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Salesman can't force class arbitration of his OT claim

Collective remedy not in employment agreement

By Eric T. Berkman
Lawyers Weekly Correspondent

A car salesman could not arbitrate wage and overtime claims on a class basis given that the arbitration clause in his employment agreement did not expressly authorize such a remedy, a Superior Court judge has ruled in a case of first impression.

Plaintiff Joseph McNamara claimed his employer, defendant Grieco Enterprises, failed to pay him and other commission-only salespeople overtime and Sunday hours in violation of state wage laws and demanded arbitration on behalf of himself and other class members.

When Grieco Enterprises filed an action in Superior Court seeking a declaration that only an individual remedy was available, McNamara argued in response that because the arbitration provision broadly referenced the Massachusetts Rules of Civil Procedure — which includes Rule 23, authorizing class actions — the provision should be read as authorizing class arbitration.

But Judge Rosemary Connolly disagreed.

"McNamara's logic is premised on the slenderest of reeds," Connolly wrote, issuing a declaratory judgment in Grieco's favor. "And like a slender reed, it must bend to the more persuasive logic upon which other courts faced with this issue based their decisions: that is, absent an express intent to submit class suits to arbitration a party cannot be compelled to do so and the court will not presume that such an intent existed."

The 13-page decision is *M. Grieco Enterprises, Inc. v. McNamara*, Lawyers Weekly No. 12-019-20. The full text of the ruling can be found at masslawyersweekly.com.

'Important decision'

One of Grieco's attorneys, Nicholas B. Carter of Boston, said the ruling is important in the wake of last spring's Supreme Judicial Court decision in Sullivan, et al. v. Sleepy's LLC, et al.

In that case, the SJC held that retail salespeople paid on 100-percent commission basis are entitled to separate additional payments at one and one-half times the minimum wage for overtime and Sunday hours, even when their commissions and advances on future commissions always at least equal the minimum wage through 40 hours and time-and-a-half in excess.

"That decision led to substantial exposure for many employers, including auto dealers," Carter said. "Many have had to pay out millions, if not tens of millions, to resolve disputes with their employees that arose because of Sleepy's."

But when there is an arbitration agreement in place, Carter said, Connolly's decision, by enabling an employer to argue that the provision permits only individual arbitration, makes it much less enticing for a plaintiff's lawyer to pursue the case.

"An employer is very interested in that outcome, and plaintiffs' attorneys presumably would be interested in knowing this analysis before embarking on litigation," Carter said.

Nicholas B. Carter

Christian G. Kiely

Plaintiff's counsel Joshua W. Gardner of Boston declined to comment on the record. But Nicholas F. Ortiz, a Boston attorney who represents employees in wage-and-hour claims, said a decision like Grieco makes it much more difficult for plaintiffs to pursue class arbitration.

Ortiz also noted that the 5th U.S. Circuit Court of Appeals held last month in Sun Coast Resources, Inc. v. Conrad that an arbitration provision making available "all remedies which might be available in court" was sufficient to allow class arbitration of a truck driver's wage and hour claims under the Fair Labor Standards Act.

"In the absence of a legislative change, plaintiffs will be unlikely to maintain a class arbitration ... unless there's some language like in the 5th Circuit case," Ortiz said.

Kevin V.K. Crick, who represents plaintiffs in employee and consumer class actions, said the decision helps ensure that individuals are not compelled to class arbitration if the language is ambiguous in that respect.

But he also said the ruling serves as a reminder for people to review all contracts carefully before signing them, particularly if they want to retain the option of becoming part of any possible future class arbitration.

"For individuals, one of the benefits of class actions is that sometimes a consumer or employee might not know that their rights were violated, and a class action can alert them to that," Crick said. "Without class actions, sometimes consumers and employees are unfortunately left in the dark."

Paul M. Harris of Boston, who represents auto dealers and other retailers on a variety of legal issues, said it was "refreshing" to see a judge spend the time and effort to analyze the law.

"Too many of the judges in the commonwealth have been letting these cases stand as class actions without any analysis of the law," he said, adding that the cases should, for the most part, remain as actions brought by the "single-employee plaintiff."

Alleged pay violations

McNamara took a job as a salesperson with Grieco in June 2017, working on a 100-percent commission/draw basis.

Upon joining the dealership, McNamara signed an at-will employment agreement and an agreement stating that binding arbitration would be used to resolve "all disputes that may arise out of the employment context" that would otherwise go to court. That included any tort, contract or statutory claims.

The agreement further stated that it was governed by the Federal Arbitration Act "in conformity with" the Massachusetts Rules of Civil Procedure and that the arbitrator was to be vested with authority to determine "any and all issues" pertaining to the disputes or claims raised.

McNamara left the company in May 2018 and, on Sept. 10, 2019, filed an arbitration demand regarding a statutory claim. Specifically, McNamara alleged that Grieco violated state provisions by failing to pay him additional amounts for overtime and Sunday work. He brought the action both individually and on behalf of a class of similarly situated individuals.

Three days later, Grieco filed a complaint in Superior Court seeking a declaratory judgment on the issue of whether the arbitration agreement provided for class action arbitration and whether that issue was a question for the arbitrator or for the court.

Grieco also sought an order compelling McNamara to proceed with arbitration on an individual basis only.

Ambiguous language

Connolly first addressed the issue of whether the arbitrator or a court has the power to decide whether an arbitration agreement permits class arbitration in the absence of express authorization for an arbitrator to do so.

She pointed out that, with bilateral arbitration, parties give up certain procedural rights in exchange for speed and efficiency, benefits that are frustrated by class arbitration, which not only introduces new risks and costs to both sides, but also raises due process concerns by adjudicating rights of absent class members with only limited judicial review.

"Because the answer to the question of whether an agreement permits class arbitration changes the nature of the underlying controversy, it is a substantive question to be resolved by the courts," the judge said.

As to whether the agreement in Grieco contemplated class arbitrations, Connolly found it did not.

"An arbitration agreement, like any contract, must express a mutual intent by the parties to be bound; and here the court must find an express intent to submit any class action dispute to arbitration," she said. "The Agreement here is silent on class arbitration. ... [S]ilence cannot be construed to mean consent because a class arbitration is a fundamental shift in the nature of the dispute(s) and must be based on mutual consent."

Connolly also stated that if she were to construe the provision's ambiguous language to include class arbitration, "unrepresented employees could be bound by an arbitration that he or she did not individually consent to participate in. Such a result is contrary to the legal underpinnings for arbitration, specifically that it is a consensual contractual matter."

When an agreement is silent or ambiguous as to the availability of class arbitration, she continued, "the court cannot compel arbitration."

Accordingly, Connolly concluded, Grieco was entitled to compel McNamara to arbitration solely on an individual basis.

M. Grieco Enterprises, Inc. v. McNamara

THE ISSUE Could a car salesman arbitrate wage and overtime claims on a class basis given that the arbitration clause in his employment agreement did not expressly authorize such a remedy?

DECISION No (Plymouth Superior Court)

LAWYERS Joshua W. Gardner of Gardner & Rosenberg, Boston (plaintiff)
Nicholas B. Carter and Christian G. Kiely, of Todd & Weld, Boston (defense)

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