NEW FEDERAL LEGISLATION RAISES MULTIPLE QUESTIONS REGARDING LITIGATION OF SEXUAL ABUSE AND SEXUAL HARASSMENT CASES AND AFFECTS RECENT STATE LEGISLATION

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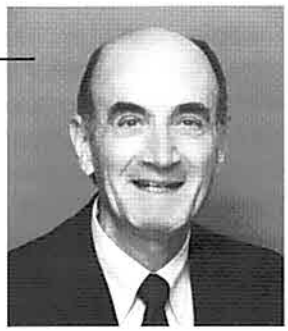

Federal law affecting predispute arbitration agreements in sexual assault and sexual harassment matters changed significantly in March of this year. This article discusses what those changes are or may be. It also addresses related California legislation.

THE FEDERAL LEGISLATION

Key provisions of the Federal Arbitration Act (FAA) are set out in chapter 1 of title 9 of the United States Code. Section 1 of this chapter contains definitions of terms, including of the term "commerce." Section 2, with exceptions not necessary for discussion here, has provided the federal statutory basis for arbitration of disputes: that the disputes involve contracts "evidencing a transaction in commerce" ... "save upon such grounds as exist at law or in equity for the revocation of any contract." At least, that was the reach of the FAA until section 2 was amended, effective March 3, 2022.

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (H.R. No. 4445, Pub.L. 117-90) (approved by the House of Representatives 335 to 97 and by voice vote in the Senate and enacted upon President Biden's signature on March 3, 2022) (the Act)), modified two sections of, and added a new chapter 4 to, title 9 of the United States Code. (Chapters 2 and 3 address procedures on enforcement of foreign conventions.)

The terms "predispute arbitration agreement," "predispute joint-action waiver," "sexual assault dispute," and "sexual harassment dispute" are defined in newly enacted chapter 4, section 401 of title 9. The term "sexual assault dispute" includes the breadth of offenses defined in section 2246 of title 18 of the United States Code, but also such "similar applicable [conduct defined in] Tribal or State laws...." The term "sexual harassment dispute" is defined as "a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law."

New section 402(a) of the same title and chapter provides that the person alleging conduct constituting either a "sexual assault dispute" or a "sexual harassment dispute," or the named class

representative for a such matter, may elect to proceed in court and thereby avoid a pre-dispute contractual provision mandating arbitration. This section applies both to claims as defined, and also to cases that "relate to" the defined claims. Arguably the quoted phrase expands the reach of the new law to include claims related to the underlying defined conduct such as claims for intentional infliction of emotional distress and wrongful termination that may be consequences of the expressly defined conduct.

This new statutory right to avoid a contractual term which otherwise would mandate arbitration of the types of disputes which are subjects of the Act applies "with respect to a case which is filed under Federal, Tribal, *or State law which relates to such a dispute.*" (Emphasis added.) (The impact of the just-quoted phrase is discussed below.) This right to elect to proceed in court rather than in arbitration applies "[n] otwithstanding any other provision of this title."

The Act also added as the concluding clause of section 2 of chapter 1 the following: "or as otherwise provided in chapter 4." With this amendment, section 2 now provides: "A written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4."

The amended concluding clause of section 2 and new chapter 4 represent, respectively, (1) an acknowledgment that the statutory preference for arbitration of disputes is now limited with respect to the subject matters defined in chapter 4; and (2) inclusion in the FAA, for the first time, of a provision for express preemption of any state law that may conflict with the option to disavow a predispute contractual commitment to arbitration of the disputes defined in chapter 4.

Readers of this article familiar with the history of expansion of the scope of the FAA over the decades (see, e.g., *Southland Corp. v. Keating* (1984) 454 U.S. 1) will recognize that, heretofore, application of the FAA had some boundaries, however ill-defined, notwithstanding the breadth and potential reach of its foundation in the commerce clause (U.S. Const., art. 1, § 8, cl. 3) and in application of the supremacy clause (U.S. Const., art. 6, cl. 2.) when a state law "directly conflicts with" section 2 of the FAA. (*Southland Corp.* at 10.) (The supremacy clause in fact addresses not just direct conflicts, but those that are implied and "obstacle preemption" as well.) It is the express addition of the term "State law" by the Act which can be understood to represent an increase (or clarification, perhaps) in the scope of the FAA, to expressly preempt state laws.

