Legal Analysis

Compelling Arbitration In Massachusetts — Recent Developments

By John R. Snyder

The past few years have seen significant developments in the law governing enforcement of arbitration agreements in Massachusetts. This article reviews some particularly noteworthy decisions handed down in the past three years (through September 2011) concerning issues such as arbitrability of statutory claims, class actions and of claims brought by government actors, and “illusoriness.” One undercurrent in the Massachusetts cases is an apparent skepticism, if not hostility, toward predispute arbitration agreements, which stands in contrast to the U.S. Supreme Court’s recent pronouncements favoring and enabling arbitration agreements.

1. Statutory claims
   A. Employment discrimination

In Warfield v. Beth Israel Deaconess Medical Center, Inc., 454 Mass. 390 (2009), the Supreme Judicial Court (“SJC”) held that statutory employment discrimination claims are subject to arbitration only if the arbitration agreement states that they are, “in clear and unmistakable terms.” 454 Mass. at 398.

But wait — the Federal Arbitration Act (“FAA”) requires that arbitration agreements shall be enforced “save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2; see also the Massachusetts Arbitration Act, Mass. Gen. Laws ch. 251, § 2 (to the same effect).

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And, to the extent it applies, the FAA preempts contrary substantive state law — statutory and common law. While acknowledging that it has singled out statutory employment discrimination claims for “distinct treatment,” the SJC contends its holding is not preempted by the FAA because “[o]ur State law principles of contract interpretation make clear that considerations of public policy play an important role in the interpretation and enforcement of contracts,” and its decision is “[c]onsistent with the public policy against workplace discrimination reflected in G. L. c. 151B.” 454 Mass. at 397-98, 400 n.16. The Court further contends that “our rule of contract interpretation neither bars agreements to arbitrate employment discrimination disputes nor applies only to arbitration clauses,” but rather “states only that as a matter of the Commonwealth’s general law of contract, a private agreement that purports to waive or limit — whether in an arbitration clause or in some other contract provision — the employee’s otherwise available right to seek redress for employment discrimination through the remedial paths set out in c. 151B, must reflect that intent in unambiguous terms.” *Id.* at 400 and n.14.

The SJC found the “clear and unmistakable terms” standard was not satisfied by the arbitration provision before it because “there is nothing in the arbitration clause or elsewhere in the agreement stating that any claims of employment discrimination by Warfield are subject to arbitration.” *Id.* at 402. The Court then took up what should happen to the plaintiff’s common law claims while her statutory discrimination claims were being adjudicated in court. The Court decided that, because “Warfield’s common-law claims are so integrally connected to her c. 151B claims. . . . [and] the evidence that Warfield would introduce in support of her statutory claims is virtually identical to the evidence she would introduce to support her common-law claims,” “[a]ll of Warfield’s claims should therefore be resolved in one judicial proceeding.” *Id.* at 403-04. Thus, in effect, the SJC invalidated the parties’ arbitration agreement as to all — statutory and common law — causes of action. That result flies in the face of *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217 (1985), a venerable U.S. Supreme Court decision that instructs that, when a complaint contains both arbitrable and nonarbitrable claims, the FAA requires a court to “compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums.” This directive was recently reaffirmed by the Supreme Court in *KPMG LLP v. Cocchi*, 2011 WL 5299457 (Nov. 7, 2011) (per curiam).
B. Wage Act

Justice Cowin in her *Warfield* dissent “wonder[ed] what type of claims will be singled out next for such treatment.” 454 Mass. at 406. Apparently not Massachusetts Wage Act claims, at least in the view of the Appeals Court. In *Dixon v. Perry & Slesnick, P.C.*, 75 Mass. App. Ct. 271 (2009), the Appeals Court held that Wage Act claims are covered by an arbitration provision encompassing “all disagreements and controversies arising with respect to this [employment] Agreement.” The Appeals Court distinguished *Warfield* on the basis that “Dixon’s claims arise directly from a term of the [employment] agreement, namely, Dixon’s rate of compensation.” Id. at 277. The Court also noted the SJC’s caution in *Warfield* that “[o]ur conclusion in this case should not be understood to suggest that parties entering into an employment (or any other) contract must specifically list every possible statutory claim that might arise or else the claim will not be covered by an otherwise ‘broad’ arbitration clause.” *Warfield*, 454 Mass. at 401 n.16.¹

2. Class actions

In *Feeney v. Dell, Inc.*, 454 Mass. 192, 205-08 (2009), the SJC also invoked public policy, holding that an arbitration provision that had the effect of prohibiting participation in class actions is void as contrary to Massachusetts’s “strong public policy in favor of class actions for small value claims under” Mass. Gen. Laws ch. 93A. For the same reason, the Court held a Texas choice of law clause was not enforceable because under Texas law such class action prohibitions are allowed.

