2013 Supreme Court Decisions Affecting Class Waivers in Employment Arbitration Agreements

By Kathlyn Perez Bethune

With the rise in multi-plaintiff litigation in the employment arena, especially Fair Labor Standards Act collective actions, employers are eager to identify strategies to manage their class, mass and collective action exposure and associated costs. As a result, more and more employers are requiring employees to sign arbitration agreements as a condition of employment. Under these agreements, employees agree that any claims arising out of their employment will be resolved in arbitration, rather than by the courts. Increasingly, class and collective action waivers have also been included in these agreements, requiring that claims in arbitration proceed on behalf of an individual employee, rather than as a class or collective action.

Two 2013 Supreme Court decisions provide guidance to employers seeking to enter into arbitration agreements with employees, including those containing class waivers. However, because neither of these arbitration cases arose in the employment context, some uncertainty still exists regarding the enforceability and bounds of class waivers in arbitration agreements with employees. The Supreme Court may ultimately be called upon to weigh in on class waivers as they specifically relate to employment laws.

***Oxford Health Plans LLC v. Sutter,* 569 U. S. ____ (2013), 2013 WL 2459522 (June 10, 2013).**

The very first sentence of *Sutter*, penned by Justice Kagan, sums it up: "Class arbitration is a matter of consent: An arbitrator may employ class procedures only if the parties have authorized them." *Id.* at *1 (citing *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.,* 559 U. S. 662, 684 (2010)).

Dr. Sutter was a pediatrician who provided medical services to members of Oxford's health insurance network. The contract between Oxford and Sutter included a broad arbitration agreement that provided: "No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration ...." Despite the absence of any explicit reference to class arbitration in the agreement, the arbitrator in *Sutter* interpreted the phrase "all such disputes" to include class claims, and he therefore concluded that the text of the agreement authorized class arbitration.

Oxford argued that the arbitrator's decision allowing class arbitration should be vacated, relying on the Supreme Court's 2010 decision in *Stolt-Nielsen SA v. AnimalFeeds International,* 130 S. Ct. 1758 (2010), which it claimed held that arbitration could not proceed on a class-wide basis without a "*sufficient contractual basis*" that the parties intended class arbitration. *Id.* at * 6. In *Stolt-Nielsen*, 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." 559 U.S. at 684 (emphasis added). There, the parties had stipulated that they had never reached an agreement on class arbitration, and therefore the Supreme Court held that an arbitration panel had exceeded its powers when it ordered a party to submit to class arbitration.

In *Sutter,* the Supreme Court refused to overturn the arbitrator's decision, holding that the arbitrator had not exceeded his authority in authorizing class arbitration. *Id.* at *6. The Court distinguished its *Stolt-Nielsen* decision to "overturn the arbitral decision there because it lacked *any contractual basis* for ordering class procedures, not because it lacked in Oxford's terminology, *a 'sufficient' one." Id.* (emphasis added).

Sutter offers an important reminder to employers: in drafting arbitration agreements, your intent should be clear from the text of the agreement so arbitrators cannot read into the agreement a result the parties never intended. Courts generally will not overturn an arbitrator's decision unless there is literally no contractual basis for the arbitrator's decision. If an employer and employee intend to preclude class treatment of claims that arise under the agreement, then best practice—and the best way to avoid arbitrator misinterpretation—is to simply and clearly say so.

***American Express v. Italian Colors Restaurant,* 570 U. S. ____ (2013), 2013 WL 3064410 (June 20, 2013).**

On June 20, 2013, the Supreme Court released *American Express Co. v. Italian Colors Restaurant,* a class action case brought by merchants challenging an alleged American Express tying arrangement as violating federal antitrust law. The plaintiffs all signed agreements to arbitrate with American Express that included a class action waiver, but they argued they should not be bound by the waiver because the only financially viable way to pursue an antitrust claim would be via a class action. Without the class action vehicle, plaintiffs claimed that there would be no incentive to challenge American Express's arguably illegal practices.[1]

Like *Sutter*, the opinion, written by Justice Scalia, starts from the basic tenet that arbitration is a matter of contract law. Consistent with contract interpretation principles, the Supreme Court has stated its support for "'rigorously enfor[cing]' arbitration agreements according to their terms." Id at *3 (citing *Dean Witter Reynolds Inc. v. Byrd,* 470 U. S. 213, 221 (1985)). In *American Express*, the contract between the parties was clear: there "shall be no right or authority for any Claims to be arbitrated on a class action basis." Given this clear language and the mandate that the contract should be interpreted according to its terms, the Supreme Court held that parties can, via arbitration agreements, agree to waive the right to bring a class action, even where doing so would be the only financially viable way to bring a claim.