Indeed, this change in scope of the FAA can be taken to represent a significant development in its history and in the breadth of its application, one made without any legislative history to acknowledge the broadening of the scope of application of that statute. The FAA had been enacted "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." (*Volt Information Sciences, Inc. v. Bd. of Trustees* (1989) 489 U.S. 468, 474 [*Volt*].) The court in *Volt* pointed out that "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." (Id. at 477.) The term "involving commerce" in section 2 of the FAA is derived from article 1, section 8, clause 3 of the United States Constitution (see, e.g., *Perry v. Thomas* (1987) 482 U.S. 483, 489) and did not presume to extend the reach of the FAA to occupy the entire field of interstate commerce with respect to matters within its scope. (*Volt*, at 477.) (For a fairly robust discussion of the terms "involved in commerce" and "engaged in commerce" see *Circuit City Stores, Inc. v. Adams* (2001) 532 U.S. 105.) Now, as noted, the plain language of the amendments to the FAA made by the Act appear to expand the reach of the FAA beyond matters arising in "commerce" or "involving commerce," so that the FAA now also reaches all matters as stated in new article 4, including those arising under "State law."

At the time of its enactment, and for decades thereafter, the FAA was understood to relate only to matters of a procedural nature in federal courts. (See *Southland Corp. v. Keating*, *supra*, 454 U.S. at 465-ff. (dis. opn. of O'Connor, J. and Rehnquist, J.).) The expansion in the scope of the FAA discussed in *Southland* and developed in the cases that followed ushered in an era in which the FAA was applied to invalidate state statutes considered hostile to arbitration, that is, to invalidate state laws that stood as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (See *Hines v. Davidowitz* (1941) 312 U.S. 52, 67-68.)

While the Act represents a further expansion in scope of the FAA, with respect to the matters defined in article 4, its legislative history contains no recognition of the actual scope of this expansion. Thus, there is nothing in the Report of the Committee on the Judiciary (H.R.Rep. No. 117-234, 117th Congress, 2d Sess. [House Report]) that mentions potential impacts on state laws that address the same subject or interests as those addressed by the Act. The debate on the floor of the House of Representatives on H.R. 4445 focused on the perceived inequities of arbitration of sexual abuse and sexual harassment claims in contrast to trying those claims in a public forum before a jury. The proponents of the legislation did not address any federal-state jurisdictional questions as they advocated allowing all affected persons to make the election which is the subject of the Act; nor was there any indication that among the results of enactment of H.R. 4445 could be invalidation of state laws that addressed the same subject matter or any consideration of whether those state laws actually "[stood] as ... obstacle[]s to the accomplishment and execution of the full purposes and objectives of Congress." (*Hines v. Davidowitz, supra*, 312 U.S. at 67.)

The Act also represents a departure, limited in scope though it is, from the decades-long view of arbitration as a co-equal, if not the preferred, forum to the courtroom for resolving disputes. (See *14 Penn Plaza LLC v. Pyett* (2009) 556 U.S. 247, 266, quoting *Mitsubishi v. Soler Chrysler-Plymouth, Inc.* (1985) 473 U.S. 614, 626-627 [arbitration instead of litigation does not waive other rights; it waives only the right to seek relief from a court in the first instance].) In this regard, the legislative history of the Act is replete with expressions of the disadvantages to plaintiffs of arbitrating their sexual abuse and sexual harassment claims. The House Report focused on the lack of "transparency and precedential guidance of the justice system" when matters covered by the legislation are arbitrated, as well as on the possibility that, with arbitration of such matters, "there is no guarantee that the relevant law will be applied to these disputes or that fundamental notions of fairness and equity will be upheld in the process." (House Report, p. 3.)

The legislative history of the Act also presumed that, once the forum for the dispute was a courtroom, a jury would be available. However, the Act contains no mandate for jury trials of disputes subject to the parties' contract. As the Seventh Amendment jury trial provision applies only to federal proceedings (*Osborn v. Haley* (2007) 549 U.S. 225, 252, fn. 17, citing *Minneapolis & St. Louis R. Co. v. Bombolis* (1916) 241 U.S. 211, 217), whether a person opting out of a predispute arbitration clause would be entitled to trial by jury in a matter to be tried, e.g., in a California court, would depend on compliance with state procedures. (Section 4 of the FAA authorizes a jury trial on the threshold question of the existence of the underlying contract, but not for the underlying dispute. (See, e.g., discussion of *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20 in *E.E.O.C. v. Luce, Forward, Hamilton & Scripps* (9th Cir. 2003) 345 F.3d 742, 745 et seq.)) (These issues are raised not to criticize the expected salutary effect, which is the premise for the legislation, but instead to point out issues which arise with its enactment.)