But again — isn’t the SJC treading on arbitration rights guaranteed by the FAA? The SJC does not think so, again invoking the notion that, under Massachusetts principles of contract law, public policy plays an important role in the interpretation and enforcement of contracts, and noting that its decision is based on “our fundamental public policy in favor of preserving the ability of consumers and businesses to vindicate their rights under c. 93A.” Id. at 209-10.²

*Feeney*’s continued validity is in considerable doubt as a result of the U.S. Supreme Court’s recent decision in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011). *Concepcion* holds that the FAA preempts California case law deeming arbitration clauses containing class action waivers to be unconscionable.

However, on remand in the Feeney case Superior Court Justice Wilkins did not see it that way. He declined to confirm an arbitration award issued pursuant to the arbitration provision prohibiting class arbitration that the SJC struck down. Feeney v. Dell, Inc., 2011 WL 5127806 (Sept. 30, 2011). Judge Wilkins concluded that the SJC’s Feeney decision is not preempted by Concepcion, distinguishing Dell’s arbitration provision from AT&T’s, and opining that the former rendered arbitration of small individual claims “infeasible as a matter of fact.” Id. at *8-9. Compare the post-Concepcion decisions in Cruz v. Cingular Wireless, LLC, 648 F.3d 1205, 1212-13 (11th Cir. 2011) (Florida law invalidating class waivers “stands as an obstacle to the FAA’s objective of enforcing arbitration agreements according to their terms, and is preempted”), and Litman v. Celco Partnership, 655 F.3d 225, 230-31 (3d Cir. Aug. 24, 2011) (“a state law that seeks to impose class arbitration despite a contractual agreement for individualized arbitration is inconsistent with, and therefore preempted by, the FAA, irrespective of whether class arbitration ‘is desirable for unrelated reasons’”(quoting Concepcion)).

In Smith & Wollensky Restaurant Group, Inc. v. Passow, 2011 WL 148302 (D. Mass. Jan. 18, 2011), USDC Judge Harrington upheld an arbitrator’s partial award finding that an arbitration provision permitted class claims. The provision covered “any claim that, in the absence of this Agreement, would be resolved in a court of law under applicable state and federal law,” and provided that the “[a]rbitrator may award any remedy and relief as a court could award on the same claim.” The Court found significant the arbitrator’s observation that “wage and hour claims like those in play here are frequently pursued as class or collective actions, and both the Claimants and S & W must be deemed to understand that.” Id. at *1. See Dixon v. Perry & Slesnick, 75 Mass. App. Ct. at 276 n.7 (“it appears that class actions, which are permitted under the Wage Act, can be maintained in the arbitration forum”). See also Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp., 130 S. Ct. 1758 (2010), in which the Supreme Court held that, if an arbitration agreement is silent as to class-wide arbitration, it is not permitted, absent local law authorizing
it or custom or usage in the industry dictating that class-wide arbitration was contemplated at the time of contracting.

3. Government agency seeking relief on behalf of individuals

In Joulé Inc. v. Simmons, 459 Mass. 88 (2011), former employee Simmons had filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”). The employer’s application to compel arbitration was denied. The SJC held that “nothing in [Simmon’s employment agreement’s arbitration provision] precludes the MCAD from proceeding with its investigation and resolution of Simmons’s discrimination complaint — including, if the evidence warrants, granting relief specific to Simmons.” Id. at 95, citing EEOC v. Waffle House, Inc., 534 U.S. 279, 291-92, 296 (2002).

However, the SJC held, the Superior Court erred in denying the employer’s motion to compel arbitration and in staying further proceedings in the Superior Court pending the outcome of the MCAD proceeding: “there is no legal bar to having an arbitration and the MCAD proceeding continue concurrently, on parallel tracks.” 459 Mass. at 99. The SJC apparently did not find the concern for adjudication efficiency it voiced in Warfield to be as compelling in this context. The Court did observe that “it ‘goes without saying that the courts can and should preclude double recovery by an individual.’” Id. at 99 n.13, quoting Waffle House, 534 U.S. at 297.

Similarly, in Commonwealth v. H&R Block, Inc. (Mass. Super. Nov. 25, 2008 (unpublished; available on Loislaw)), then Superior Court Judge Gants held that the Massachusetts Attorney General was not bound by arbitration agreements in mortgage loan agreements, and therefore could proceed with her Chapter 93A and Chapter 151B action seeking relief for a class of borrowers with respect to alleged unfair and deceptive conduct and discrimination by subprime lenders.

