DOES JUSTICE SCALIA'S DEATH SIGNAL THE FALL OF ARBITRATION?

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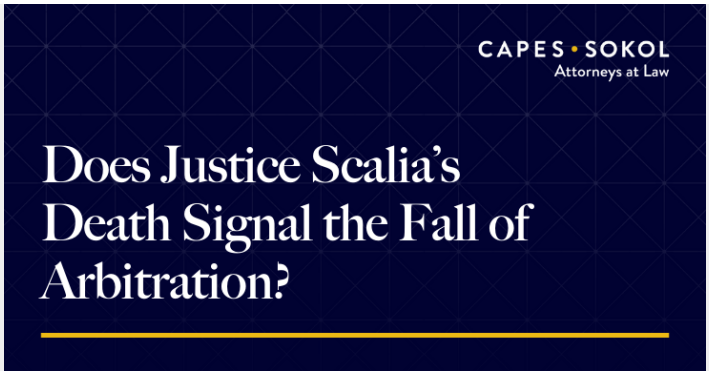

Justice Antonin Scalia was best known for his scathing opinions, often in cases split along ideological lines. Even in dissent, he often played integral roles in landmark appeals at the center of nation's attention, including *Obergefell v. Hodges* (gay marriage, dissent), *District of Columbia v. Heller* (gun rights, majority opinion) and *Planned Parenthood v. Casey* (abortion rights, partial concurrence and partial dissent).

Lesser known, however, was Scalia's impact on the scope of the Federal Arbitration Act. While the Supreme Court historically has not shied away from Federal Arbitration Act preemption issues, its opinions on the subject have been far from first page news. Though out of the national spotlight, rest assured that the Court's position on arbitration has always been closely monitored by the nation's largest corporations, who have taken advantage of the Court's multi-decade long tendency, predominately led by Justice Scalia, to enforce arbitration clauses and expand the scope of Federal Arbitration Act preemption.

Scalia and AT&T

For example, in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), Scalia authored the majority

opinion in a 5-4 decision split along traditional ideological lines. Following a class action lawsuit filed in a California Federal District Court, *AT&T* sought to compel arbitration. In response, the AT&T consumers argued that the subject arbitration clause contained a class action waiver that was unconscionable under California law.

Scalia and his conservative counterparts (Roberts, Kennedy, Alito, and Thomas) were not persuaded. The Court held that states must enforce arbitration agreements, even if those agreements compel complaints to be arbitrated individually—and not on a class action basis.

To suggest *AT&T* was anti-consumer is an understatement. Corporations, under *AT&T*, can now, in many circumstances, immunize themselves from class action litigation by including a waiver of the same within binding arbitration clauses. Because certain types of litigation are only cost-effective if brought as class actions, corporations can now avoid that type of litigation altogether through the use of arbitration clause waivers.

AT&T highlighted the ideological differences among the Court's conservative and liberal wings, as to the intent of the Federal Arbitration Act:

> *Contrary to the dissent's view, our cases place it beyond dispute that the FAA was designed to promote arbitration. They have repeatedly described the Act as embodying a national policy favoring arbitration and a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.*

Id. at 345-46 (Scalia, Majority Opinion).

> *Congress was fully aware that arbitration could provide procedural and cost advantages. . . But we have also cautioned against thinking that Congress' primary objective was to guarantee these particular procedural advantages. Rather, that primary objective was to secure the "enforcement" of agreements to arbitrate. . . Thus, insofar as we seek to implement Congress' intent, we should think more than twice before invalidating a state law that does just what §2 requires, namely, puts agreements to arbitrate and agreements to litigate upon the same footing.*

Id. at 361-62 (Breyer, Dissent).

In short, with Justice Scalia, the Court's slight 5-4 majority embodied the belief that the Federal Arbitration Act was meant to promote the use of arbitration, instead of merely regulating the judicial enforcement of arbitration agreements. Thus, it is undisputable that Justice Scalia's replacement could have a profound impact on whether the Court continues to expand the scope of Federal Arbitration Act preemption or slowly begins to rescind that multi-decade expansion. Given the Supreme Court's propensity to grant certiorari in arbitration matters, it will likely not be long, after Scalia's replacement is confirmed, before we know whether new battle lines have been drawn.