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THE SUPREME COURT ANNOUNCES A PRESUMPTION AGAINST CLASS ARBITRATION

The Supreme Court of the United States announced a landmark ruling about arbitration clauses on April 24, 2019. In *Lamps Plus, Inc. v. Varela*, the high court held that an arbitration clause does not permit class arbitration without clearly and explicitly stating so. Chief Justice Roberts delivered the opinion of the Court, reasoning that "shifting from individual to class arbitration is a 'fundamental' change that 'sacrifices the principal advantage of arbitration' and 'greatly increases risks to defendants," and therefore class arbitration should not be allowed absent, unambiguous language in the arbitration clause permitting class arbitration. Where an arbitration clause is ambiguous on the issue of whether class arbitration is permitted, it will be presumed that class arbitration is not permitted.

This particular attempted class arbitration arose from a phishing scheme whereby a hacker obtained tax information for about 1,300 employees of Lamps Plus, Inc. One such employee attempted to bring a class action under the arbitration clause. The federal district court, and then the Ninth Circuit on appeal, ordered that the employee could not pursue the lawsuit in court, but ordered that the class could proceed with the case through arbitration. The Supreme Court reversed—not only did the arbitration clause bar the employee from bringing a class claim through ordinary litigation, he was also barred from bringing a class claim through arbitration. He must instead pursue an individual claim only through arbitration, leaving all other employees whose tax information was compromised to pursue their respective individual claims separately, dramatically reducing both the probability that most of the employees would obtain any recovery and the leverage to obtain a favorable settlement. The four members of the Court each filed individual dissents.

PROS AND CONS OF ARBITRATION

The Supreme Court has indicated that arbitration agreements are enforceable and for this kind of issue will even have ambiguities construed in favor of employers. Does this mean that employers should be sure to funnel as many conflict resolution procedures as possible into arbitration?

Not necessarily. While a jury trial entails some expenses that can be avoided through arbitration—jury selection, jury instructions and appeals, among others—arbitration entails paying an arbitrator much more than the fees charged by the court system, and the arbitration process may not be significantly less expensive than ordinary litigation. Although the rules of procedure may be somewhat more relaxed, the same or similar rules are often followed.

Moreover, the lack of precedential value of an arbitration decision and the lack of ability to appeal is a two-edged sword. Sometimes employers may wish to generate positive precedent and may wish to appeal unfavorable decisions. Arbitration forecloses these options.

Finally, in the absence of potential appellate review, arbitrators can lean towards imposing whatever outcome seems fair without feeling overly constrained by the law. This more "subjective" approach can be advantageous or otherwise, depending on the particulars of the case.

PRACTICAL TAKEAWAYS

- While this case should not impel employers to thoughtlessly jump on the arbitration bandwagon, it is advisable to think carefully about how to tactically use arbitration clauses to prevent class action lawsuits and individual lawsuits in the regular courts.
- Even where arbitration is deemed tactically superior to ordinary litigation, employers should not be surprised if the expense to reach a resolution is similar, when arbitration is used compared with ordinary courts.
- Because the process laid out by the rules of civil procedure is so very expensive as a means of reaching a resolution, and those rules are typically used whether in arbitration or in the court system, other alternative dispute resolution methods should also be considered alongside ordinary litigation and arbitration, such as binding mediation, other forms of mediation-arbitration or mutually agreed procedural rules designed to trade some of the thoroughness of the standard rules of civil procedure in exchange for greater efficiency.

If you have any questions about arbitration, please contact Brian Sabey at (720) 282-2025 or briansabey@hallrender.com or your regular Hall Render attorney.