4. “Illusoriness”

Unconscionability is sometimes asserted in opposition to applications to compel arbitration as a “ground[] as exist[s] at law or in equity for the revocation of any contract.” FAA § 2. The unconscionability standard under Massachusetts law has been stated by the SJC as follows: “the sum total of [the contract’s]

The First Circuit has provided a new twist on unconscionability. *Awuah v. Coverall North America, Inc.*, 554 F.3d 7 (1st Cir. 2009), was an interlocutory appeal of Judge Young’s order referring to a magistrate judge the franchisee plaintiffs’ claim that an arbitration provision was unconscionable. The First Circuit disagreed with the District Court, holding that the language of the arbitration provision, in particular its incorporation of the rules of the American Arbitration Association, required that the unconscionability claim be decided by the arbitrator. (See the U.S. Supreme Court’s subsequent decision in *Rent-A-Center West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010), holding that the arbitrator must decide the threshold issue of arbitrability where the parties’ arbitration agreement explicitly delegates that role to the arbitrator.)

However, the First Circuit identified “illusoriness” as a distinct threshold issue, to be decided, not by the arbitrator, but by the District Court. The Court explained, “Our concern here is not with unconscionability — essentially a fairness issue …— but more narrowly with whether the arbitration regime here is structured so as to prevent a litigant from having access to the arbitrator to resolve claims, including unconscionability defenses.” 554 F.3d at 13 (emphasis in original), citing *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 90-91 (2000) (in which this issue was identified but not decided). The First Circuit’s “illusoriness” concern arose from the franchisees’ assertion “that the amounts likely to be recovered by each of the individual franchisees may be modest, and that the costs of arbitration itself — independent of counsel fees, which can be contingent — would be overwhelming.” 554 F.3d at 12.

It could be argued that the distinction drawn by the First Circuit between unconscionability and “illusoriness” is contrived — both issues go to the “validity of the arbitration agreement,” which issue was explicitly reserved for the arbitrator by the arbitration provision language. Neither of the Court of Appeals decisions on which the *Awuah* decision relies support its conclusion that the “illusoriness” issue should be decided by the court. In any event, the “illusoriness” inquiry was not resolved on remand — Judge Young decided the claims as arbitrator with the parties’ consent. See June 15, 2011 Memorandum and Order, 2011 WL 2356893.
5. “Cumulative remedies” provisions

The First Circuit held that a so-called “cumulative remedies” provision does not undercut an arbitration agreement. In *PowerShare, Inc. v. Syntel, Inc.*, 597 F.3d 10, 15-18 (1st Cir. 2010), Magistrate Judge Dein had found the following sentence in an arbitration provision rendered arbitration optional: “Nothing in this clause shall prejudice Syntel or PowerShare’s right to seek injunctive relief or any other equitable/legal relief or remedies available under the law.” Judge Gertner upheld that ruling. The First Circuit reversed, holding that “the Agreement as a whole admits of only one reasonable interpretation: the parties are obliged to submit their disputes to arbitration,” and interpreting the clause as empowering the arbitrator to issue any relief a court could issue. See also *Laughton v. CGI Technologies and Solutions, Inc.*, 602 F. Supp. 2d 262 (D. Mass. 2009), coming to the same conclusion with respect to similar contract language.

Conclusion

Perhaps the most striking aspect of recent Massachusetts jurisprudence on arbitration agreements is the stark disconnect with the U.S. Supreme Court’s recent facilitation and protection of arbitration. This contrast is manifested in *Warfield’s* “clear and unmistakable terms” requirement, in *Feeney’s* prohibition of class action waivers, and in *Awuah’s* “illusoriness” construct. This dissonance may not be resolved unless and until the Supreme Court is presented with opportunities to have the “last word” on the handiwork of Massachusetts courts on these issues.

Endnotes

1. In *Joulé Inc. v. Simmons*, 459 Mass. 88, 100 n.15 (2011), the SJC provided some guidance as to what would constitute the requisite “clear and unmistakable terms,” holding that the following arbitration provision language “makes it ‘clear and unmistakable’ … that the arbitration provision applies to employment discrimination claims”: “disputes … relating to my employment and/or termination of my employment (which includes without limitation, claims of discrimination, harassment, hostile work environment, retaliation, or other wrongful termination claims) ...”
2. Justice Cowin did not participate in this decision, which singled out another type of claim for distinct treatment based on public policy.