

THE REVIEW OF SECURITIES & COMMODITIES REGULATION

AN ANALYSIS OF CURRENT LAWS AND REGULATIONS
AFFECTING THE SECURITIES AND FUTURES INDUSTRIES

Vol. 47 No. 9

May 7, 2014

THE EFFECT OF ARBITRATION AGREEMENTS ON CLASS ACTIONS

In a series of recent decisions “rigorously enforcing” arbitration agreements, a divided U.S. Supreme Court has made it increasingly difficult for parties to invalidate class action waivers in such agreements. The Court has also dealt with issues surrounding the right to class arbitration and whether a court or arbitrator is to decide that issue. The authors discuss the cases and their teaching for the drafting of such agreements.

By Rex S. Heinke, Julia I. De Beers, and Elias Dabaie *

The Federal Arbitration Act (“FAA”)¹ facilitates private dispute resolution through arbitration. The FAA was enacted by Congress in 1925 to offset widespread judicial hostility to arbitration. Under the FAA, courts must “rigorously enforce” arbitration agreements in strict accordance with their terms.

Though a seemingly straightforward proposition, results have often been unpredictable and dependent on the nature of the claim. Until recently, this was especially true in the class arbitration context. Courts were reluctant to enforce arbitration agreements that prohibited class actions in arbitrations.

However, in a series of recent decisions, the United States Supreme Court has made it increasingly difficult for parties to invalidate class action waivers in arbitration agreements. A company wishing to limit exposure to class actions should consider this jurisprudence when entering into arbitration agreements.

The Supreme Court has made it clear that arbitration is a matter of private contract. Therefore, an arbitration agreement with an express class action waiver will generally be enforced.

When crafting an arbitration agreement, a company must also carefully consider who will determine whether the agreement allows for class arbitration: arbitrators or judges. Arbitrators have broad discretion in making such determinations. Courts will not overturn an arbitrator’s decision unless the arbitrator says what the law is and then refuses to follow it. Companies can minimize such unpredictable decision-making by expressly excluding interpretation of the class action waiver from the arbitrator’s jurisdiction. If faced with an existing arbitration agreement that is silent on the availability of class arbitration, companies can obtain a judge by specifically challenging the arbitration provision because such challenges are judicially determined.

While the FAA supersedes contrary state law, state laws that invalidate arbitration agreements but apply

¹ 9 U.S.C. § 1.

* REX S. HEINKE is the co-head of Akin Gump Strauss Hauer & Feld LLP’s Supreme Court and Appellate practice. JULIA DE BEERS is counsel and ELIAS DABAIE is an associate in the firm’s Litigation practice. They are based in Los Angeles. Their e-mail addresses are rheinke@akingump.com, jdebeers@akingump.com, and edabaie@akingump.com.

IN THIS ISSUE

- THE EFFECT OF ARBITRATION AGREEMENTS ON CLASS ACTIONS

equally to all contracts are valid. Therefore, state law claims of unconscionability and unenforceability still can invalidate arbitration agreements. However, facially neutral state laws will not stand where they are applied disproportionately to arbitration agreements.

The Supreme Court has also rejected arguments challenging the validity of class action waivers in arbitration agreements as unlawful waivers of federal statutory rights. For such claims to succeed, the Court has made it clear that Congress must expressly state that the applicable federal law overrides the FAA's mandate, making the class action waiver unenforceable.

Based on this jurisprudence, more and more companies in both commercial and employment settings will rely on class action waivers in their arbitration agreements to limit exposure to class actions. This article explains the Court's prevailing jurisprudence on these issues.

Concepcion – FAA preempts state law that disproportionately affects arbitration agreements.

The United States Supreme Court in *AT&T Mobility v. Concepcion*² held that class action waivers in arbitration agreements are enforceable despite contrary state law. *Concepcion* overruled the California Supreme Court decision in *Discover Bank v. Superior Court*,³ which held that a class action waiver is unconscionable if the provision (1) is in a contract of adhesion; (2) governs disputes involving predictably small damages; and (3) is alleged to be part of a scheme to cheat large numbers of consumers.

In *Concepcion*, a plaintiff's cellular service agreement with AT&T contained an arbitration clause that required all claims be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." However, plaintiff consolidated its complaint with a putative class action in district court. AT&T then moved to compel individual arbitration

pursuant to the parties' agreement. The district court denied the motion, finding the arbitration provision unconscionable. Relying on *Discover Bank*, the Ninth Circuit affirmed.

