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Another appellate court weighs in on class action waivers

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Can an employer require its employees to resolve employment-related disputes through individual arbitration, waiving the ability to pursue class or collective proceedings? Insurers, like other employers, are waiting for the United States Supreme Court to answer this question in the upcoming term. In the meantime, however, lower courts around the country continue to reach divergent results.

The latest example of the tangled legal landscape on this issue comes from the New York Supreme Court Appellate Division (the intermediate appellate court for New York). In Gold v. New York Life Insurance Co., 2017 NY Slip OP. 05695 (July 18, 2017), New York Life Insurance Company required its agents to sign standardized contracts providing, among other things, that any claim or dispute with the company had to be arbitrated and could not be maintained "on a class action, collective action or representative action basis either in court or arbitration." When four agents brought a class action in state court for alleged wage and hour violations, New York Life moved to dismiss, relying on the class action bar in the plaintiffs' contracts.

Though the trial court dismissed the claims and compelled arbitration, the New York Supreme Court Appellate Division reversed, finding that the arbitration provisions in the contracts violated the National Labor Relations Act (NLRA) and were, thus, unenforceable. The court (over a dissent) sided with the Seventh and Ninth Circuits, both of whom have ruled in similar fashion. The Second, Fifth and Eighth Circuits (as well as the California and Nevada Supreme Courts) have gone the other way, finding such clauses enforceable. Certiorari has been granted in three of the federal cases and they have been consolidated for oral argument in early October. The Solicitor General's office, which originally weighed in on behalf of the employees, has done a 180 under the new administration and now supports the employers.

By some point in 2018, we should have a definitive resolution to the debate, which pits the Federal Arbitration Act (and the policy favoring enforceability of arbitration agreements) against the National Labor Relations Act (giving employees the right to engage in "concerted activity"). If the difference of opinion in the appellate cases and the Solicitor General's office is any indication, the likelihood of a unanimous Supreme Court decision is virtually nil.

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