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FEDERAL COURT REJECTS CLASS ACTION WAIVERS IN ARBITRATION CLAUSES

by
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Businesses routinely include arbitration provisions in their standard consumer contracts, and require individual rather than class-wide arbitration in order to preserve the simplicity and efficiency of the arbitral process. Most courts enforce these class-arbitration waivers, guided by the strong pro-arbitration policy of the Federal Arbitration Act.

Recently, however, the U.S. Court of Appeals for the First Circuit reached the opposite conclusion. In *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006), an antitrust class action, the First Circuit reversed a district court decision denying enforcement of Comcast's arbitration provision, but did so only by severing the class waiver and compelling class arbitration.

The First Circuit invalidated Comcast's class waiver on the ground that it would preclude the plaintiffs from vindicating their rights under the federal antitrust laws, thus "shield[ing]" Comcast from liability. *Id.* at 61. The court reasoned that plaintiffs could not afford to arbitrate individual antitrust claims valued in the thousands of dollars because the action would require hundreds of thousands of dollars in expert fees, and perhaps millions of dollars in attorneys' fees. *See id.* at 58-59. The First Circuit noted that four other circuits have upheld class-arbitration waivers, but dismissed them as involving "vastly different" claims under the federal Truth in Lending Act. *Id.* at 57.

In severing the class waiver, the First Circuit noted that the language that proscribed class arbitration was "*unless your state's laws provide otherwise*." *Id.* at 61 (capitalization removed; emphasis added by court). The court treated this language as "an unmistakable expression" that the prohibition on class arbitration was not an "indispensable condition of the arbitral forum." *Id.* at 61-62. The court believed that, in forcing class arbitration upon the parties despite the contrary terms of their agreement, it was "actually saving the arbitral forum—an outcome consistent with the federal policy favoring arbitration." *Id.* at 62. The court did leave open the possibility that Comcast could seek to withdraw the motion to compel arbitration before the district court. *See id.* at 63 n.25. Ultimately, Comcast did withdraw its motion, agreeing to waive further review of the First Circuit's decision and not to raise other customers' arbitration agreements to oppose class certification. *Kristian v. Comcast Corp.*, 2006 WL 1494580 (D. Mass. May 18, 2006).

By invalidating Comcast's class-arbitration waiver, the First Circuit aligned itself with the minority position advanced most prominently by the Ninth Circuit and the California Supreme Court. *See Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003); *Discover Bank v. Superior Court*, 113 P.3d 1100, 1109 (Cal. 2005). *See* Falk and Parasharami, *State High Court Condemns Arbitration Provisions That Don't Allow Class Actions*, Washington Legal Foundation LEGAL BACKGROUNDER, available at http://www.wlf.org/upload/032406LBFalk.pdf. *Kristian* represents a troubling outcome for businesses that

rely on arbitration provisions. It is possible to circumscribe *Kristian* narrowly to its facts: complex antitrust actions that require expensive expert testimony. If the ruling is viewed more expansively—as a number of lower courts have treated *Ting* and *Discover*—then many businesses may choose to abandon arbitration altogether. Class arbitration removes the benefits of arbitration—its speed, informality, and efficiency—while retaining its principal burden, the lack of meaningful appellate review.

Businesses would therefore be wise to guard against being forced into class arbitration—which appears far riskier than class litigation—by making clear in their contracts that a class-arbitration waiver is non-severable. Otherwise they, like Comcast, may be compelled to proceed in an unanticipated, high-stakes class arbitration subject to extremely limited review.

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