Upon finding that the plaintiffs agreed to waive their rights to bring a class action, the Court addressed what is known as the "effective vindication" exception to enforcing an arbitration agreement: for "public policy" reasons the court may still invalidate the agreement if it operates "as a prospective waiver of a party's right to pursue statutory remedies." *Id.* at *6 (emphasis in original) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 628 (1985)).

The plaintiffs argued that enforcing the waiver was against public policy because without the class action procedure, they would be denied "effective vindication" because there would be "no economic incentive to pursue their antitrust claims

individually in arbitration." *Id*. at *5. However, the Supreme Court found this argument unpersuasive, noting that the effective vindication exception precluded a "prospective waiver of a party's right to *pursue* statutory remedies." *Id*. at ___ (quoting *Mitsubishi Motors*, supra, at 637, n. 19) (emphasis added by Court in *American Express*). The plaintiffs clearly retained the opportunity to bring their antitrust claims, just not in a court and not as a class action.

The Court emphasized that the "effective vindication" exception could apply if the parties had prospectively waived *any right* to bring a claim, or the filing fees and administrative costs of arbitration were so high that the plaintiffs did not have access to the forum. However, the Court distinguished the opportunity to pursue a claim from the opportunity to successfully pursue a claim: the fact that "it is not worth the expense involved in proving [the claim] does not constitute the elimination of the *right to pursue* that remedy." *Id.* at at 5, 7 (emphasis in original).

The dissent, written by Justice Kagan, harshly criticizes the reasoning and result of the majority opinion. Arguing that the merchants' antitrust cases (brought individually) would be a "fool's errand" resulting in no effective vindication of their substantive rights, the dissent characterizes the majority's holding as "a betrayal to our precedents, and of federal statutes like the antitrust laws." Dissent at *1. This reasoning is perhaps difficult to rectify with Justice Kagan's majority opinion in *Sutter*, which relied as a principle tenant on the fact that "[a] n arbitrator may employ class procedures only if the parties have authorized them." *Sutter* at *1 (citing *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.,* 559 U. S. 662, 684 (2010)). While *Sutter* did not raise issues of "effective vindication," the dissent in *American Express* certainly strays from the notion that the parties' agreement to employ or waive the class action procedure controls.

How Will These Rulings Be Interpreted in the Employment Context?

Sutter (and its predecessor *Stolt-Nielsen*) suggests that the best practice for employers seeking to avoid employee class and collective actions is to provide that exclusion clearly in the arbitration agreement. Under *American Express*, explicit class action waivers with employees should generally be upheld, even where the practical result maybe to discourage pursuit of a claim.

However, *American Express* does not give employers carte blanche to impose onerous arbitration agreements and class waivers on employees. Employers need to keep in mind that the "effective vindication" theory (though undercut by *American Express*) is still alive and well. The limits of the doctrine are unclear because the Supreme Court did not use it to invalidate the arbitration agreement in that case, but it did leave the door open for the exception to apply where an arbitration agreement prospectively waives the right to pursue a claim at all. Depending on the facts of the case, high arbitration costs, or an onerous choice of venue or law provision could preclude a litigant from effectively vindicating a federal statutory right. *Green Tree Financial Corp.-Ala. v. Randolph* 531 U. S. 79, 90 (2000); *see also Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc*., 473 U.S. 614, 637 n.19 (1985). Also, any attempt to require an employee to waive certain types of damages that are specifically allowed by federal statute, shorten the statute of limitations or improperly shift fees/costs to the employee may be subject to challenge. *See e.g. Booker v. Robert Half Int'l, Inc*., 413 F.3d 77 (D.C. Cir. 2005) (invalidating clause in arbitration agreement purporting to waive punitive damages for racial discrimination claim). But, *American Express* holds that the mere fact that the potential damages for a federal employment claim do not make the case financially attractive is insufficient to invalidate an otherwise lawful arbitration agreement.

