SUTHERLAND

LEGAL ALERT

February 28, 2013

Arbitration and Class Action Waiver Issues Again Before the Supreme Court

The U.S. Supreme Court heard oral argument yesterday in the first of two cases to be argued this term again raising questions regarding the enforceability of arbitration agreements and class action waivers. These cases continue the Court's recent focus on arbitration and related class action issues. The first case, *American Express Co. v. Italian Colors Restaurant*, 12-133 (*Amex*), follows the Supreme Court's 2011 decision in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (U.S. 2011) which upheld the enforceability of class action waivers contained in arbitration provisions. (For a transcript of the oral argument, click here.) Later this term, the Court will hear *Oxford Health Plans LLC v. Sutter*, 12-135, a follow-up to *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758 (U.S. 2010), holding that an arbitrator may not compel class arbitration under the Federal Arbitration Act (FAA) unless the underlying agreement between the parties provides specifically for a class action remedy.

American Express Co. v. Italian Colors Restaurant

In *Amex*, the Court was asked to review a Second Circuit decision holding that a mandatory class action waiver in an arbitration provision was unenforceable where the plaintiffs established that enforcement of the waiver would prevent them from vindicating federal statutory rights, specifically antitrust laws. *See In re American Express Litigation*, 667 F.3d 204 (February 1, 2012). (For a copy of the Second Circuit's opinion, click here.) The Second Circuit found that if the class waiver were enforced, "the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws." The court held that this fact rendered the arbitration provision and class waiver unenforceable based on language from *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), which stated that where "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." The Second Circuit found that plaintiffs had met that burden, and that the provision was unenforceable because otherwise "[t]he defendant will thus have immunized itself against all such antitrust liability by the expedient of including in its contracts of adhesion an arbitration clause that does not permit class arbitration."

Petitioner Amex has argued that the Second Circuit's decision was contrary to the FAA's "core mandate" that arbitration agreements be enforced according to their terms. Amex also expressly argued that the Second Circuit's decision contravenes the Supreme Court's 2011 decision in *Concepcion*, in which the Court held that the FAA preempted a California state court doctrine under which class action waivers in consumer arbitration agreements in most consumer and employment contracts had been held to be *per se* unconscionable. According to Petitioner, *Concepcion* was not limited to state law claims and foreclosed the "vindication of statutory rights" rationale adopted by the Second Circuit. Amex contended that the statement in *Randolph* regarding vindication of statutory rights was *dicta* (the Court had rejected a cost-related challenge to an arbitration provision in that case), and that *dicta* cannot override the mandate of the FAA and *Concepcion*. The Second Circuit's "labored efforts" to "evade" *Concepcion* were without merit, said Amex, because the Second Circuit ruling would prevent bilateral arbitration and force the Amex to either accept class arbitration or no arbitration at all.

Respondents, a group of merchants who contracted with Amex to accept its credit cards and related products, took the position that an arbitration provision with a class action waiver clause should be

unenforceable where a litigant would be unable to effectively vindicate its federal statutory rights in the arbitral forum. In line with the Second Circuit's opinion, Respondents have relied on the language in *Randolph* to argue that arbitration agreements should not be enforced when prohibitive costs would prevent the effective vindication of federal statutory rights in the arbitral forum, and that the effective vindication rule is consistent with the Supreme Court's prior arbitration decisions. They argued that an effective vindication rule is not inconsistent with *Concepcion* because it does not condition the enforcement of arbitration agreements on the availability of class procedures. Respondents also emphasized that *Concepcion* involved a conflict between the FAA and a competing *state* law, while in *Amex* there is a competing *federal* law, a difference which they contend is fundamental and compels a different result. Respondents pointed out that they are not arguing that the effective vindication doctrine should apply to competing state laws. The Solicitor General filed a brief and argued as amicus curiae in support of Respondents.

At oral argument, Justices Ginsburg and Kagan opened the questioning by challenging Amex's attorney on whether the arbitration provision functioned as an exculpatory clause and should be declared unenforceable. Justice Breyer, along with Justice Kennedy and Chief Justice Roberts, raised a number of issues about the costs of vindicating one's rights in the arbitral forum, and whether there would be a workable standard for striking down class waivers on that basis. Justice Breyer suggested that it would be an "odd doctrine" if the Court were to establish a cost-based standard for application on a case-by-case basis, because plaintiffs could seek to avoid arbitration simply by alleging "far out" theories that are "expensive enough" to prove. Chief Justice Roberts queried whether it would be possible to find ways to fund arbitration of antitrust claims on a non-class basis, such as through a trade association. Justice Scalia seemed to side with Amex, noting that small claims are not always practical to bring and that "[n]obody thought the Sherman Act was a dead letter, that it couldn't be vindicated" in the "years before there was such a thing as [a] class action in Federal Courts." Justice Sotomayor, who was on the Second Circuit panel assigned to the case before her elevation to the Supreme Court, recused herself.

