



Judge strikes class-action restriction in wage disputes

Cleaning company workers signed arbitration agreement

By David E. Frank

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One year after the Supreme Judicial Court banned the use of class-action waivers in consumer arbitration clauses, a Superior Court judge has held that such restrictions are also improper in the employment arena.

Though the parties to a cleaning service company had signed a franchise arbitration agreement that prevented them from bringing class-action claims, Judge Patrick F. Brady, in an issue of first impression, struck down the provision as a violation of public policy.

The judge based his ruling on the SJC's widely read 2009 *Feeney v. Dell* decision in which Chief Justice Margaret H. Marshall found that class-action waivers often leave aggrieved consumers unable, for economic reasons, to properly pursue their legal rights.

Boston's Shannon Liss-Riordan, who represented the plaintiffs in *Marchado v. NECCS Inc.*, said lawyers in the wake of *Dell* have routinely asked federal and state court judges to apply the SJC's holding to wage claims under G.L.c. 149, §150.

Until Brady, no one agreed to do so, she said.

"This ruling is so important because it establishes for the first time that Massachusetts public policy does not allow employers to prevent their employees from suing them in a class action through the use of a mandatory arbitration agreement," said the Lichten & Liss-Riordan attorney. "Although there was no appellate law on the subject, we've been working for a while to get a ruling like this that extends *Dell* to a wage case, because there has to be a strong incentive to allow plaintiffs to vindicate their rights through a class action."

Silence

While the SJC sought to prevent companies from taking advantage of a consumer's unequal bargaining power, the court was silent on how far its ruling applied, said Edward D. Rapacki of Boston's Ellis & Rapacki, who represented the plaintiffs in *Dell*.

That silence, however, did not mean the SJC intended to limit its holding to consumer suits, he said. If plaintiffs could not bring class actions, Rapacki noted, the small damage amounts involved in most cases would make it difficult for them to secure counsel.

"These statutes were designed to encourage private enforcement and to make private lawyers available to plaintiffs," Rapacki said. "But if claims couldn't be consolidated, most lawyers wouldn't be able to afford to take them on, so you'd essentially be left with a law that was unenforceable."

John A. Shope, who represented Dell before the SJC, countered that any time a court nullifies an arbitration provision, it sends a negative message to Massachusetts businesses.

"It has always been presumed that statutory, as well as common law claims, can be fully arbitrated, so to suddenly declare that a statute creates a 'public policy' in favor of litigation in court is opening a Pandora's Box," Shope, a lawyer at Boston's Foley Hoag, said. "Particularly where so many civil claims these days include a Chapter 93A cause of action, it could essentially make arbitration unavailable in the majority of cases."

Eric H. Karp of Witmer, Karp, Warner & Ryan in Boston, who represented the defendant in *NECCS*, could not be reached for comment prior to deadline.

Contrary to public policy

In March, plaintiff Edson Teles Machado filed suit in Norfolk Superior Court on behalf of himself and others who performed cleaning services for the defendant, *NECCS*.

According to his complaint, the company hired thousands of workers who had little or no fluency in English to perform cleaning services for its customers.

Machado alleged the company improperly classified the workers as independent contractors, which denied them benefits they would have been entitled to as employees.

As a prerequisite to work for the company, Machado said, he signed a franchise agreement that stated "arbitration will be conducted only on an individual, not a class-wide basis, and ... an arbitration proceeding... may not be consolidated with any other arbitration proceeding between them and any other person or legal entity."

In response to the suit, the company argued that the arbitration provision barred Machado from filing a class-action suit.

But Brady, citing *Dell*, disagreed.

In a one-sentence ruling, he wrote that the clause was contrary to public policy and unenforceable.

'AT&T'

While a resolution in *NECCS* may ultimately come from the Appeals Court or SJC, several lawyers say the U.S. Supreme Court's *AT&T v. Concepcion* case could make the entire issue moot in Massachusetts.

In *AT&T*, which was heard on Nov. 9, the Supreme Court will decide whether the Federal Arbitration Act prevents a state from striking down a class-action waiver on unconscionability grounds.

The case from the 9th U.S. Circuit Court of Appeals involves a group of customers who allege they received an offer to get a free phone if they signed up for wireless service. The offer was fraudulent, they argue, because the company then charged sales tax on the retail value of the phone.

AT&T sought to force the plaintiffs to arbitrate the case under a mandatory arbitration provision that barred class actions. But a U.S. District Court judge and the 9th Circuit found the waiver was unconscionable under state law and that the Federal Arbitration Act did not preempt state law.

Paul Bland, a staff attorney with Public Justice in Washington, D.C., who litigates consumer cases, said a decision for AT&T could "literally wipe out" 90 percent of class actions across the country.

"What AT&T is going for is huge," Bland said. "There are some class-action lawyers who think their whole practice is going to disappear."

One case likely to be reversed by a defense ruling in *AT&T* is *NECCS*.

Liss-Riordan called *AT&T* a "ticking time bomb" that could take away a state court judge's ability to undo an arbitration provision, as Brady did in her case.

"From a plaintiffs' lawyer's perspective, it is quite scary what the court might do," she said. "If they say states don't have the ability to strike these provisions down, there is nothing stopping employers everywhere from instituting mandatory arbitration clauses that contain class-action waivers."

Even though the court granted cert, Brian Wolfman, a visiting professor at Georgetown University Law Center, said the *AT&T* plaintiffs have a strong argument.

"Unconscionability is a generally applicable doctrine that applies to any contract, not just arbitration," he said. "Sometimes, when lots of litigation is percolating, the court for whatever reason wants to jump in rather early and put a halt to something."

Lawyers USA reporter Sylvia Hsieh contributed to this story.

CASE: *Marchado v. NECCS Inc.*

COURT: Superior Court

ISSUE: Does the Supreme Judicial Court's *Feeney v. Dell* ruling, which bans class-action waivers in consumer arbitration clauses, apply to employment cases?

DECISION: Yes