claims in arbitration. Mr. Varela, an employee of Lamps Plus, had his tax information hacked from the company's computers. Subsequently, a fraudulent tax return was filed in Mr. Varela's name. Varela brought suit on behalf of himself and a putative class of employees, who had also had their tax information stolen. The Lamps Plus arbitration agreement was anything but clear regarding whether class actions were prohibited, as there was no explicit language referring to class actions in the agreement. Both Lamps Plus and Varela could point to suggestive language in the agreement supporting their positions. The Ninth Circuit, recognizing the ambiguity of the contract and following California law, construed the contract against the drafter, Lamps Plus, concluding there was no class action waiver. In reversing the Circuit Court,

a closely divided Supreme Court stated that arbitrating class action claims would undermine the most important advantages of speed and cost of arbitration. Thus, there is a strong presumption in favor of concluding that the parties intended a waiver in their agreement. The Court rejected the use of California contract principles of interpretation. Those principles must give way to accomplishing the "full purposes and objectives of the FAA." 139 S.Ct. at 1415. Construing consent—as evidenced by the execution of the employment contract by Varela—as paramount, it is the duty of the courts to enforce the terms to which the parties agreed. But then, the Court goes a step further. "Neither silence nor ambiguity provides a sufficient basis for concluding that parties to an arbitration agreement agreed to undermine the central benefits of arbitration itself[,]" which class actions would do. *Id.,* at 1417. Under the principle set forth in *Lamps Plus,* an agreement that is silent on waiving class action claims will be construed to have waived them anyway. Only if the parties expressly set out that class action claims are permissible, will such claims be permissible in arbitrations.

However, in declining to hear *McArdle,* the Court appears to have left open the possibility that it will distinguish between presuming an automatic waiver of a procedural tool, class actions, from a waiver of a substantive right such as a public injunction. Under California law, public injunctive relief has "the primary purpose and effect of prohibiting unlawful acts that threaten future injury to the general public." Several state consumer protection statutes in California expressly provide for public injunctive relief. In contrast, injunctive relief between private parties resolves their dispute and "rectifies individual wrongs." While such relief may extend beyond the litigants, the focus is to resolve a private dispute and address a private wrong.

In *McGill v. Citibank, N,A.,* 2 Cal. 5th 945, 216 Cal. Rptr. 3d 627, 393 P.3d 85 (Cal. 2017), the California Supreme Court held that a waiver of the right to seek public injunctive relief violates California Civil Code § 3513. *Blair*, 928 F.3d at 824 (*citing McGill,* 216 Cal. Rptr.3d at 627, 393 P.3d at 94). Section 3513 provides that "a law established for a public reason cannot be contravened by a private agreement."

A public injunction is not a class action, although it may have all the trappings and impact that a class action would have. For companies and employers, the possibility of arbitrating a public injunction in an arbitration with the potential widespread impact and no meaningful right to appeal may be shockingly unattractive. It's too early to read too much into the mere order not to grant cert to a case. However, while the Supreme Court has consistently vindicated the rights of companies to insert waivers into their arbitration agreement and limit access to remedies for claimants, so far its focus has been on procedural rights. Abrogating a clear substantive right granted by a state legislature may give the Supreme Court pause.

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