DAILY BUSINESS REVIEW

Relief for Employers Arrived When High Court Closed Door on Class Arbitration

Mandatory arbitration has long been a fixture in employment agreements. However, there has been confusion over whether this includes the right to bring claims as a class.

By **Leonard J. Dietzen and Kayla Platt Rady** | May 06, 2019 at 10:15 AM

Kayla E. Platt Rady, left, and Leonard J. Dietzen, III, right, of Rumberger, Kirk & Caldwell.

Mandatory arbitration has long been a fixture in employment agreements. However, there has been confusion over whether this includes the right to bring claims as a class. The consequences of class arbitrations are immense: Once class certification is granted, settlements almost always follow with lawyers pocketing millions of dollars in fees while clients get pennies and coupons. Class certification is the poison pill of arbitration.

Fortunately, on April 24, the U.S. Supreme Court closed the door on class arbitration in its decision in *Lamps Plus v. Varela*.

Hacked W-2s led to the employee claim.

In 2016, Lamps Plus, a California lighting manufacturer and retailer, was the victim of a phishing attack in which a hacker obtained copies of 1,300 employees' W-2 forms. Frank Varela, an employee, filed a claim against the company in U.S. District Court in California and sought class certification for employees affected by the breach. Varela had agreed that all disputes with his employer would be decided in arbitration in his employment contract, which Lamps Plus interpreted as individual, rather than class-wide, arbitration.

The legal problem: Varela's arbitration agreement was silent on whether employees have the right to classwide arbitration. As the district court saw it, that silence amounted to ambiguity and under California law, and any ambiguity must be construed against the drafter of an agreement. The court ruled an arbitration agreement that does not expressly

prohibit class actions is presumed to allow it. The U.S. Court of Appeals for the Ninth Circuit agreed with the district court and in April 2018 the Supreme Court agreed to hear the case.

The question before the Supreme Court was whether the Federal Arbitration Act (FAA) foreclosed a state law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements. The FAA imposes certain rules on arbitration while generally deferring to state law for interpretation of such agreements. One fundamental aspect of the FAA is that arbitration must be a matter of consent by both parties. Lamps Plus argues that means affirmed, not inferred, consent.

This case has far-reaching implications, as there are currently tens of thousands of employment agreements in force that fail to consider the possibility of a class action. If the California interpretation held sway, every one of those agreements could be found as authorizing a class. Fortunately for employers, the Supreme Court disagreed with California.

The Supreme Court, following precedent, issued a business-friendly decision.

The Supreme Court rejected the Ninth Circuit's opinion and agreed with what other U.S. Circuit Courts have said repeatedly—arbitration waivers must be explicit, not inferred.

The Supreme Court concluded that, under the FAA, an ambiguous agreement cannot provide the necessary contractual basis for compelling class arbitration. This conclusion follows directly from the Supreme Court's 2010 ruling in *Stolt-Nielsen v. AnimalFeeds International.*

In *Stolt*, the Supreme Court found that the FAA does not allow the imposition of class arbitration on nonconsenting parties absent an affirmative contractual basis for concluding that the parties agreed to submit to do so.

In individual arbitration, parties forgo the procedural rigor of courts and benefit from private dispute resolutions' informality, lower costs, greater efficiency and speed, and the ability to choose experts to resolve specialized disputes.

Class arbitration lacks those benefits. For that reason, silence is not enough. Courts cannot infer consent to participate in class arbitration, and the FAA requires more than ambiguity to ensure that the parties actually agree to arbitrate on a class-wide basis. Like silence, ambiguity does not provide a sufficient basis to conclude that the parties to an arbitration agreement agreed to sacrifice the principal advantages of arbitration.

The Ninth Circuit's conclusion was based on California contract law. California's default contract rule is premised on the idea that silence amounts to ambiguity, and ambiguity must be construed against the drafter. However, this default rule is based on public policy considerations, not on the intent of the parties.

Such an approach is flatly inconsistent with the foundational FAA principle that arbitration is a matter of consent. Courts may not rely on state contract principles to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent. Here, the FAA provides the default rule for resolving ambiguities in arbitration agreements.

The bottom line: Courts cannot infer from an ambiguous agreement that parties have consented to arbitrate on a class-wide basis.

What Florida Employers Can Do Now

The Supreme Court follows its prior ruling that an agreement means exactly what it says. Thus, although not necessary, it is advisable that companies audit existing agreements to see whether they are explicit in waiving class arbitration.

Likewise, although the Supreme Court held that arbitration waivers must be explicit and not inferred, employers should be certain that new employee agreements state explicitly that employees waive the right to class arbitrations. A reading of the Supreme Court's May 2018 decision in *Epic Systems v. Lewis* offers clear instructions on the language to use.

In Florida, we also like to add a clause that says nothing in the agreement gives preference for or against the drafter—the employer. This avoids being in the same predicament Lamps Plus was in wherein the lower court relied on the legal maxim that any ambiguity is interpreted against the drafter of the agreement. A waiver preempts that presumption.

Leonard J. Dietzen III *is a partner and* **Kayla Platt Rady** *is an associate in the Tallahassee office of Rumberger Kirk & Caldwell, where they represent private and public sector employers in labor and employment law. Contact Dietzen at ldietzen@rumberger.com and Platt Rady at krady@rumberger.com.*