The Supreme Court granted certiorari to determine whether *Discover Bank* violated the FAA by conditioning enforceability of arbitration agreements on the availability of class arbitration. Writing for the majority, Justice Scalia focused on Section 2 of the FAA, which provides, in pertinent part:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*⁴

The Court noted that the final phrase of section 2 operates as a "savings clause," permitting courts to apply generally applicable contract defenses such as duress and unconscionability to arbitration agreements. Examining *Discover Bank's* practical application, the Court found that courts had repeatedly applied it to find unconscionable class arbitration waivers in consumer contracts. Therefore, the Court held that *Discover Bank* merely purported to apply generally to contracts while disproportionately invalidating arbitration agreements – thereby contravening the FAA's language. Ultimately, the Court held that the FAA preempts *Discover Bank* because "it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁵

In a dissenting opinion, Justice Breyer challenged the majority's premise that *Discover Bank* impermissibly discriminates against arbitration agreements. He focused on the FAA's legislative purpose of limiting judicial hostility to arbitration by "placing agreements to arbitrate on the same footing as other contracts."

² 131 S. Ct. 1740 (2011).

³ 36 Cal. 4th 148 (2005).

⁴ 9 U.S.C. § 2 (emphasis added).

⁵ Justice Scalia's majority opinion was joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito.

According to Justice Breyer, *Discover Bank* is consistent with Congress's intent because it does not propound any special rule applicable only to arbitration agreements. It is unimportant if courts apply *Discover Bank* to repudiate more arbitration agreements than other agreements, so long as the grounds apply equally to all contracts. Accordingly, "California is free to define unconscionability as it sees fit, and its common law is of no federal concern as long as the State does not adopt a special rule that disfavors arbitration."⁶

American Express – FAA overrides other federal law absent contrary Congressional command.

While *Concepcion* held that the FAA preempts state law, what about controversies alleging a violation of federal law? The Court in *American Express v. Italian Colors Restaurant*⁷ considered this issue and held that courts must "rigorously enforce" arbitration agreements according to their terms unless Congress has clearly expressed a contrary intent.

In *American Express*, merchants doing business with American Express brought a class action alleging that it had extracted from them supra-competitive fees in violation of federal antitrust laws. However, the merchants' respective agreements with American Express each contained an arbitration clause with a class action waiver, providing that "[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis." American Express moved to compel individual arbitration pursuant to the parties' agreements. The merchants resisted, claiming that the class action waivers were unenforceable because the merchants would necessarily incur prohibitive costs, especially expert witness fees, making arbitration uneconomical. Thus, the Court considered whether a contractual waiver of class arbitration is enforceable under the FAA when the plaintiffs' cost of individually arbitrating a federal statutory claim exceeds their potential recovery.

Again writing for the majority, Justice Scalia examined the FAA's language and found that it "reflects the overarching principle that arbitration is a matter of contract" and, therefore, "courts must rigorously enforce arbitration agreements according to their terms." This principle governs actions alleging a violation of federal law, unless Congress expresses a clear intent to override the FAA's mandate.

⁶ Justice Breyer's dissenting opinion was joined by Justices Ginsberg, Sotomayor, and Kagan.

⁷ 133 S. Ct. 2304 (2013).

Applying this rationale, Justice Scalia found no "contrary congressional command" in the federal antitrust laws at issue that would override the FAA and invalidate the underlying arbitration agreements. The Court held that an arbitration agreement is enforceable under the FAA even if the cost of proving an individual claim in arbitration exceeds the potential recovery.

Next, the Court considered the applicability of the "effective vindication" exception to the FAA. According to the Court, this exception grants courts discretion to "invalidate, on public policy grounds, arbitration agreements that operate as a prospective waiver of a party's right to pursue statutory remedies." Although several cases have acknowledged this exception, Justice Scalia noted that all have declined its application. Likewise, Justice Scalia found the exception inapplicable, drawing a distinction between *proving* a statutory remedy and the *right to pursue* that remedy. Justice Scalia reasoned that arbitration agreements do not limit a party's right to pursue a statutory remedy simply because it might be financially untenable to do so.⁸

Justice Kagan, dissenting, strongly disagreed with the majority's view of the effective vindication exception's underlying purpose.⁹ She argued a more practical approach to the exception, espousing its application where either an arbitration clause effectively prevents a party from enforcing congressionally created rights or where such a clause "operates to confer immunity from potentially meritorious federal claims." Thus, Justice Kagan rejected the majority's distinction between *proving* and *pursuing* a federal remedy, concluding that an arbitration clause may not properly frustrate a federal law – irrespective of exactly how.¹⁰

CompuCredit – What constitutes a contrary Congressional command?

