PUBLICATION

The Supreme Court Giveth and The Ninth Circuit Taketh Away: Recent Arbitration Rulings Incent Employers to Review Their Agreements

May 13, 2010

The Supreme Court's Opinion

On April 27, 2010, the United States Supreme Court decided *Stolt-Nielsen S. A., et al. v. AnimalFeeds Int'l Corp*., No. 08-1198 (2010), which delivers good news to employers that require their employees to sign arbitration agreements. While not an employment case, *Stolt-Nielsen* holds that the Federal Arbitration Act prohibits parties from being forced to arbitrate class claims against their will. Here, because the parties' arbitration agreement in their contract was silent as to whether they were agreeing to arbitrate class claims, the Court held that, as a matter of contract law, it was improper to infer that the parties' intent was otherwise. Notably, the dissent wanted the opinion to be limited to arbitration agreements negotiated between sophisticated parties, as was the case between the businesses in the case. Although this limitation was not adopted by the majority, employers should be aware that plaintiff's lawyers trying to arbitrate employment class or collective actions in a similar context may seek to distinguish this case as on the ground that employment disputes typically involve parties with unequal bargaining power. Accordingly, employers would be wise to plainly disallow class or collective claims in their arbitration agreements.

The Ninth Circuit's Ruling

The parties' relative bargaining power was a compelling factor in another case concerning arbitration agreements, this one decided by the Ninth Circuit Court of Appeals. In *Pokorny v. Quixstar, Inc*., No. 08-15880 (Apr. 20, 2010), Quixstar required its distributors to enter into agreements, under Michigan law, that included a three-step ADR process for dispute resolution. When Quixtar was sued in a purported class action for allegedly operating an illegal pyramid scheme, it sought to have the case submitted to arbitration pursuant to its standard ADR agreement. The trial court held that the ADR agreement was unconscionable, in that it lacked procedural and substantive due process. On appeal, the Ninth Circuit agreed.

The Ninth Circuit held that the agreement was procedurally unconscionable because there were no negotiations over its terms; rather the agreement was presented on a "take it or leave it" basis. Further, because Quixtar retained the right to amend the rules pertaining to ADR at any time, the Court found it substantively unconscionable.

The Ninth Circuit then carefully identified numerous other problems raised by the ADR agreement:

1. The agreement lacked mutuality. Distributors were required to resolve disputes under the ADR process, but Quixtar was not.
2. Quixtar's non-binding conciliation program provided only Quixtar with insight into the plaintiff's case, not visa-versa.
3. The agreement contained unfair time restrictions. Distributors were precluded from starting arbitration until at least 90 days after the claim arose and were limited to a two-year statute of limitations. Quixtar was not similarly limited. Accordingly, Quixtar could delay the claim until after the statute of limitations had run against the distributor.

4. The agreement contained a unilateral confidentiality provision. Quixtar was not bound by the confidentiality provisions.
5. In addition, the arbitrator selection process was unfair. Quixtar's distributors had the choice of selecting a "Quixtar-trained" arbitrator, whose fees were capped, or a non-Quixtar-trained arbitrator, with no fee cap.
6. Finally, the ADR Agreement's fee-shifting clause put the distributors at risk of incurring greater costs than they would bear if they were to litigate in court.

Given the totality of substantive and procedural due process issues, the Ninth Circuit refused to sever any of the provisions, finding that the agreement was "too tainted to be saved through minor adjustments" and was the "'permeated with unconscionable provisions.'"

One can imagine that Quixtar went to great effort and expense to create an ADR procedure that would save it time, public exposure and avoid the uncertainty of the court system. However, in order to enforce arbitration or ADR agreements, at least in the Ninth Circuit, mutuality of obligation is of great importance to the courts. In this case, it is possible that the Ninth Circuit would not have taken issue with so much of the agreement had Quixtar been bound to play by the same "rules" that it imposed on the other party to the contract.

We can help you navigate these and other changes to arbitration law. If you need assistance with this or any labor and employment issue, do not hesitate to contact your Baker Donelson attorney or any of our nearly 70 Labor & Employment attorneys, located in *Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville* and *New Orleans, Louisiana; Jackson, Mississippi;* and *Chattanooga, Johnson City, Knoxville, Memphis* and *Nashville, Tennessee*.

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