SAN FRANCISCO
Daily Journal
www.dailyjournal.com

VOL. 119 NO. 008 FRIDAY, JANUARY 11, 2013

Laura Hautala / Daily Journal

Bryan J. Schwartz, a sole practitioner in Oakland, represents the plaintiff in an arbitration case.

Companies face risks of class arbitration in employee cases

By Laura Hautala
Daily Journal Staff Writer

When a company faces class action claims from employees, it normally won't hesitate in trying to enforce an arbitration agreement. But some employers who win the fight to arbitrate might be jumping out of the proverbial frying pan into the deep-fat fryer: class arbitration. It happened to VMware Inc., a technology company in Palo Alto that successfully compelled arbitration in an employment dispute with a worker who filed class claims. The company's agreement did not specifically ban class arbitration, so the arbitrator decided to consider certifying a class and hearing the claims together, according to court filings. Bryan J. Schwartz, a sole practitioner in Oakland who represents the plaintiff, said class arbitration is "a fairly brutal proposition for employers," pointing to the high cost and slow speed of the mass proceedings.

"They've got to be careful what they ask for," Schwartz said. VMware asked the judge who initially awarded arbitration to strike the arbitrator's decision, but the judge said in December it was not within his powers to do so. *Laughlin v. VMware Inc.*, CV11-530 (N.D. Cal., filed Feb. 3, 2011).

Though it's not clear how often arbitrators decide to hear these cases as class proceedings, parties currently have to guess what an arbitrator is likely to decide.

The uncertainty comes from a 2010 U.S. Supreme Court decision, which said arbitrators cannot construe contracts that are silent on the matter of class arbitration to tacitly allow the proceedings. While defense lawyers hoped that would prevent arbitrators from hearing class claims in many cases, the decision left some questions open, according to Paul Hastings LLP partner Paul W. Cane Jr. *Stolt-Nielsen S.A. et al. v. Animalfeeds International Corp.*, 130 US 1758 (2010).

"Some courts and arbitrators have taken silent agreements and reasoned through a variety of gymnastic exercises that the silent agreement really wasn't silent after all," Cane said. For example, an arbitrator might interpret an agreement that states "any and all types of disputes" must be settled in arbitration to include class claims, he said.

The high court accepted another case for review in the current session that attorneys on both sides expect to settle whether arbitrators can make this decision for parties "based solely on their use of broad contractual language." *Oxford Health Plans LLC v. John Ivan Sutter*, 11-1773.

For now, parties to some employment disputes might continue finding themselves in class arbitration, where the pressure to settle intensifies. And the downsides for employers can go beyond the cost — fees of roughly $700 per hour — to procedural drawbacks. For one, arbitration doesn't create a record that parties can later appeal. Often, companies are willing to take this

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risk for the speedy resolution promised by individual arbitration, Cane said, but the stakes are too high in a class arbitration.

Many plaintiffs' attorneys say the lack of a record hurts their clients more than it does the defense in an individual proceeding. But for employers in a class arbitration, "the shoe is on the other foot," said Victoria W. Ni, a senior attorney at Public Justice PC in Oakland.

What's more, the resolution might no longer be as quick as it is in individual proceedings.

"Class actions in courts move slowly," Cane said. "Class actions in arbitration move like glaciers."

Winston & Strawn LLP partner Joan B. Tucker Fife said class arbitration can still provide advantages for employers.

"You pretty much know who your judge is going to be, and you can anticipate what that looks like," Fife said. "I could certainly envision a circumstance where the employer is more comfortable with a selected arbitrator than they were with the judge that was selected for the case." She also said that a company might prefer class arbitration because it reduces publicity around the case, preventing other employees from filing "copycat" cases.

But, as in the VMware case, the prospect of class arbitration can give an employer "buyer's remorse" after compelling arbitration. Fife said that's an outcome attorneys should be prepared for. A case alleging violations of the California labor code against American Life and Accident Insurance Co. went to arbitration, but the arbitrator decided to continue the case for the group of all affected employees. The defendants asked the judge to reverse the decision, but just as in the VMware case, the judge left it up to the arbitrator. *Banford v. American Life and Accident Insurance Co.*, DS1017566 (San Bernardino Co. Super. Ct., filed Dec. 30, 2010).

"The lawyers should be advising the clients of the risk of demanding arbitration," Fife said.

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