DEVELOPING DOCTRINE

Enforceability of collective action waivers when parties do not arbitrate.

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A current or former employee with a wage and hour dispute claim under the federal Fair Labor Standards Act, or FLSA, has powerful statutory remedies. Perhaps the most threatening to employers, however, is a single plaintiff's ability to seek collective action certification,[1] and if certified, send notice of the case with opt-in[2] instructions to each potential plaintiff who might have the same type of claim.

To mitigate against the risk that one disgruntled employee might become a class of hundreds, drafters of employment agreements typically include arbitration clauses, class action waivers, collective action waivers, or a combination of all three. Not surprisingly, along with the arbitration clauses themselves, class and collective action waivers are heavily contested battlegrounds in virtually every case where they are invoked.

In 2018, the U.S. Supreme Court decided *Epic Systems v. Lewis* and held that collective action waivers contained in arbitration clauses are enforceable, do not violate the National Labor Relations Act, or NLRA, and are not otherwise illegal under federal law.[3]

But what happens when an employer-defendant does not want to arbitrate due to negative prior experiences with a particular association, rising arbitration expenses,[4] or just the desire for stronger appellate remedies? Can a defendant waive arbitration but still prevent an FLSA plaintiff from seeking collective action or class certification? Quite possibly, but it depends on how the clauses themselves are drafted.

IS THE DEFENDANT SEEKING TO ENFORCE A CLASS ACTION WAIVER RATHER THAN A COLLECTIVE ACTION WAIVER?

If the defendant is relying on a class action waiver to defeat collective action certification, they will have a tough road, because class action waivers will generally be insufficient to prevent collective action certification in FLSA actions. In *International Bancshares v. Lopez,* the agreement, by its own terms, "explicitly barred only class actions, not collective actions."[5] The court therefore upheld an arbitrator's "clause construction award" allowing the arbitration to proceed on a collective basis, emphasizing that the American Arbitration Association rules incorporated into the agreement distinguish between class and collective actions.[6] The court went on to explain that "the arbitrator determined that the Agreement, which explicitly covered '[c]laims regarding wages or other compensation due under the Fair Labor Standards Act' but required consent for 'class actions' did not require consent for collective actions under the FLSA."[7] In doing so, the court distinguished *Stolt-Nielsen v. Animal Fields,* a Supreme Court opinion holding that arbitration clauses cannot implicitly authorize class action arbitrations, emphasized the opt-in consent nature of collective actions, and upheld the arbitrator's construction of the contract under the liberal appeal standard for arbitration awards.[8]

A magistrate court in the Southern District of Texas went further and held de novo that a class action waiver does not prevent a collective action where the parties have declined to arbitrate.[9] That court based its analysis on the same distinction between class and collective actions, noting that it would have denied certification had the language in the agreements expressly prohibited collective actions.[10] A defendant successfully executing a strategy to stay in court but prevent collective action will likely need a provision that specifically waives collective action proceedings—a general class action waiver probably will not work, especially if the case stays in court.

DOES THE WAIVER APPEAR IN AN ARBITRATION CLAUSE?

Another hurdle for the defendant to consider is that the waiver can be thrown out along with the unenforced arbitration clause if it is contained within the arbitration provision itself. In *Vine v. PLS,* the plaintiffs who signed the class action waiver "gave up their right to participate in a class action *by virtue of* their agreement to resolve disputes exclusively through individual arbitration."[11] But once the defendants waived arbitration, the court held that the plaintiffs were free to select another form of dispute resolution, including a class action, because the waiver functions as part of "the rules and procedures that apply if a dispute is arbitrated—not as an independently effective waiver."[12] The Fifth Circuit contrasted the class action waiver with a jury trial waiver appearing in a separate provision in the agreement "to show that the parties waived their right to a jury trial, full stop—not just as a consequence of agreeing to arbitrate."[13] The lesson taught by *Vine v. PLS* is of course that a waiver contained within the arbitration clause itself will be harder to enforce outside of arbitration.

IS THERE LANGUAGE IN THE COLLECTIVE ACTION WAIVER THAT DEMONSTRATES ITS APPLICABILITY OUTSIDE OF ARBITRATION?

A collective action waiver contained within an arbitration

clause may still be enforceable, provided that a court agrees it applies outside of an arbitration proceeding. A severance clause in the agreement will be crucial to executing this strategy. In *Figueredo-Chavez v. RCI,* the defendant sought to enforce a collective action waiver contained within an arbitration clause after waiving arbitration.[14] The court held the collective action waivers to be enforceable outside of arbitration and precluded conditional certification of the class.[15]

The *Figueredo-Chavez* court relied heavily on the reasoning in the *Epic Systems v. Lewis* majority opinion written by U.S. Supreme Court Justice Neil Gorsuch. He observed that a collective action waiver in an employment agreement can serve to mitigate "pressure on the defendant to settle even unmeritorious claims," which the district court observed demonstrates that a collective action waiver in an employment agreement does not serve only to facilitate an agreement to arbitrate.[16] "Rather, a waiver of collective action also carries independent significance, outside the context of arbitration, because it protects defendants from potentially unfair pressure to settle these unmeritorious claims."[17] The court further emphasized, "[c]onsequently, the unavailability of an arbitral forum must not render a collective action waiver unenforceable."[18]

The court also seized on a severability clause in the agreement requiring the court to apply the agreements "to the greatest extent permitted by law," which distinguished those agreements from the unenforced class action waiver in *Vine*.[19] However, the key issue for courts facing this issue is whether the waivers contemplate functioning outside of arbitration.[20] If they do, whether by aid of a severability provision or not, then the court will enforce the waiver regardless of arbitrability.

