Class Actions

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After an eventful 2004, in which the Eleventh Circuit Court of Appeals explored in depth[1] the class certification requirements of Rule 23 of the Federal Rules of Civil Procedure,[2] the court's 2005 docket presented more threshold questions concerning whether or not putative class actions could proceed past the pleading stage. The court's most important class action decisions during the year addressed the efficacy of contract provisions designed to preclude class actions in favor of individual arbitration proceedings. This issue is among the most controversial in class action law, as many businesses have turned to using standard arbitration provisions to curtail class action and other litigation exposure, and courts are divided on the outcomes.[3]

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1. *See* Thomas M. Byrne & Suzanne M. Alford, *Class Actions*, 56 MERCER L. REV. 1219 (2005).

2. FED. R. CIV. P. 23.

3. In a significant 2005 case, the California Supreme Court held that a class action waiver in an arbitration agreement was unconscionable under certain circumstances. Discover Bank v. Superior Court, 113 P.3d 1100, 1103 (Cal. 2005). The decision generally aligned California's highest court with several Ninth Circuit Court of Appeals decisions to the same effect. *See* Ingle v. Circuit City Stores, Inc., 328 F.3d 1165 (9th Cir. 2003); Circuit City Stores, Inc. v. Mantor, 335 F.3d 1101 (9th Cir. 2003); Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003). Some courts elsewhere have agreed. Leonard v. Terminix Int'l Co., 854 So. 2d 529 (Ala. 2002); State *ex rel.* Dunlap v. Berger, 567 S.E.2d 265 (W. Va. 2002). But many others, rebuff claims of unconscionability and enforce class action waivers. *See e.g.*, Iberia Credit Bureau, Inc. v. Cingular Wireless L.L.C., 379 F.3d 159 (5th Cir. 2004); Snowden v. CheckPoint Check Cashing, 290 F.3d 631 (4th Cir. 2002); Hutcherson v. Sears Roebuck & Co., 793 N.E.2d 886 (Ill. App. Ct. 2003). The United States Supreme Court will likely have to resolve the question of whether or not refusals to enforce arbitration agreements on unconscionability grounds violate the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-307 (2002).

In *Jenkins v. First American Cash Advance of Georgia, LLC*,[4] the court considered an appeal from a district court's determination that arbitration agreements signed by a borrower of a so-called "payday" lender were unconscionable.[5] The plaintiff alleged violations of Georgia's usury statutes[6] and the Georgia RICO Act[7] and brought a putative class action against the bank and the servicer in Georgia state court.[8] After removal, the defendants sought to enforce arbitration agreements signed by the plaintiff.[9] The arbitration agreements included a class action waiver that provided: "THE ARBITRATOR SHALL NOT CONDUCT CLASS ARBITRATION; THAT IS, THE ARBITRATOR SHALL NOT ALLOW YOU TO SERVE AS A REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY FOR OTHERS IN THE ARBITRATION."[10] The district court found that this provision, coupled with a lack of "mutuality of obligation,"[11] made the agreements unconscionable under Georgia law and thus unenforceable.[12]

After determining that it had jurisdiction to consider the appeal,[13] the Eleventh Circuit dealt with an important threshold question concerning whether the unconscionability issue was for the court or for an arbitrator to decide.[14] The court concluded that it should apply the

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4. 400 F.3d 868 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 1457 (2006). Judge Susan H. Black wrote the court's opinion and was joined on the panel by Judge R. Lanier Anderson III and Judge Joel F. Dubina. *Id.* at 876.

5. *Id.* at 873-74. Because the district court refused to enforce arbitration agreements subject to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-307 (2000), the defendants, a national bank and one of its loan servicers, were able to take a direct appeal. *Jenkins*, 400 F.3d at 870-71; 9 U.S.C. § 16(a).

6. O.C.G.A. §§ 7-4-2, 7-4-18 (2004).

7. O.C.G.A. § 16-14-4 (2003).

8. *Jenkins*, 400 F.3d at 872-73.

