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Labor and Employment Law Bulletin

Supreme Court Validates Class Action Waiver Provisions in Arbitration Agreements

In our April 2010 issue of *Labor and Employment Law*, we discussed using mandatory arbitration agreements as one option for combating the proliferation of wage and hour class action litigation. Under these agreements, an employee is required to waive the right to bring or participate in any collective or class action lawsuit. In addition, such agreements often prohibit arbitration of class claims. Arbitration agreements can be equally effective in requiring arbitration on an individual basis of all types of employment-related claims. However, as we explained in our April 2010 newsletter, the enforceability of these agreements has been controversial and has been denied in some jurisdictions on "unconscionability" and public policy grounds.

One year ago, the Supreme Court held in *Stolt-Nielsen S.A. v. Animalfeeds International Corp.*, No. 08-1198 (Apr. 27, 2010), that class arbitration claims could not be brought where an arbitration agreement is silent on the issue. But the Supreme Court did not directly address the enforceability of arbitration provisions expressly disallowing class claims, and much uncertainty remained. For example, the Supreme Court remanded the Second Circuit Court of Appeals' decision in *In re American Express* to reconsider, in light of *Stolt-Nielsen*, its opinion denying enforceability of an arbitration agreement precluding class claims. On remand, the Second Circuit held that American Express's class action waiver provision in its merchant credit card arbitration agreement was still unenforceable because "the cost of plaintiffs individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws." *In re American Express*, No. 06-1871 (2d Cir. Mar. 8, 2011).

The United States Supreme Court, in its April 27, 2011 decision in *AT&T Mobility LLC v. Concepcion et ux*. (No. 09-893), now has upheld these types of mandatory arbitration agreements in consumer contracts.

In *AT&T*, the plaintiffs signed a wireless service agreement requiring arbitration of all disputes and that any arbitration claims be brought on an individual basis. Plaintiffs nevertheless filed a lawsuit in California federal district court alleging that AT&T engaged in false advertising and fraud by charging them $30.22 in sales tax for cell phones that were advertised as "free" upon agreement to a two-year contract term. The district court and Ninth Circuit Court of Appeals refused to compel arbitration, holding the arbitration agreement unconscionable under state law. Both courts relied heavily on the California Supreme Court's decision in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), which held that class action waivers could be unconscionable under certain circumstances, and praised the class action vehicle for deterring and redressing wrongdoings especially where a company is accused of defrauding numerous individuals out of small sums of money.

In a 5-4 decision, the Supreme Court majority, led by Justice Antonin Scalia, reversed the Ninth Circuit's decision and held that the Federal Arbitration Act (FAA), reflecting a broad federal policy promoting arbitration, preempts the California

Supreme Court class action waiver rule set forth in the *Discover* decision. The Court explained "'the principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.'" The Court found that the California Supreme Court's rule interfered with this goal by permitting plaintiffs to bring class actions in spite of an agreement's clear language prohibiting class treatment. The Court also found that requiring the availability of classwide arbitration would frustrate the benefits of arbitration fostered by the FAA by increasing costs, formality and delay. More generally, the Court questioned the appropriateness of class arbitrations in light of the significant stakes involved in class litigation, limited appeal options for challenging an arbitrator's certification decision and qualifications of arbitrators to make such certification decisions.

The holding and rationale in *AT&T* would appear to apply equally to employment-related claims and to eliminate challenges to the enforceability of such arbitration agreements on grounds of "unconscionability" under state law. However, *AT&T* did not address the Second Circuit's denial of enforceability under public policy grounds in *American Express*, and the dissenting justices in *AT&T* echoed the concern "that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system." But, the AT&T majority disagreed, making it clear that "[st]ates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." At a minimum, *AT&T* appears to have limited the types of public policy arguments employees may make to avoid the enforceability of class action waivers.

Employee advocates will undoubtedly interpret the majority's opinion in *AT&T* as an attack on consumer and employee rights. Legislation seeking to bar all mandatory arbitration provisions that require arbitration of employment-related claims will likely be reintroduced in Congress. But passage of such legislation is unlikely while there is a Republican majority.

The Supreme Court also is expected to issue another significant class action decision this summer in *Dukes v. Wal-Mart*. Employers are hopeful that in *Dukes*, the Court will bring some order and consistency to class action certification analysis and, in particular, the permissible scope of certified classes. However, even a favorable decision in *Dukes* will not eliminate class actions.

Accordingly, in the wake of *AT&T*, employers may wish to re-evaluate the appropriateness of implementing mandatory arbitration agreements depending on their specific circumstances. Employers with mandatory arbitration systems already in place may also want to consider adding a class action waiver provision. As mentioned in our April 2010 newsletter, numerous other benefits may be gained through mandatory arbitration including protecting confidentiality, participation in the choice of arbitrator, elimination of juries and reduction of litigation costs. We will keep you updated on any developments.

Vedder Price is adept and experienced at analyzing the feasibility, pros and cons and implementation of mandatory arbitration programs. If you have any questions about state and/or federal class actions or mandatory arbitration programs, please call **Thomas G. Abram** (312-609-7760), **Joseph K. Mulherin** (312-609-7725), **Neal I. Korval** (212-407-7780) or **Amy L. Bess** (202-312-3361).

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