While the Court in *American Express* held that Congress may override the FAA's mandate, the Court did not address what constitutes such a congressional edict. In *CompuCredit v. Greenwood*,¹¹ the Court took up this issue, considering whether an arbitration

⁸ Justice Scalia's majority opinion was joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito.

⁹ Justice Kagan's dissenting opinion was joined by Justices Ginsberg and Breyer.

¹⁰ Justice Sotomayor took no part in the consideration or decision of this case.

¹¹ 132 S. Ct. 665 (2012).

agreement must be enforced despite alleged violations of a federal statute.

In *CompuCredit*, individuals alleged misrepresentations by credit providers promising to help rebuild the individuals' credit. Upon assessment of allegedly usurious fees, the individuals filed a class action complaint alleging violations of the Credit Repair Organizations Act (the "CROA"), a federal law that regulates the practices of credit repair organizations. The CROA contains disclosure and nonwaiver provisions that credit providers must offer consumers before executing any service contract. These provisions state:

You have the right to sue a credit repair organization that violates the Credit Repair Organization Act Any waiver by any consumer of any protection provided by or any right of the consumer under this subchapter – (1) shall be treated as void; and (2) may not be enforced by any Federal or State court or any other person.¹²

However, each of the individuals had entered into agreements with their credit provider that contained class action waivers:

Any claim, dispute, or controversy (whether in contract, tort, or otherwise) at any time arising from or relating to your Account, any transferred balances or this Agreement (collectively, 'Claims'), upon the election of you or us, will be resolved by binding arbitration....

Both the district court and Ninth Circuit held that this arbitration provision was unenforceable because Congress had evinced a contrary intent in the CROA's disclosure and nonwaiver provisions.

The Supreme Court granted certiorari. Invoking *Concepcion*, the Court again made clear that the FAA establishes a federal policy favoring arbitration agreements even when federal statutory claims are at issue. However, the Court acknowledged that an exception applies where the "FAA's mandate has been overridden by a contrary congressional command." According to the Court, Congress had not evinced any such intent in the CROA's disclosure and nonwaiver provisions because these provisions are silent on whether claims may be arbitrated. In reaching this conclusion, the Court considered other federal statutes

restricting arbitration claims and reasoned that Congress has typically expressed such intent with greater clarity. Thus, the Court required some affirmative congressional statement before finding an arbitration agreement unenforceable.

Also, the Court found the "right to sue" language in the disclosure provision to be a mere colloquial expression directed at laymen consumers, simply referring to protections afforded by other areas of the law. Since the CROA did not specify any enforcement mechanism, the Court concluded that the "right to sue" may be satisfied by either judicial or arbitral proceedings. Here, the Court seems to require express statutory language to include an arbitration agreement within a nonwaiver provision's ambit.¹³

Both Justice Sotomayor's concurrence and Justice Ginsberg's dissent took issue with this last point, albeit to varying degrees. Concurring only in the judgment, Justice Sotomayor agreed with the majority's assertion that the "right to sue" language is colloquial.¹⁴ However, she found that the language is therefore plausibly intended to promise a right to sue in court. Thus, finding the competing statutory interpretations in "equipose," Justice Sotomayor concluded that the "opponents of arbitration ... bear the burden of showing that Congress disallowed arbitration." Likewise, Justice Ginsberg found that it is inconsistent with the colloquial nature of the "right to sue" language to interpret it as meaning anything other than a right to sue in court.¹⁵

Bazze – What if an arbitration agreement is silent on whether class arbitration is permitted?

The Court in *CompuCredit* held that a federal statute cannot override the FAA's mandate without an explicit countervailing Congressional intent. Does the FAA require equally explicit language from the parties when determining whether their agreements permit class action arbitration?

The Court in *Green Tree Financial Corp. v. Bazze*¹⁶ addressed this issue. The case involved contracts between a commercial lender and its customers. Each contract contained an arbitration clause providing that all

¹² 15 U.S.C. § 1679f(a).

¹³ Justice Scalia's majority opinion was joined by Chief Justice Roberts and Justices Kennedy, Thomas, Breyer, and Alito.

