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Recent Supreme Court Arbitration Rulings Affect Employment and Class Action Arbitrations

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by Professor Kristen M. Blankley[1]

The United States Supreme Court remains active in the area of arbitration law, deciding between one and three arbitration cases per term over the course of the last five or so years. Despite their recentness, many of these arbitration decisions are already considered "landmark" cases, drastically affecting the way attorneys, arbitrators, and judges approach arbitration cases. This short article recounts some of the most important arbitration decisions of the last decade, focusing on cases relating to labor and employment issues and class action issues.

The first section of this article considers cases dealing with labor and employment issues, as well as statutory issues. This section focuses primarily on the 2009 case of *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 129 S. Ct. 1456 (2009), which upheld the enforceability of a provision in a collective bargaining agreement (CBA) requiring individual union members to arbitrate their statutory claims. The second section of this article primarily considers the *Stolt-Nielsen-Jackson-Concepcion* "trilogy" of cases dealing with class action and arbitrability issues.

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Part I – Labor/Employment and Statutory Claims Cases

Until the *Pyett* decision, the realms of labor arbitration and employment arbitration remained relatively separate. In the employment sphere, the Supreme Court has consistently enforced arbitration agreements between employers and individual employees following the 1991 landmark case of *Gilmer v. Interstate/Johnson Lane Corp*, 500 U.S. 20 (1991).[2] The *Gilmer* Court essentially held that employees can effectively vindicate their statutory rights in the arbitral forum and that the waiver of a jury trial was not a waiver of the protections afforded by the employment statutes, such as the Age Discrimination in Employment Act.[3]

Unlike the area of employment law, the precedent in the area of labor law was considerably less favorable towards arbitration of statutory claims of individual union members. In 1974, the Supreme Court decided in *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), that an employer could not compel a union-represented employee to arbitrate statutory claims because of the potential conflict of interest between the union and the employee.[4] In *Wright v. Universal Maritime Services, Corp.*, 525 U.S. 70 (1998), the Court further held that a unionized employee could not be required to submit a statutory claim to arbitration unless the CBA "clearly and unmistakably" waived the judicial forum within the CBA. Prior to *Pyett*, however, many lower courts, as well as many practitioners, read *Gardner-*

Denver and Wright to mean that unions could not waiver the judicial forum for the resolution of individual union member's cases involving statutory rights.

The Supreme Court in *Pyett*, however, held exactly the opposite. The *Pyett* case involves a CBA for a group of employees in the building-services industry, such as cleaners, porters, and doorpersons. The CBA specifically required that claims for discrimination falling under Title VII, the ADA, the ADEA, and other similar laws "be subject to the grievance and arbitration process . . . as the sole remedy for violations." *Pyett*, 129 S. Ct. at 1461. The Court flatly rejected the argument that a collective bargaining unit could not waive the judicial forum for the resolution of the employee's individual statutory rights. *Id.* at 1464. The Court rejected the employees' argument that "the arbitration clause here is outside the permissible scope of the collective-bargaining process because it affects the 'employee's individual, non-economic statutory rights." *Id.* (internal quotation marks omitted). According to the Court, if a union wanted to waive the judicial forum in these cases, such a concession on the part of the union could be made "in return for other concessions from the employer[, and that c]ourts generally may not interfere in this bargained-for exchange." *Id.* In other words, the litigation forum can be bargained for in the same manner as wages, hours, and other terms of the agreement.

With respect to the *Denver-Gardner* line of cases, the Court read that case (and cases following *Gardner-Denver*) as one not involving a contract that provided for the arbitration of statutory claims. *Id.* at 1467 (citing *Gardner-Denver*, 415 U.S. at 49-50). Instead, the Court read these cases for the question of the procedure involving subsequent litigation in cases in which the CBA covers some grievances (non-statutory) but not others (statutory claims). *Id.* at 1468-69. The Court also rejected the conflict-of-interest argument, holding that "unions certainly balance the economic interests of some employees against the needs of the larger work force . . . [b] ut this attribute of organized labor does not justify singling out an arbitration provision for disfavored treatment." *Id.* at 1472.

