Legal Update Article

U.S. Chamber of Commerce Seeks En Banc Review of Decision on FAA Preemption and California's AB 51

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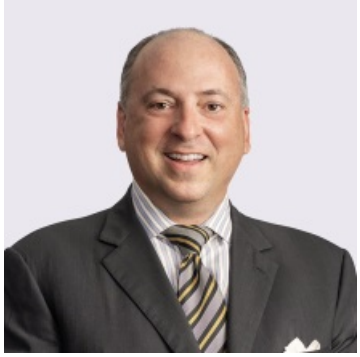

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As suggested by its previous motion, the U.S. Chamber of Commerce has filed a petition for rehearing *en banc* after a divided panel of the U.S. Court of Appeals for the Ninth Circuit found the Federal Arbitration Act (FAA) did not preempt California's ban on mandatory arbitration contracts, Assembly Bill 51 (AB 51).

Previously, a divided Ninth Circuit panel reversed, in part, the district court's order and vacated the district court's preliminary injunction precluding enforcement of AB 51 with respect to arbitration agreements governed by the FAA. *Chamber of Commerce of the U.S., et al. v. Bonta, et al.,* No. 20-15291 (9th Cir. Sept. 15, 2021). In its opinion, the Ninth Circuit concluded that the FAA does not preempt AB 51 to the extent AB 51 seeks to regulate an employer's conduct *prior* to executing an arbitration agreement. It held the FAA preempts AB 51 only to the extent AB 51 seeks to impose civil or criminal penalties on employers who have successfully executed arbitration agreements governed by FAA.

In its petition for *en banc* review, the Chamber echoes Judge Sandra Ikuta's vigorous dissent. Judge Ikuta said the Ninth Circuit's decision violates U.S. Supreme Court precedent as AB 51 runs afoul of the FAA because AB 51's threatened criminal and civil penalties create an obstacle to the FAA's pro-arbitration objectives and AB 51 discriminates against arbitration agreements by imposing a heightened consent requirement on such agreements. The Chamber also argues that the Ninth Circuit's decision creates a circuit split over the reach of FAA preemption. In contrast to the Ninth Circuit, the First and Fourth Circuits have held state laws that created obstacles in forming and discouraging arbitration agreements were preempted by the FAA. *Securities Indus. Ass'n v. Connolly,* 883 F.2d 1114 (1st Cir. 1989); *Saturn Distrib. Corp. v. Williams,* 905 F.2d 719 (4th Cir. 1990).

The Chamber's petition also emphasizes the widespread consequences of the Ninth Circuit's decision, as the decision affects "millions of workers" and "thousands of businesses" across California. As the Chamber highlights, these workers and businesses in many cases will be deprived of the benefits of arbitration: "faster resolution of disputes with lower litigation costs – and outcomes for employees that are just as good, and frequently better, than decisions in cases litigated in court."

While the Chamber's petition is pending, the district court's injunction against the enforcement of AB 51 remains in effect. Should the Ninth Circuit deny the Chamber's petition, the likely next step would be a petition for review by the U.S. Supreme Court. The Chamber also may move to stay the Ninth Circuit's decision becoming effective pending review by the U.S. Supreme Court.

Jackson Lewis attorneys will continue to track developments related to AB 51. If you have questions about the Ninth Circuit ruling or arbitration agreements, please contact a Jackson Lewis attorney to discuss.