9. *Id.* at 873.

10. *Id.* at 872 n.2. In *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), the Supreme Court held that an arbitrator may be authorized to conduct a class arbitration where the agreement does not prohibit class arbitration. *Green Tree*, 539 U.S. at 453-54. The Court did not address the question of the enforceability of class action waivers. Subsequently, the American Arbitration Association and other arbitration organizations adopted rules for the conduct of class arbitrations, when authorized. *See, e.g.*, Alternative Dispute Resolution, http://www.adr.org/ (last visited March 14, 2006).

11. *Jenkins*, 400 F.3d at 878-79. Because the agreement allowed access to a small claims tribunal in circumstances that would benefit only the lender, the court determined mutality of obligation did not exist. *Id.*

12. *Id.* at 876.

13. *Id.* at 873 n.3.

14. *Id.* at 876.

doctrine of *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*[15] to resolve this issue.[16] The court explained that *Prima Paint* "distinguished between claims that challenge the contract generally and claims that challenge the arbitration provision itself."[17] In *Prima Paint,* which concerned a claim that a contract was fraudulently induced, the Supreme Court concluded that the fraud claim related to the contract generally and not to the arbitration provision specifically; therefore, the unconscionability issue was for the arbitrator to resolve.[18] Applying *Prima Paint* in *Jenkins,* the Eleventh Circuit held that the arbitrator would have to resolve any claim of procedural unconscionability directed to whether or not the underlying contracts were adhesion agreements.[19] The court concluded that the class action waiver that was included in each of the arbitration agreements at issue concerned the arbitration agreements themselves rather than the underlying loans and, thus, should be considered by the court.[20] But the court rejected the argument that the arbitration agreements were unenforceable.[21] The court noted that it had previously held that a contractual provision to arbitrate was enforceable even if its effect would be to preclude the plaintiff from bringing a class action.[22] The court also characterized as "unfounded" the district court's conclusion that consumers would be unlikely to obtain legal representation without the availability of the class action vehicle.[23] The court pointed out that the Georgia RICO statute allowed a prevailing party to recover attorney fees and costs.[24] The court concluded that "precluding class action relief will not have the practical effect of immunizing [the defendants]."[25]

Also significant in *Jenkins* was the court's rejection of the plaintiff's argument that there was nothing to arbitrate because the underlying

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15. 388 U.S. 395 (1967).
16. *Jenkins*, 400 F.3d at 876.
17. *Id.*
18. *Id.* at 876-77 (citing *Prima Paint Corp.*, 388 U.S. at 406).
19. *Id.* at 877.
20. *Id.*
21. *Id.* at 877-78.
22. *Id.* (citing *Prima Paint Corp.*, 388 U.S. at 403-04). The court cited *Randolph v. Green Tree Financial Corp. Alabama,* 244 F.3d 814 (11th Cir. 2001), which held that an arbitration provision was enforceable in a Truth-in-Lending Act, 15 U.S.C. §§ 1601-1693 (2000), case even if it would have the effect of precluding a class action. *Randolph*, 244 F.3d at 819. The case did not concern a contractual class action waiver.
23. *Jenkins*, 400 F.3d at 878.
24. *Id.* Whether or not a plaintiff has sufficient incentive to bring a case only as an individual action is a subject of recurring debate in class action cases. *See, e.g.,* Coleman v. General Motors Acceptance Corp., 296 F.3d 443, 448-49 (6th Cir. 2002).
25. *Jenkins*, 400 F.3d at 878.

loan contracts were illegal and void under Georgia law.[26] The court noted that the *Prima Paint* rule would also apply to allegations of illegality as to the underlying loans. Therefore, the arbitrator would need to consider and determine that issue.[27] In so holding, the court correctly anticipated the Supreme Court's recent decision in *Buckeye Check Cashing, Inc. v. Cardegna*,[28] where the Court held that the arbitrator should decide the illegality issue.[29]