Given that statutory claims can be arbitrated, the second question for the court was an easy one – does the ADEA permit the arbitration of claims falling under the statute? Clearly the answer to this question is "yes," and has been "yes," ever since the Court decided *Gilmer* in 1991. On this point, the Court stated that the "*Gilmer* Court's interpretation of the ADEA fully applies in the collective-bargaining context. Nothing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative." *Pyett*, 129 S. Ct. at 1465. The Court reaffirmed its earlier precedent that the "waiver" involved in the case is not the waiver of a statutory right, but only the waiver of a judicial forum. *Id.* (citing *Wright*, 525 U.S. at 80). Given that the waiver in this case was clear and unmistakable, the *Pyett* decision simply answered the open question in *Wright* regarding the ability of a union to waive the judicial forum for its members for the resolution of statutory rights.

Although not a labor decision, the 2012 decision in *Compucredit Corp. v. Greenwood*, No. 10-948, 565 U.S. ___ (2012), further upholds the ruling in Gilmer and continues to support the arbitrability of statutory claims. *Compucredit* involves a class action claim by consumers under the Credit Repair Organizations Act (CROA) for alleged misrepresentations made to them regarding the available credit limits under certain credit cards and the fees associated with those cards. *Id.* The CROA requires that creditors give certain notices to cardholders, one of which states that the cardholders have a "right to sue a credit repair organization." *Id.* The act also has a non-waiver provision, meaning that any attempt by the credit repair organization to waive the protections of the statute would be void. In *Compucredit*, the plaintiffs received the requisite disclosure, but the contracts also had arbitration agreements.

The question for the Court was whether the arbitration agreement constituted a waiver of` the "right to sue" provision, thus voiding the contractual requirement to arbitrate. Unsurprisingly, the Court found the claim arbitrable and found that the requirements under the CROA are to provide a Congressionally-written notice to consumers, and nothing more. *Id.* Just as in the long line of cases culminating with *Gilmer*, the Court examined the legislation at issue to determine whether Congress intended to preclude the waiver of the judicial forum in cases falling under the statute. *Id.* (citing *Gilmer*, *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987) (involving RICO), and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 472 U.S. 614 (1985) (involving the Clayton Act)). The Court found nothing in the text of the CROA that would *guarantee* a judicial forum but only that the power to impose liability (be it in a specific court or in arbitration) be preserved. *Id.* If Congress had intended to provide a judicial forum, the Court reasoned that the legislation should have specifically stated that arbitration of such statutory claims not be allowed. Because Congress was not so specific, then the arbitration of such claims is not prohibited.

Reading *Compucredit* and *Pyett* together, the Court has continued its strong pro-arbitration stance in both the labor context and the statutory context. If Congress does not intend for the arbitration of claims under certain statutes, then the burden is on Congress to put within the text of the legislation (or clearly within the legislative history) language indicating that parties cannot waive their right to a judicial forum for resolution of disputes under the statutes. Simply making a judicial recourse for wronged parties is not enough because the Court has now consistently held that the provision of a judicial forum is not necessarily a barrier to the arbitration of cases under those statutes.

On the Congressional side, recent years have shown some signs of increased activism on the part of Congress to

intervene and limit the ability of parties to arbitrate. Over the course of the last five years, Congresspersons have introduced differing versions of the Arbitration Fairness Act (AFA) that would have the effect of nullifying all pre-dispute arbitration agreements in the employment, consumer, and civil rights contexts. Although the passage of such a broad AFA appears unlikely (and likely ill advised) in today's political climate, recent attempts to limit arbitration in certain contexts has been a more successful solution for anti-arbitration supporters. For instance, Congress passed the Jamie Leigh Jones/Al Franken Amendment, which prohibits the use of pre-dispute arbitration agreements for tort claims (such as battery or sexual assault) in employment agreements with defense contractors. Similarly, Al Franken (and others) introduced the Consumer Mobile Fairness Act (CMFA), which would invalidate pre-dispute arbitration clauses with consumers purchasing wireless services.

At this time, it is still unclear how many CBAs will include *Pyett*-inspired arbitration clauses covering statutory claims, and the commentators have certainly split on whether such clauses are a good idea.[5] Given the Supreme Court's consistent rulings with respect to arbitrability of statutory claims, unless Congress intervenes in a systematic way (such as through a bill like the AFA) or in a piecemeal, industry-specific manner (such as the CMFA), those with contracts to arbitrate statutory claims will likely be unsuccessful in arguing that they cannot vindicate their statutory rights in the arbitral forum.

Part II – Cases Involving Class Actions and Arbitrability

The second line of noteworthy cases of the past few years deals with the issues of class actions and arbitrability. Class action arbitration is an important topic in employment law, and these cases are equally applicable to the employment context, although they involved factual situations in the consumer and commercial contexts.