The *American Express* antitrust litigation has been back and forth between the Second Circuit and the Supreme Court for more than two years on the arbitration issue. The litigation began as a consolidated class action, with Plaintiffs alleging that the merchant contract they each signed with Amex violated the Sherman Antitrust Act. *See In re American Express Merchants' Litigation*, No. 03-CV-9592, 2006 WL 662341 (S.D.N.Y. March 16, 2006). The merchant contract contained an arbitration provision that required all claims "arising from or relating to [the] Agreement" to be resolved by arbitration. The contract also contained a class action waiver that purported to preclude merchants from bringing or participating in class actions regarding issues subject to arbitration.

The U.S. District Court for the Southern District of New York granted Amex's motion to compel arbitration, but held that the enforceability of the class action waiver was an issue for the arbitrator to decide. On appeal, the United States Court of Appeals for the Second Circuit reversed and held that the class waiver was unenforceable. *See* 554 F.3d 300 (2d Cir. 2009) (*Amex I*). In a May 3, 2010 order vacating the judgment and remanding the case, the Supreme Court instructed the Second Circuit to reconsider the case in light of the Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corporation.* There the Supreme Court held that imposing class arbitration on parties who have not agreed specifically to class arbitration is inconsistent with the Federal Arbitration Act, 9 U.S.C. § 1 et seq. On remand, the Second Circuit found its original analysis unaffected by *Stolt-Nielsen* (*Amex II*). Then, following the Supreme Court's decision in *Concepcion*, the Second Circuit accepted supplemental briefing from the parties and found the class action wavier unenforceable for a third time. The Second Circuit opined that "what *Concepcion* [does] not do is require that all class-action waivers be deemed per se enforceable," and it continued to rest its decision on "a vindication of statutory rights" analysis, holding that a mandatory

class action waiver clause is unenforceable if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to bring federal antitrust claims. (*Amex III*). The Supreme Court has now taken up these issues.

Oxford Health Plans LLC v. Sutter

Later this term, the Supreme Court will take up arbitration issues again in *Oxford Health Plans LLC v. Sutter*, where the Supreme Court is poised to resolve a circuit spilt regarding agreements to class arbitration following the Court's decision in *Stolt-Nielsen v. AnimalFeeds International Corp.*, 130 S. Ct. 1758, 1776 (2010).

The Supreme Court declared in *Stolt-Nielsen* that "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to arbitration." Accordingly, the Supreme Court held "that a party may not be compelled under the [FAA] to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." 130 S. Ct. at 1775 (emphasis in original). The Supreme Court, however, declined "to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration." *Id.* The issue presented in *Sutter* is whether the parties' use of broad contractual language precluding litigation and requiring arbitration of any dispute arising under their contract may be interpreted by an arbitrator, consistent with the FAA, as an agreement to class arbitration.

In *Sutter*, Petitioner Oxford Health Plans LLC (Oxford) entered into an employment agreement with Respondent, Dr. Sutter (Sutter), that contained an arbitration provision stating that "[n]o civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be subject to final and binding arbitration . . ." (emphasis added). When Sutter filed a putative class action against Oxford, Oxford successfully moved to compel arbitration under the agreement. Before the arbitrator, the parties disputed whether their agreement permitted class arbitration. The arbitrator concluded, among other things, that the broad language in the agreement authorized class arbitration because the language "any civil action" would include class action suits. Oxford argued to a district court judge and then to the Third Circuit that the arbitrator's interpretation was wrong because the arbitration agreement did not address or mention class arbitration. Both courts, however, rejected Oxford's argument, and instead deferred to the arbitrator's interpretation, which read into the arbitration provision an intent by the parties to include class arbitration. Specifically, the Third Circuit concluded: "We are satisfied that the arbitrator endeavored to interpret the parties' agreement within the bounds of the law, and we cannot say that his interpretation was totally irrational." *Sutter v. Oxford Health Plans LLC*, 675 F.3d 215, 225 (3d Cir. 2012).

The Third Circuit's decision in *Sutter* is consistent with the Second Circuit's decision in *Jock v. Sterling Jewelers Inc.*, 646 F.3d 114 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 1742 (2012) and in conflict with the Fifth Circuit's decision in *Reed v. Florida Metro. Univ.*, Inc., 681 F.3d 630 (5th Cir. 2012). In *Reed*, the Fifth Circuit held that language in an arbitration provision covering "any dispute" and making available "any remedy" failed to evidence the parties' agreement to authorize class arbitration.

Together, *Amex* and *Oxford* demonstrate the Supreme Court's continued attention to arbitration and class action waiver issues, and gives the Court an opportunity to consider the scope of its recent decisions in *Concepcion* and *Stolt-Nielsen.*

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