

SPECIAL FEATURE

Arbitration Class Action Waiver Ruled Unenforceable

By William E. Hannum III



Kevin Brusie Photography

The Massachusetts Superior Court has ruled that a mandatory arbitration agreement in a consumer sales contract is unenforceable because it contains a class action waiver.

Feeney v. Dell, Inc. is notable in that it deviates from the U.S. Supreme Court's April decision in *Concepcion v. AT&T Mobility LLC*, which, if construed broadly, holds that the Federal Arbitration Act preempts state laws that prohibit arbitration agreements containing class action waivers.

Determining that *Concepcion* did not govern, Superior Court Judge Douglas A. Wilkins ruled that the class action waiver was unenforceable because it would not have been feasible for the consumer to pursue his claim on an individual basis.

The ruling has implications for Massachusetts employers because it informs the analysis that would likely take place if a class action waiver in an employment agreement were challenged in the Commonwealth.

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Background of 'Feeney'

The plaintiffs in *Feeney* sued Dell, Inc., in the Superior Court in 2003, claiming that Dell's collection of sales tax on optional service contracts violated the Massachusetts consumer protection law.

Dell sought to compel arbitration pursuant to the FAA based on the respective consumer contracts the plaintiffs signed at the time of their purchases. The consumer contracts provided that claims against Dell were to be resolved "exclusively and finally" by arbitration, and that the arbitration would be "limited solely to the dispute or controversy between" the consumer and Dell.

The case reached the Massachusetts Supreme Judicial Court in 2009. The SJC held that Dell's consumer contract — specifically the contract's mandatory arbitration provision and class action prohibition — was unenforceable because it violated Massachusetts public policy.

The SJC remanded the case to the Superior Court, where it was pending when the U.S. Supreme Court decided *Concepcion*.

'Concepcion'

Concepcion involved a dispute that arose in California between cell phone customers and AT&T Mobility LLC over AT&T's customer contract.

The contract contained an arbitration provision requiring all claims against AT&T to be brought in the customer's individual capacity and, therefore, not as a class action.

The customer contract specified: (i) if the parties proceeded to arbitration, then AT&T would pay all of the costs for non-frivolous claims; (ii) either party could bring a claim in small claims court in lieu of arbitration; (iii) AT&T was prohibited from seeking reimbursement for attorneys' fees; and (iv) AT&T would pay a minimum recovery amount of \$7,500 plus double the cost of attorneys' fees if the customer received an arbitration award greater than AT&T's last written offer.

Despite the arbitration provision of the customer contract, the plaintiff-customers sought to invalidate the class action waiver and pursue a lawsuit against AT&T for overcharged sales taxes.

The case reached the U.S. Supreme Court, which ruled in favor of AT&T and upheld the arbitration agreement and class action waiver.

The Supreme Court explained that the primary purpose of the FAA is to "ensur[e] that private arbitration agreements are enforced according to their terms" and that "[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute."

Accordingly, the Supreme Court concluded that states cannot require a procedure that is inconsistent with the FAA, even if it may be desirable for unrelated reasons.

'Feeney v. Dell, Inc.'

After the U.S. Supreme Court issued *Concepcion*, Dell sought to dismiss the

Feeney case based on federal preemption.

In sum, Dell argued that state courts must follow the Supreme Court's interpretation of the FAA and that *Concepcion* effectively overruled the SJC's decision in 2009 that the arbitration provision at issue was invalid.

Judge Wilkins disagreed. He determined that Dell's "arbitration agreement stands in stark contrast to the AT&T agreement in *Concepcion*, which had so many pro-consumer incentives that an individual consumer might be better off in arbitration than in class action."

In contrast, Wilkins said, the "Dell Arbitration Clause provides no incentives and simply requires arbitration of all disputes, even those that could not possibly justify the expense in light of the amount in question."

For those reasons, Wilkins found that

Concepcion was distinguishable and, as such, did not govern the outcome of the case.

When viewed in the employment context, *Feeney* is but one stitch in the patchwork of statutes, caselaw and agency policies bearing on the enforceability of arbitration agreements.

Recommendations for employers

The upshot of *Feeney* for Massachusetts employers is that employment agreements containing arbitration provisions with class

action waivers probably will not be deemed invalid per se.

Rather, it is likely that the courts will examine those provisions to determine if they provide employees with an adequate avenue for relief, as in *Concepcion*, or if they set forth a procedure that makes pursuit of relief impractical in light of such factors as the amount of damages being sought and the anticipated cost of pursuing a recovery, as in *Feeney*.

When viewed in the employment context, *Feeney* is but one stitch in the patchwork of statutes, caselaw and agency policies bearing on the enforceability of arbitration agreements.

Accordingly, employers are advised to consult with experienced labor and employment counsel in formulating and drafting arbitration requirements for their applicants and employees. **NEH**