CONCLUSION

Aside from something employment litigators should generally be aware of, this line of cases teaches us some valuable best practices in drafting employment agreements. Employers will want all three provisions—an arbitration clause, a class action waiver, *and* a collective action waiver. The provisions should appear under separate subheadings to make clear they are distinct, independently enforceable provisions, and the agreements should also contain a severability clause. Lastly, the employer should incorporate language in the collective and class action waivers that demonstrate their applicability in a judicial proceeding rather than just arbitration.[21] Taking these steps will maximize an employer's ability to have their day in court without losing the ability to prevent collective action. **TBJ**

NOTES

1. Texas practitioners with previous FLSA experience might recall a conditional collective action certification process with a fairly relaxed standard based on the seminal *Lusardi* case. *See Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987). Although that is still the law in much of the country, in February 2021, the 5th Circuit abolished the two-step certification process and now requires a more rigorous "similarly situated" analysis before notice can be sent to potential class members. *Swales v. KLLM Transp. Servs., L.L.C.,* 985 F.3d 430, 441-43 (5th Cir. 2021).
2. The FLSA has an opt-in procedure, rather than the opt-out procedure applicable in traditional class actions. *See* Fed. R. Civ. P. 23.
3. *See Epic Sys. Corp. v. Lewis,* 138 S. Ct. 1612, 1630-32 (2018). Of course, state law contract challenges to contract formation and enforceability may still defeat either an arbitration clause or collective action waivers. *See e.g. Edwards v. Doordash, Inc.,* 888 F.3d 738, 745 (5th Cir. 2018) ("We use state law to evaluate the underlying agreement.").
4. The once prevailing view that arbitration is less expensive than traditional litigation is falling further and further out of favor. *See e.g. How Much Does Arbitration Cost?*, ADR Times (April 30, 2021), https://www.adrtimes.com/how-much-does-arbitration-cost/.
5. *Int'l Bancshares Corp. v. Lopez,* 57 F. Supp. 3d 784, 791 (S.D. Tex. 2014).
6. *Id.*
7. *Id.*
8. *Id.* at 788, 790-91.
9. *Kibodeaux v. A&D Ints., Inc.,* No. 3:20-CV-00008, 2020 WL 6292551 (S.D. Tex. Oct. 27, 2020), *order vacated on reconsideration on other grounds and to apply the then newly announced Swales standard*, No. 3:20-CV-00008, 2021 WL 6344723 (S.D. Tex. Mar. 4, 2021) (quoting *Genesis Healthcare Corp.,* 569 U.S. at 74).
10. *Kibodeaux,* 2020 WL 6292551, at *4 ("If someone is contractually prohibited from proceeding in a collective action, they cannot participate in a federal court collective action lawsuit and should not receive notice.").
11. *Vine v. PLS Fin. Servs.,* 807 Fed. App'x 320, 328 (5th Cir. 2020) (emphasis in original).
12. *Id.* (internal quotations omitted).
13. *Id.* at 328-39.
14. *Mayte Figueredo-Chavez v. RCI Hospitality Holdings, Inc., et al.*, No. 1:21-CV-21733-KMM, 2021 WL 5763577, at *1 (S.D. Fla. Dec. 3, 2021).
15. *Id.* at *5-*6.
16. *Figueredo-Chavez,* 2021 WL 5763577, at *6 (citing *Epic Sys. Corp.*, 138 S. Ct. at 1632).
17. *Id.*
18. *Id.*
19. *Id.* at *7 n. 1 ("In *Vine*, the Fifth Circuit did not address…whether a collective action waiver can be severed from an agreement to arbitrate.").
20. *Id.* ("the collective action waivers do not serve solely to facilitate arbitration, and therefore, must be severed and enforced…"); *see also Bock v. Salt Creek Midstream LLC,* No. CV 19-1163 WJ/GJF, 2020 WL 3989646, at *15–16 (D.N.M. July 15, 2020), *report and recommendation adopted,* No. CV 19-1163 WJ/GJF, 2020 WL 5640669 (D.N.M. Sept. 22, 2020) ("the reader can readily determine that Section 3's class action waiver covers *all* claims, whether brought against Kestrel, the other enumerated targets of section 1, or Defendant. And Section 3's waiver likewise applies whether the claims are restricted to arbitration by Section 1 or brought in a court of competent jurisdiction against unenumerated third parties.").
21. For example, including language such as "a Court, arbitrator, or other tribunal construing this provision shall give full force and effect to its language" would signal to a court that the provision applies outside of arbitration.

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