In *Caley v. Gulfstream Aerospace Corp.*,[30] the Eleventh Circuit enforced another class action waiver, this time in an employment context.[31] In *Caley* employees of Gulfstream brought two related class actions against the company under the Fair Labor Standards Act,[32] the Age Discrimination in Employment Act,[33] and the Employee Retirement Income Security Act,[34] among other claims.[35] In response to the complaints, the defendants moved to compel arbitration pursuant to a "dispute resolution policy" (the "DRP") that Gulfstream had adopted during the plaintiffs' employment. The company mailed the DRP to its employees and distributed the DRP electronically on the company's intranet and by e-mail. The employees were informed that, after its effective date, agreement to the DRP would be a condition of continued employment. The DRP provided that continuation of employment would be deemed an acceptance of the policy, with no requirement of signature by any employee. The DRP defined its "covered claims" as employment-related claims including involuntary terminations, tort claims, and contract claims, but it excluded certain other claims.[36] A subsequent

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26. *Id.* at 880-82.

27. *Id.* at 881.

28. 126 U.S. 1204 (2006).

29. *Id.* at 1210. In reaching its decision, the Supreme Court reversed a Florida Supreme Court decision, *Cardegna v. Buckeye Check Cashing, Inc.*, 894 So. 2d 860 (Fla. 2005), which held that the trial court should decide the illegality issue. *Id.* at 865; *Buckeye Check Cashing, Inc.*, 126 U.S. at 1210. The Supreme Court's decision also calls into question a Georgia Court of Appeals decision, *Stewart v. Favors*, 264 Ga. App. 156, 590 S.E.2d 186 (2003), which reached a holding similar to the Florida Supreme Court's. *See id.* at 159, 590 S.E.2d at 189.

30. 428 F.3d 1359 (11th Cir. 2005). The court's opinion was written by Judge Frank M. Hull, who was joined on the panel by Judge Stanley F. Birch, Jr. and Judge Pasco M. Bowman II from the Eighth Circuit Court of Appeals. *Id.* at 1364.

31. *Id.*

32. 29 U.S.C. §§ 201-219 (2000).

33. 29 U.S.C. §§ 621-634 (2000).

34. 29 U.S.C. §§ 1001-1461 (2000).

35. 428 F.3d at 1364.

36. *Id.* at 1365-66.

amendment to the DRP provided that the employee agreed that no covered claim could be brought as a class or collective action.[37]

The district court entered an order granting the defendants' motions to compel arbitration and dismissed the plaintiffs' cases. On appeal, the plaintiffs made numerous arguments concerning the enforceability of the DRP under the Federal Arbitration Act.[38] First, the plaintiffs argued that a signature was required by both parties to constitute an "agreement in writing" under the FAA.[39] The court's response was to "readily conclude that no signature is needed to satisfy the FAA's written agreement requirement."[40] Second, the court rejected the plaintiffs' argument that the underlying employment relationship did not affect commerce sufficiently to invoke the FAA.[41] The court concluded that the defendants' "overall employment practices affect commerce" and determined that effect sufficient to provide a commerce nexus for the FAA to apply.[42] Third, the plaintiffs argued that they could not waive their Seventh Amendment[43] rights to jury trial in the DRP without satisfying a "heightened 'knowing and voluntary' standard."[44] The court rejected the argument that a heightened standard applied and noted that ordinary contract principles, which are not subject to a heightened standard, governed the waiver of jury trial rights.[45] This holding conflicted with the Sixth Circuit's 2005 holding[46] that an employee arbitration agreement's waiver of a jury trial right required a showing of knowing and voluntary action.[47] The Eleventh Circuit concluded that applying a heightened "knowing and voluntary" standard to the waiver of jury trial rights, which are necessarily waived whenever arbitration agreements are enforced, would conflict with the FAA's plain language.[48]

The court also rejected the plaintiffs' arguments that the DRP was not a binding contract under Georgia law.[49] Specifically, the court determined that the DRP constituted an offer for contract law purposes, and