¹⁴ Justice Sotomayor's concurring opinion was joined by Justice Kagan.

¹⁵ Justice Ginsberg's dissenting opinion was not joined by any other justice.

¹⁶ 539 U.S. 444 (2003).

contract-related disputes would be submitted to an arbitrator. In relevant part, the arbitration provisions stated:

All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract ... shall be resolved by binding arbitration by one arbitrator selected by us and with consent of you The parties agree and understand that the arbitrator shall have all power provided by the law and the contract.

Alleging that the commercial lender failed to provide legally required forms, two sets of customers filed separate complaints seeking damages. Each asked the state court to certify a class action. The state court both certified class actions and ordered arbitration. The commercial lender appealed to the South Carolina Court of Appeals, asserting that class arbitration was prohibited by the express terms of the parties' respective agreements. The South Carolina Supreme Court assumed jurisdiction, consolidated the proceedings, and held that the agreements permitted class arbitration because they were silent on the issue. The United States Supreme Court granted certiorari to determine whether this holding was consistent with the FAA.

While no rationale commanded a majority, a plurality determined that the answer turned on three questions: (1) whether the state court or arbitrator should decide whether the agreements were silent as to class arbitration; (2) whoever the decision maker was, what was the appropriate standard to determine whether an agreement permits class arbitration; and (3) whether class arbitration would be appropriate in the instant controversy. The plurality considered the first question dispositive because the parties' agreements each provided that an arbitrator must resolve "[a]ll disputes, claims, or controversies arising from or relating" to the parties' agreements. Writing for the plurality, Justice Breyer found that the arbitration provisions clearly expressed the parties' intent to submit to arbitration all disputes resulting from the contract. In the plurality's view, this meant an arbitrator had to resolve the parties' dispute because it concerned the *kind* of arbitration they had agreed to and not the threshold question of whether or not they had agreed to arbitration. Accordingly, the plurality remanded the case for further proceedings consistent with its opinion.

Despite its holding, the plurality identified "limited circumstances" in which, absent unequivocal evidence to the contrary, the courts may assume that the parties

intended a court, not an arbitrator, to decide a particular arbitration-related matter. These limited exceptions include (1) instances typically involving such matters as "contracting parties would likely have expected a court to decide"; (2) such preliminary matters as an agreement's validity or applicability; (3) whether an arbitration agreement survives a corporate merger; and (4) the scope of an arbitration agreement.¹⁷

Concurring in the judgment and dissenting in part, Justice Stevens agreed with the plurality's holding that an arbitrator should have interpreted the parties' agreement, reasoning that the express terms of the parties' agreement should govern.¹⁸ However, Justice Stevens dissented from the plurality's decision to remand the case for further proceedings. Since the lower court's decision did not violate the FAA and the petitioner had challenged only the merits of the court's decision – and not whether the court was the appropriate decision maker – Justice Stevens found that allowing class action arbitration was correct as a matter of law. Therefore, he would have simply affirmed the lower court's holding.

Chief Justice Rehnquist filed a dissenting opinion questioning the plurality's conflation of *what* is submitted to arbitration and to *whom* it is submitted.¹⁹ According to Chief Justice Rehnquist, the Court's decision violated the express terms of the parties' agreement, which clearly stated that the commercial lender would choose the arbitrator to resolve disputes arising under each contract. By permitting class arbitration, the Court had violated the FAA by depriving the commercial lender of this contractually secured right because only one arbitrator would determine the disputes under *all* the contracts. Chief Justice Rehnquist then conceded that, while the FAA does not prohibit it, the parties in the instant controversy simply did not elect to allow class arbitration.

Justice Thomas filed a separate dissenting opinion asserting that the FAA does not apply to state court proceedings. Accordingly, he made clear that the Court should have left undisturbed the South Carolina Supreme Court's ruling, reasoning that the FAA cannot

¹⁷ Justice Breyer's plurality opinion was joined by Justices Scalia, Souter, and Ginsberg.

¹⁸ Justice Stevens's concurring opinion was not joined by any other justice.

¹⁹ Chief Justice Rehnquist's dissenting opinion was joined by Justices O'Connor and Kennedy.

preempt a state court's interpretation of a private arbitration agreement.²⁰

Stolt-Nielsen – What standard governs whether an agreement permits class arbitration?