In addition to the foregoing, the Act also does not resolve the issue of adjudication of cases presenting multiple claims. It is not uncommon for an aggrieved party to present multiple claims for relief in an effort to vindicate her or his rights, all of which are within the scope of the same agreement to arbitrate. While the Act presents the option to elect not to arbitrate the two categories of claims defined in section 401, it does not consider the impact of removing only those claims from arbitration. Even assuming the concluding clause of section 402(a) expands the scope of claims that may be elected to be litigated rather than arbitrated (see discussion above regarding the scope of section 402(a)), there may also be claims as to which the opt-out provision of the Act does not apply. Would those claims be stayed while the claims covered by the Act are litigated?

Consider the not atypical situation presented to the court in *Dean Witter Reynolds, Inc. v. Byrd* (1985) 470 U.S. 213 [*Dean Witter Reynolds*]. There, the United States Supreme Court held that the district court should have granted the broker-dealer's motion to compel arbitration of pendent state claims with the result that all claims were to be arbitrated together. (*Id.* at 223-224.) In the course of its analysis, the court reasoned: "The preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation, at least absent a countervailing policy manifested in another federal statute. [ ] By compelling arbitration of state-law claims, a district court successfully protects the contractual rights of the parties and their rights under the Arbitration Act." (*Id.* at 221.)

Such reasoning is challenged now that a claimant may elect to try covered claims in a courtroom while leaving other claims to arbitration. Thus, there is potential for piecemeal adjudication of the entirety of claims often alleged in the same complaint absent agreement by the other party to the arbitration agreement to forgo arbitration of the claims not specifically addressed in the Act (or not within its scope as expanded by section 402(a)). Whether the claims removed from arbitration or those which remain subject to arbitration are resolved first is an issue better resolved by agreement among the parties than litigated, at least until the order in which such sets of claims are likely to be resolved has been sorted out. (*Volt*, *supra*, 489 U.S. at 476 endorsed agreement among the parties to replace the procedures otherwise required under federal and state laws.)

The Act only applies to claims arising on or after the date of its enactment. Section 3 of the Act provides, "This Act, and the amendments made by this Act, shall apply with respect to any dispute or claim that arises or accrues on or after the date of enactment of this Act." If a claim is based on facts that originated prior to March 3, 2022, and which continued thereafter, it remains to be determined whether the claimant would be allowed to make the election allowed for the entirety of such claims or for only the portion that post-date the effective date of the Act.

It is perhaps an understatement to write that these and other issues regarding implementation of the Act are likely to be the subject of litigation in federal and state courts for some time.

ASSEMBLY BILL NO. 51

Assembly Bill (AB) 51, as relevant to this discussion, added section 432.6 to the Labor Code and section 12953 to the Government Code (a statute within the California Fair Employment and Housing Act (FEHA)). These new laws generally bar employers from requiring applicants or employees, as conditions of employment, to agree to arbitrate any claims under FEHA or the California Labor Code. (Additional provisions are omitted for brevity.)

A federal district court issued a preliminary injunction against enforcement of AB 51 insofar as "the entry into an arbitration agreement is covered by the [FAA]" based on the finding that AB 51 is "likely preempted by the FAA because it discriminates against arbitration and interferes with the FAA's objectives." (*Chamber of Commerce of the U.S. v. Becerra* (E.D. Cal. 2019) 438 F.Supp.3d 1078, 1107.)

The appeal in this case initially resulted in an opinion by the Ninth Circuit in which the court partially revived the state laws, reinstating the pre-employment choice of the prospective employee to waive the procedures set out in the Labor Code and FEHA. (*Chamber of Commerce of the U.S. v. Bonta* (9th Cir. 2021) 13 F.4th. 766.) However, on August 22, 2022, the court withdrew its opinion in the case and granted a rehearing.

The two statutory plans share a common thread — a focus on validating the plaintiff's right to pursue redress in a court rather than in arbitration for rather focused (the matters defined in section 402(a)) or more general (AB 51) claims. The provisions of the new federal law are a certainty. Whether all or parts of the state legislation will endure remains to be determined.