The first class-action arbitration case the Supreme Court decided was *Green Tree Financial Corp. v. Bazzle*, 538 U.S. 444 (2003). The *Bazzle* case concerned the issue of *who decided* whether claimants in arbitration could proceed as a class when the arbitration clause at issue does not address the issue (i.e., the clause is "silent"). A plurality of the Supreme Court ruled that the arbitrator – not the court – should have decided whether the class procedure was supported by the arbitration clause. Following *Bazzle*, the American Arbitration Association (AAA) responded and created Supplemental Rules for Class Arbitrations (Supplemental Rules) and a public Class Arbitration docket.[6] Under the Supplemental Rules, arbitrators are tasked with determining whether a silent contract supports a class arbitration. Supplemental R. 3.[7] The AAA created a successful class arbitration program, handling hundreds of cases.[8]

One of the cases to go through the AAA process was *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758 (2010). *Stolt-Nielsen* involved a case between business parties in an international shipping contract. The arbitration agreement at issue did was silent on the issue of class arbitration, and the AAA arbitrator ruled that the silent clause could be construed to support class arbitration. *Id.* at 1765-66. The *Stolt-Nielsen* court held that a silent arbitration clause cannot be read to permit a class-action procedure, and that the *Bazzle* case did not support the proposition that a silent clause could be read to permit such a procedure. *Id.* at 1772. In fact, the Court went so far as to hold that the arbitrators "exceeded their powers" under §10 of the FAA, which is a standard of review considered to be quite limited. The Supreme Court found that a silent clause did not evidence an agreement to participate in class arbitration "because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Id.* at 1775. The Court stressed the differences between bilateral arbitration and class arbitration, such as the number of parties, the lack of confidentiality, the involvement of absent parties, and the stakes involved in the case. *Id.* at 1776. Under these circumstances, the Court ruled that parties could not have a class procedure if the agreement to arbitrate is silent on the issue.

The Court's more recent decision in *AT&T Mobility v. Concepcion*, No. 09-893 (2010), takes the *Stolt-Nielsen* decision a step further. While *Stolt-Nielsen* dealt with a case involving an arbitration clause silent on the issue of class actions, the *Concepcion* case involved an express ban on the use of classwide arbitration. The plaintiffs in *Concepcion* filed suit against one of AT&T's predecessors to recover false advertising damages in the amount of $30.22 per person in fees charged for a "free phone." The plaintiffs claimed that the class action arbitration ban was unconscionable under California law. At the time, California law included an unconscionability test known as the *Discover Bank* test that invalidated class action waivers in the consumer context if the plaintiff could prove that the dispute involved predictably small amount of damages, and that the party with the greater bargaining power carried out a scheme to exploit a large amount of people out of a small amount of money each. The lower courts found the class action waiver unconscionable and void under the *Discover Bank* rule.

The Supreme Court reversed the decision, holding that the FAA preempted the *Discover Bank* rule. The Court held that, although the *Discover Bank* rule did not single out arbitration in its text, the rule would have "a disproportionate impact on arbitration agreements" and "interferes with arbitration. *Id.* The Court then reaffirmed its decision in *Stolt-Nielsen*, again emphasizing the differences between bilateral arbitration and class arbitration. Those differences include the fact that class

arbitration is "slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* The Court was also concerned about the increased required formality of class arbitration and how bilateral arbitration was not intended to have such procedural formality. The Court also expressed skepticism on the part of the arbitrators' ability to handle class cases.

Thus, under *Concepcion*, class action waivers appear to be enforceable. Reading *Stolt-Nielsen* and *Concepcion* together, the only way that consumers (or employees, for that matter) can have a class action procedure in arbitration is if the parties **specifically allow** for class arbitration, which is highly unlikely. For companies and employers, now, all they need to do is to not say anything at all about class arbitration to prohibit the action, and the waivers are less likely to be found unconscionable following *Concepcion*.

The final case in the recent arbitration "trilogy" is the 2010 case of *Rent-a-Center v. Jackson*, 130 S.Ct. 2772 (2010). Although *Jackson* does not deal with class actions, it does deal with the power of arbitrators to determine questions of arbitrability. *Jackson* involved an employment claim and an arbitration agreement that gave the arbitrator the ability to determine his or her own jurisdiction (the "delegation clause"). Jackson challenged the arbitration agreement as unconscionable, and the question before the Court was who was to decide the question of unconscionability. Applying the "separability" principles of *Prima Paint*, the Court held that any challenge to an agreement with a delegation clause could only be leveled against the delegation clause. In other words, the unconscoinability challenge could not be made to the arbitration agreement as a whole, but only to the delegation clause. *Id.* at 2780.