The Court in *Bazze* raised the question of the appropriate standard to determine whether an agreement permits class arbitration, but did not reach a conclusion. *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*²¹ took up this issue. Justice Alito delivered the Court's opinion holding that the FAA prohibits arbitrators from imposing class arbitration where the parties' agreement is silent on the issue. *Stolt-Nielsen* concerned an arbitration panel's decision to permit class arbitration pursuant to an agreement that stated:

Any dispute arising from the making, performance, or termination of this [agreement] shall be settled in New York, [Seller] and [Buyer] each appointing an arbitrator, who shall be a merchant, broker, or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an Admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and procedure of the [FAA], and a judgment of the Court shall be entered upon any award made by said arbitrator.

The district court overturned the arbitration panel's class certification, finding that the panel had not based its decision on the applicable bodies of law. However, the Second Circuit reversed because the presumably applicable bodies of law did not affirmatively establish a rule *against* class arbitration.

The Supreme Court granted certiorari to determine “whether imposing class arbitration on parties whose arbitration clauses are silent on that issue is consistent with the [FAA].” The Court upheld the Second Circuit's holding but overruled its reasoning, basing its analysis on section 10(a)(4) of the FAA, which imposes a “high hurdle” to overturning an arbitrator's decision. Specifically, section 10(a)(4) provides that an arbitrator's decision cannot be overturned simply because it's erroneous. Rather, it must be demonstrated that the arbitrator had exceeded its authority by disregarding the parties' agreement and instead imposing its own public policy preferences.

²⁰ Justice Thomas's dissenting opinion was not joined by any other justice.

²¹ 559 U.S. 662 (2010).

Citing *Bazze* for the proposition that “arbitrators must look to the language of the parties agreement to ascertain the parties' intention whether they intended to permit or preclude class action,” the Court found that the arbitrators in the instant case had failed to ascertain the parties' intent, because the parties themselves had stipulated that their agreement was silent as to class arbitration. Therefore, the arbitrators' decision could not have been based on the parties' intent. In overturning the Second Circuit's reasoning, the Court held that it is “only when an arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice that his decision may be unenforceable.”²²

Justice Ginsberg dissented. In her view, the issue before the Court was unripe because the arbitration panel's decision was “highly interlocutory.” Therefore, the Court should not have granted certiorari. She then addressed the merits, disagreeing that the arbitration panel's decision was based on public policy. Instead, she underscored evidence that the arbitration panel had actually based its decision on an interpretation of the parties' agreement. Justice Ginsberg questioned whether the parties had actually stipulated that the agreement was silent on class arbitration, again pointing to evidence that the parties had simply agreed that their agreements *did not prohibit* class action arbitration. Finally, Justice Ginsberg lamented that the Court's decision had created disparate default rules governing judicial and arbitral class actions by requiring that the latter be available only pursuant to an express agreement.²³

Oxford Health Plans – Arbitral determinations usually survive judicial review, but who – arbitrator or court – decides whether class arbitration is appropriate?

The Court in *Oxford Health Plans LLC v. Sutter*²⁴ limited *Stolt-Nielsen*, unanimously holding that the parties' intent to permit class arbitration may be either expressly stated or implied in the arbitration provision's language.

In *Oxford Health*, a pediatrician had a contract with Oxford Health Plans, a health insurance company. Alleging that Oxford Health Plans failed to make due

²² Justice Alito's majority opinion was joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas.

²³ Justice Ginsberg's dissenting opinion was joined by Justices Stevens and Breyer. Justice Sotomayor took no part in the consideration or decision of this case.

²⁴ 133 S. Ct. 2064 (2013).

payments, the pediatrician filed a class action in New Jersey Superior Court. Oxford Health Plans moved to compel arbitration pursuant to the parties' agreement, which provided:

No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association with one arbitrator.

The state court granted the motion, and the arbitrator was tasked by the parties with determining whether the above quoted language authorized class arbitration. Applying rules of contract construction and interpretation, the arbitrator ultimately found that the "arbitration clause unambiguously evinced an intention to allow class arbitration." Oxford Health Plans appealed this decision, claiming that the arbitrator had exceeded his authority by not properly interpreting the parties' agreement. The Third Circuit Court of Appeals upheld the arbitrator's decision, finding that "[s]o long as an arbitrator 'makes a good faith attempt' to interpret a contract, 'even serious errors of law or fact will not subject his award to vacatur.'"