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37. *Id.*
38. *Id.* at 1368; 9 U.S.C. §§ 1-307 (2000).
39. *Caley*, 428 F.3d at 1368.
40. *Id.* at 1369.
41. *Id.* at 1370.
42. *Id.*
43. U.S. CONST. amend. VII.
44. *Caley*, 428 F.3d at 1370.
45. *Id.* at 1371.
46. Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370, 381 (6th Cir. 2005).
47. *Caley*, 428 F.3d at 1373 n.14 (citing *Walker*, 400 F.3d at 381).
48. *Id.* at 1372-73.
49. *Id.* at 1373-79.

that the employees' continued employment constituted an acceptance of that offer.[50] The court also noted that the reciprocal promises from the company to arbitrate and to pay arbitration and mediation costs were sufficient consideration for the employees' acceptance of the agreement.[51] The court was not troubled by the company's ability to modify the DRP at any time; the court remarked that the company was still bound until modification of the DRP occurred.[52]

The court also rejected the plaintiffs' argument that the DRP was unconscionable under Georgia law.[53] The plaintiffs argued that the DRP was substantively unconscionable because the employee would typically bring many of the claims subject to arbitration, and the company would more typically bring the excluded claims.[54] But the court held that this purported lack of "mutuality" did not make the agreement unconscionable, citing a Georgia case to that effect.[55]

Finally, the court rejected the plaintiffs' arguments that the DRP's class action waiver and its limitations on discovery made the DRP unconscionable.[56] The court reasoned that "[t]he DRP's prohibition of class actions and discovery limitations are consistent with the goals of 'simplicity, informality, and expedition' touted by the Supreme Court."[57] The court acknowledged that this holding conflicted with the Ninth Circuit's decision in *Ingle v. Circuit City Stores, Inc.*,[58] but the court distinguished *Ingle* because that case applied a California state law rebuttable presumption of unconscionability in employer/employee arbitration agreements.[59] Overall, the court's rejection of an entire inventory of anti-arbitration arguments can be read as a broad endorsement of employer/employee arbitration agreements.

In *Blinco v. Green Tree Servicing LLC*,[60] the court again short-circuited a putative class action in favor of arbitration.[61] In *Blinco* the plaintiffs brought a putative class action under the Real Estate

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50. *Id.* at 1373-76.
51. *Id.* at 1376.
52. *Id.* at 1376-77.
53. *Id.* at 1377-79.
54. *Id.* at 1378.
55. *Id.* (citing Saturna v. Bickley Constr. Co., 252 Ga. App. 140, 142, 555 S.E.2d 825, 827 (2001)).
56. *Id.*
57. *Id.* (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991)).
58. 328 F.3d at 1176.
59. *Caley*, 428 F.3d at 1378 n.21.
60. 400 F.3d 1308 (11th Cir. 2005) (per curiam).
61. *Id.* at 1310-13.

Settlement Procedures Act ("RESPA"),[62] and the court reversed a district court's denial of motions to compel arbitration of class actions.[63] The court did not consider the enforceability of a class action waiver but held that an arbitration provision in a promissory note signed by one spouse could be enforced against the non-signatory spouse under the doctrine of equitable estoppel.[64] The non-signatory spouse was a plaintiff who made RESPA claims that the court determined to derive from her status as a borrower under the note despite the fact that she did not sign the note.[65] The court also concluded that the arbitration provision was broad enough to require the plaintiffs to arbitrate their claims against non-signatory affiliates of the note holder, which were alleged to be servicers of the note.[66]

Together, this trio of decisions reinforces the impression that the Eleventh Circuit will not hesitate to enforce the FAA, even in the consumer and employment contexts where some courts have balked. A likely consequence of widespread use of arbitration provisions will be to reduce the number of class actions filed in the district courts.

62. 12 U.S.C. §§ 2601-2617 (2000).
63. *Blinco*, 400 F.3d at 1310-11, 1313.
64. *Id.* at 1312.
65. *Id.*
66. *Id.* at 1311-12.

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