The fallout of *Jackson* is that an increased number of decisions can be delegated to an arbitrator, including decisions regarding the creation of the arbitration agreement. After *Jackson*, companies would be well advised to include delegation clauses in their contracts in order to insulate the agreement from challenge and to give as many questions as possible to an arbitrator and out of the courts.[9] In reading all three of these cases together, the Supreme Court has been extraordinary friendly to business interests. Business can now impose upon consumers and employees arbitration agreements that require individual arbitration and that have the arbitrators, by and large, determining their own jurisdiction and the defenses to nearly all of the possible challenges to the mediation agreement.

Conclusion

The Supreme Court's interest in arbitration remains strong, and the consistent messages that ring from the Court's decisions support the arbitration of individual claims and increased power in the hands of the arbitrator. How parties – particularly businesses and employers – react will be something that time will tell, but it might be safe to anticipate increased use of pre-dispute arbitration clauses in consumer and employment cases. The Supreme Court has deeply entrenched itself into these positions, and Congressional action appears to be the only way to change the precedent set forth by the Court.

Endnotes

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2 In 2001, the Supreme Court's decision in *Circuit City Stores, Inc. v. Adams*, 352 U.S. 105 (2001), made clear that the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq., applied to all workers engaged in interstate commerce with the exception of certain interstate transportation workers, such as railroad employees or seamen.

3 Of course, an employee could challenge an arbitration agreement on other grounds. For instance, in *Green Tree Financial Corporation of Alabama v. Randolph*, 531 U.S. 79 (2000), the Supreme Court left open the possibility that plaintiffs could prove that the financial burden of arbitration could impede an employee's ability to vindicate his or her statutory rights. In addition, arbitration agreements can be challenged on the grounds of a contract-law defense under §2 of the FAA, such as unconscionability or duress. For a classic example of an unconscionable agreement to arbitrate in the employment context, *see Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999). The arbitration agreement in the *Hooters* case included lopsided obligations on the parts of the employer and employee and included a provision that allowed Hooters to control the pool of potential arbitrators.

4 Labor unions operate to protect the majority, and not necessarily the individual employee. Accordingly, the rights of the majority will prevail over the rights of the individual if the two sets of rights conflict. For example, a union is legitimately permitted to forgo pursing some grievances to the final step (i.e., arbitration) of the dispute resolution procedure if the costs of such a procedure would pose a concern to the financial well-being of the union as a whole. Michael Z. Green, *Examining the Current Merger of Labor and Employment Arbitration*, 2011 ABA Section of Labor and Employment Law ADR in Labor and Employment Law Committee Mid-Winter Meeting, at 6.

5 S*ee, e.g.*, Margaret L. Moses, *The Pretext of Textualism: Disregarding Stare Decisis in 14 Penn Plaza v. Pyett*, 14 LEWIS & CLARK L. REV. 825 (2010); Sarah Rudolph Cole, *Let the Grand Experiment Begin: Pyett Authorizes Arbitration of Unionized Employees' Statutory Discrimination Claims*, 14 LEWIS & CLARK L. REV. 861 (2010); David L. Gregory & Edward McNamara, *Mandatory Labor Arbitration of Statutory Claims, and the Future of Fair Employment: 14 Penn Plaza v. Pyett*, 19 CORNELL J. L & PUB. POLICY 429 (2010); Brendan D. Cummis & Nicole M. Blissenbach, *The Law of the Land in Labor Arbitration: The Impact of 14 Penn Plaza LLC v. Pyett*, 25 ABA J. OF LAB. & EMP. L. 159 (Winter 2010).

6 The Supplemental Rules can be found at: http://www.adr.org/sp.asp?id=21936.

7 The Supplemental Rules provide for a three-step class-arbitration process. In the first step, the arbitrator examines the contract to determine whether a class procedure can even occur. If the case passes the first step, then the second step involves the arbitrator determining whether to certify a class, using a standard similar to the standards set forth in the civil rules (Civil Rule 23). Finally, the arbitrator decides the case on the merits. The Supplemental Rules also give the participants an opportunity to appeal the decision following the conclusion of each of these stages.

8 The AAA still has more than 300 active cases on its class action docket.

9 An argument exists that arbitrators would be more likely to rule in a self-serving manner and find that the agreements are not unconscionable so that they can keep working on the case and resolve the merits of the dispute. Any instance in which arbitrators rule on their own jurisdiction poses potential questions of bias and self-serving in the decision-making process.