The United States Supreme Court granted certiorari and affirmed. In an opinion by Justice Kagan, it reasoned that FAA section 10(a)(4) limits a court's ability to overturn an arbitrator's decision where it is arguably based on an interpretation of the parties' agreement. While the Court conceded that the parties' agreement did not contain any language authorizing class arbitration, it noted that the arbitrator found the arbitration clause "unambiguously evinced an intention to allow class arbitration" based on construing "the arbitration clause in the ordinary way to glean the parties' intent." Tacitly acknowledging the arbitrator's potentially erroneous interpretation, the Court again made clear that section 10(a)(4) provides that the "arbitrator's construction holds, however good, bad, or ugly." Accordingly, the Court upheld the arbitrator's decision to permit class arbitration under the parties' agreement.

The Court limited the scope of *Stolt-Nielson*, explaining that it applies only where the parties' agreement lacks *any* basis for allowing class proceedings. The Court pointed out that, there, the parties had entered into a stipulation that left no room for an inquiry regarding intent. Therefore, the arbitrators in that case could not have based their decision on a determination of the parties' intent.

Citing *Bazzle*, the Court also stated that the issue would have been different had Oxford Health Plans challenged the availability of class arbitration as a "question of arbitrability." Such questions include preliminary matters such as whether the parties have a valid agreement and are presumptively decided by the courts. Instead, Oxford Health Plans challenged the decision as a matter within the arbitrator's discretion. Consequently, the Court did not inquire into whether class arbitration is a question of arbitrability.²⁵

Rent-A-Center – Who decides unconscionability?

In *Rent-A-Center v. Jackson*,²⁶ the Court considered whether the FAA affords courts discretion to invalidate arbitration agreements as unconscionable, despite an express agreement between the parties to submit such questions to arbitration. Writing for the majority, Justice Scalia made clear that the answer depends on the nature of the challenge presented. While an arbitrator resolves challenges to the entire agreement's validity, courts resolve challenges directed specifically to an arbitration provision.

Rent-A-Center involved an employment discrimination suit filed against Rent-A-Center by a former employee. As a condition of his employment, the former employee had entered into an agreement with Rent-A-Center requiring arbitration of all "past, present, or future" disputes arising out of the employment, including "claims for discrimination" and "claims for violation of any federal ... law." Also, the agreement provided that "the Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement, including, but not limited to, any claim that all or any part of this Agreement is void or voidable."

In the Nevada district court, Rent-A-Center filed a motion to compel arbitration pursuant to the parties' agreement. Plaintiff opposed, claiming that the agreement was unconscionable and, therefore, unenforceable. The district court found that, whatever the merits of plaintiff's claim, under the parties' agreement, the question of unconscionability would be properly decided by an arbitrator. The Ninth Circuit

²⁵ Justice Kagan's majority opinion was joined by Chief Justice Roberts and Justices Scalia, Kennedy, Ginsberg, Breyer, and Sotomayor. Justice Alito filed a concurring opinion joined by Justice Thomas.

²⁶ 561 U.S. 63 (2010).

reversed and held that courts should decide such gateway questions as unconscionability.

The Supreme Court granted certiorari and reversed the Ninth Circuit, reasoning that section 2 of the FAA contemplates severability of arbitration provisions and provides that a “written provision” “to settle by arbitration a controversy” is “valid, irrevocable, and enforceable” without concern for the validity of the entire agreement.²⁷ Thus, the Court distinguished challenges directed specifically to an arbitration provision and challenges directed to an entire agreement. Challenges to an entire agreement’s validity are properly arbitrated, while challenges specific to an arbitration provision are judicially determined. According to the Court, plaintiff’s unconscionability claim was directed

specifically to the parties’ arbitration agreement and, therefore, would be properly resolved by a court.²⁸

CONCLUSION

The Supreme Court is vigorously enforcing the FAA, regularly upholding class action waivers in arbitration agreements. While not all of the issues have been settled, it is clear that the Court is making it increasingly difficult for parties to invalidate class action waivers in such agreements. To ensure ironclad enforcement, contracting parties should clearly express their intent with unequivocal language as to whether class arbitration is permitted and whether a court or arbitrator is to decide that issue. ■

²⁷ Justice Scalia’s majority opinion was joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito.

²⁸ Justice Stevens filed a dissenting opinion joined by Justices Ginsberg, Breyer, and Sotomayor. The dissenting opinion is outside the scope of this article.