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Class Action Waivers in Arbitration Agreements in Massachusetts

By Adam Forman and Stephen Melnick

A flurry of new decisions from the Massachusetts Supreme Judicial Court (SJC) and the U.S. Supreme Court have approved the use of class action waivers in arbitration agreements. These decisions affirm that employers in Massachusetts can dramatically reduce their exposure to employment law class actions by adopting arbitration agreements that contain class action waivers.

In Massachusetts, employers may require employees to enter into arbitration agreements as a condition of employment (or as a condition of continued employment).[1] These agreements mandate that employees resolve employment law disputes before an arbitrator rather than in court. Until recently, however, it had been unclear whether an arbitration agreement can waive an employee's ability to bring a claim as a class action (that is, a legal action filed by one person on behalf of many other similarly situated individuals). On one hand, the SJC ruled in 2009 that arbitration agreements could not ban class actions in cases where the statute under which the employees sought relief explicitly authorized the filing of class actions.[2] Since many employment law statutes contain this type of language, some practitioners in Massachusetts assumed class action waivers in arbitration agreements would not be enforced in lawsuits involving these statutes. On the other hand, in 2011, the U.S. Supreme Court found in *AT&T Mobility v. Concepcion* that a similar state ruling in California was preempted by the federal arbitration statute, and the Supreme Court ruled in favor of enforcement of the class waiver in an arbitration agreement.[3]

Earlier this summer, the SJC revisited the class action waiver issue in a pair of decisions, *Feeney v. Dell, Inc.*[4] and *Machado v. System4 LLC*.[5] In *Feeney*, the SJC deferred to the U.S. Supreme Court's finding in *Concepcion* that state law cannot automatically prohibit class action waivers, regardless of what a statute may say about class actions. However, the SJC carved out an exception. It found that if a person can prove that he or she could not realistically bring a case individually, because the cost and complexity of the case far exceeds the potential recovery of individual damages, then the class action waiver was void. For instance, in *Feeney*, the plaintiffs' potential damages in their

1 *Warfield v. Beth Israel Deaconess Medical Center, Inc.*, 454 Mass. 390 (2009).

2 *Feeney v. Dell, Inc.*, 454 Mass. 192 (2009).

3 131 S.Ct. 1740 (2011).

4 --- Mass. ---, 2013 Mass. LEXIS 462 (June 12, 2013).

5 --- Mass. ---, 2013 Mass. LEXIS 461 (June 12, 2013).

consumer fraud case were as low as $13 each. The SJC reasoned that no one would bring a complex consumer case for so little money, and therefore the only way such claims could be heard would be as a class action (where the damages would be multiplied over numerous class members). As a result, in *Feeney*, the SJC refused to enforce the class action waiver provision in the arbitration agreement, and ordered the class action to proceed in court.

While *Feeney* was a consumer case, *Machado v. System4 LLC*, decided the same day, is squarely in the employment context. In that case, the plaintiffs filed a lawsuit in court as a class action, alleging defendant System4 wrongfully misclassified them as "franchisees" when in fact they were employees. The plaintiffs sought lost wages and other damages under the Massachusetts wage and hour laws as a result of the alleged misclassifications. Because the plaintiffs had signed arbitration agreements with class action waivers, System4 moved to compel individual (not class) arbitration. The trial court judge denied that motion.

The SJC reversed the trial judge, finding that the class arbitration waiver was valid and enforceable. While the Massachusetts wage and hour laws expressly allow for class actions, the SJC nonetheless held that statutory language alone would not invalidate a class action waiver, in line with *Feeney* and *Concepcion*. The SJC next considered whether the plaintiffs' potential recovery was large enough to justify individual arbitration. Because the plaintiffs sought at least $10,000 each, and the wage and hour laws permitted the plaintiffs to recover attorney's fees if they prevailed, the SJC held that their claims were not "so small as to preclude the bringing of claims in individual arbitration." Therefore, the SJC ordered that each of the plaintiffs pursue their wage and hour claims in individual arbitrations and not as a class.

Despite these two decisions, the U.S. Supreme Court may end up having the last word on the issue of class waivers in arbitration agreements. Only a week after the SJC decided *Feeney* and *Machado*, the Supreme Court issued yet another decision on class waivers in, *American Express Co. v. Italian Colors Restaurant*.[6] The Supreme Court rejected a rule from a court in New York invalidating class waivers on grounds that were nearly identical to the potential-recovery exception adopted by *Feeney*. In other words, according to the Supreme Court, the size of a potential recovery is not relevant to whether a class action waiver is enforceable. Even if a person's claims are too small to realistically bring a claim in individual arbitration, under the new *American Express* decision a court still cannot invalidate a class action waiver in an arbitration agreement. It remains to be seen whether the SJC will reconsider *Feeney* regarding the potential-recovery exception, or whether that the SJC will wait for another opportunity to update its position and adopt the Supreme Court's holding in *American Express*.

Regardless of how *Feeney* turns out, the *Machado* decision has clarified much for employers in Massachusetts. It is now clear that an employee's arbitration agreement can include a class action waiver, which will be enforced in most instances. While the *Feeney* potential-recovery exception arguably has been implicitly overruled by *American Express*, at the very least as a practical matter any employment claim worth at least $10,000 per employee will likely be found large enough even under the *Feeney* standard to render class action waivers in arbitration agreements enforceable.

While an arbitration agreement with a class action waiver can be a powerful way to lower the risk of class action liability, there are many complexities in drafting these agreements, setting up the arbitration process, rolling out the agreements to current and new employees and administering the agreements on a going forward basis. As just the past few weeks have shown, this area of law is evolving at a breakneck pace. Employers should consult with counsel to find an approach that best meets their business needs.

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6 --- U.S. ---, 2013 U.S. LEXIS 4700 (June 20, 2013).