Some federal agencies and courts may attempt to distinguish *American Express* because it is not an employment case. For example, prior to the *American Express* decision, the National Labor Relations Board took the position that the mere existence of a broad class waiver in an employee arbitration agreement constitutes a violation of the National Labor Relations Act because it purportedly requires employees to waive their statutory right to engage in concerted activity. *In re D.R. Horton, Inc.,* 357 NLRB No. 184, 2012 WL 36274 (Jan. 3, 2012). The *American Express* case was decided while *D.R. Horton* was pending before the Fifth Circuit. In response to the Supreme Court's ruling, the NLRB submitted a letter to the Fifth Circuit attempting to distinguish *American Express* because it does not "address that core NLRA right" to "pursue work-related claims concertedly in a judicial or arbitral forum." Fifth Circuit Case No. 12-60031, R. Doc. 00512287456 (Filed 06/26/2013).

The Fifth Circuit's decision in *D.R. Horton* has been much anticipated, and is still pending at the time of this writing, but its significance is falling behind the curve given that several federal circuits have declined to follow the NLRB's *Horton* decision and have specifically upheld the waiver of class or collective actions in employee arbitration agreements. This is especially true in light of the *American Express* ruling. The general consensus seems to be that "even if Congress intended to create some 'right' to class actions, if an employee must affirmatively opt in to any such class action [as with an FLSA case], surely the employee has the power to waive participation in a class action as well." *Owen v. Bristol Care, Inc*., 702 F.3d 1050, 1053 (8th Cir. 2013); *see also Vilches v. Traveler's Cos.,* 413 F. App'x 487, 494 n.4 (3d Cir. 2011); *Horenstein v. Mortg. Mkt., Inc.*, 9 F. App'x 618, 619 (9th Cir. 2011); *Caley v. Gulfstream Aerospace Corp.,* 428 F.3d 1359, 1378 (11th Cir. 2005); *Carter v. Countrywide Credit Indus. Inc.,* 362 F.3d 294, 298 (5th Cir. 2004); *Adkins v. Labor Ready, Inc.,* 303 F.3d 496, 503 (4th Cir. 2002).

To avoid the "effective vindication" argument related to an employee's statutory right to make a complaint to an administrative agency, arbitration agreements should not attempt to waive employees' rights to file a complaint with the EEOC, NLRB or other federal, state or local agencies designated to investigate complaints of harassment, discrimination or other statutory violations. *Owens*, 702 F.3d at 1051. The agencies then have the right to bring suit against the employer in the name of the agency, which right is unaffected by any agreement between the employee and the employer.

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Given the recent Supreme Court rulings further bolstering the FAA and the use of arbitration agreements, employers should consider their options in pursuing a mandatory arbitration agreement with employees. Though not bullet-proof, the following may be relevant to a factual determination of whether an employment arbitration agreement and/or class waiver will be upheld or invalidated under current case law:

1. Does the arbitration agreement express a clear intent to waive an employee's right to bring a class or collective action against the employer?
2. Does the arbitration provision allow employees to redress complaints through government agencies, such as the EEOC, DOL or NLRB?
3. Would pursuing arbitration result in an employee being unable to bring a claim because it would be cost-prohibitive?
4. Does the arbitration provision require fee shifting in favor of the prevailing party, thus making the employee liable for fees and costs if the employer prevails?
5. Does the arbitration provision attempt to take away statutory rights from the employee, such as choice of venue, choice of law, available remedies, shortened statute of limitations, etc.? ■

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Endnotes

[1]*American Express* builds upon the 2011 Supreme Court decision in *AT&T Mobility v. Concepcion*, 563 U.S. ___, 131 S. Ct. 1740 (2011), which held that a California state law prohibiting contracts that unfairly exculpate one party from its wrongdoing, such as class action waivers in consumer contracts, could not usurp the FAA and invalidate the class action waiver plaintiffs' agreed to in their contract. *American Express* applied that holding to class waivers related to federal law claims.