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Employment Law Alert

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Class Action Waivers Vindicated Again by the United States Supreme Court

This month, the U.S. Supreme Court issued two decisions addressing the issue of class actions and arbitrations. These decisions underscore the importance of having a carefully crafted arbitration agreement and further strengthen the argument that arbitration agreements containing class action waivers are enforceable.

In the first case, *Oxford Health Plans LLC v. Sutter*, No. 12-135, __ U.S. __ (June 10, 2013), a unanimous Court upheld an arbitrator's decision that interpreted a garden variety arbitration agreement as allowing for class arbitration. The question the Court faced in *Oxford Health* was whether the arbitrator had exceeded his authority in allowing class arbitration. The Court upheld the arbitrator's interpretation of the agreement even though (i) it was silent on whether class actions were allowed, and (ii) the Supreme Court has previously emphasized that arbitrators may permit class arbitrations only if the parties have consented to that procedure in their agreement. Critical to the Court's decision was the fact that the parties agreed to have an arbitrator decide the issue in the first place, which limited the scope of judicial review of the arbitrator's decision. Specifically, where an issue is committed to the arbitrator to decide, an arbitrator's decision cannot be overturned except in very limited circumstances (even where there is serious error). And, because the arbitrator had (even arguably) interpreted the agreement at issue, the Court found no basis to overturn the decision.

Oxford Health Plans is likely to have limited impact for businesses. Given the parties' agreement to have the arbitrator decide the class arbitration issue in the first place, the Court had no reason to address the open question whether, absent such agreement, the arbitrator or a court decides if class arbitration is allowable. Nonetheless, the decision highlights the importance for employers to draft arbitration agreements that clearly address whether class arbitration is permissible. The decision also underscores the potential downside to arbitration, *i.e.*, because judicial review of arbitral decisions is very limited, the parties are almost always stuck with what the arbitrator decides.

111 SUTTER STREET
SUITE 700
SAN FRANCISCO
CA 94104
415 464 4300 T
415 464 4336 F

12121 WILSHIRE BLVD.
SUITE 1300
LOS ANGELES
CA 90025
310 943 8500 T
310 943 8501 F

In the second (and perhaps more significant) case, *American Express Co. v. Italian Colors Restaurant*, No. 12-133, ___ U.S. ___ (June 20, 2013), the Court again weighed in on the enforceability of class action waivers. The case involved a dispute between American Express and a group of merchants who claimed American Express violated federal antitrust laws by using its monopoly power to charge inflated fees. The parties had entered into an arbitration agreement, however, that included a class action waiver. The merchants argued that the class action waiver should be unenforceable because it would effectively prevent them from vindicating their rights under the antitrust laws. According to the record, the cost to an individual merchant to prove its claims was prohibitive because it would greatly exceed the potential recovery.

In a split decision, the Supreme Court rejected the merchants' arguments, holding that the Federal Arbitration Act (FAA) does not permit courts to invalidate arbitration agreements merely because the cost of individual arbitration may not make economic sense. Further, the Court stated that the antitrust laws did not guarantee plaintiffs an affordable path to vindicating their claims. The Court also rejected the application of the so-called "effective vindication" doctrine, which in some circumstances may invalidate arbitration agreements that operate as a *prospective* waiver of a party's right to pursue federal statutory rights and remedies. The Court held that this doctrine does not apply to a class action waiver that merely limits arbitration to two contracting parties but does not eliminate a party's right to pursue statutory remedies.

American Express also reaffirms the importance of the Court's decision in *AT&T Mobility, LLC v. Concepcion,* ___ U.S. ___, 131 S.Ct. 1740 (2011). *Concepcion* held that the FAA preempts California's rule, established in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), that invalidates arbitration agreements in which the parties waive the right to class-wide proceedings (see our May 11, 2011 Employment Law Alert). Indeed, because *Concepcion* broadly authorizes enforcement of arbitration agreements containing waivers of class-wide proceedings, the Court in *American Express* noted that its earlier decision all but resolved the case before it.

American Express will very likely affect how California courts apply the FAA in the employment context. Indeed, last fall, the California Supreme Court granted review in *Iskanian v. CLS Transportation Los Angeles, LLC*, 206 Cal. App. 4th 949 (2012), *review granted* 147 Cal.Rptr.3d 324 (Sept. 19, 2012), which raises two issues in light of

Concepcion: (1) whether the FAA preempts the rule established in *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007), which held that class action waivers in employment agreements could be unenforceable where a plaintiff establishes certain factors that, taken together, show that the waiver would undermine the vindication of a substantive statutory right; and (2) whether the FAA mandates enforcement of an arbitration agreement containing a waiver of employees' rights to bring a representative action under the California Private Attorneys General Act ("PAGA") (an issue over which the California appellate courts are currently split). No doubt, the California Supreme Court will now have to grapple with the U.S. Supreme Court's latest pronouncement on the FAA.

Miller Law Group exclusively represents business in all aspects of California employment law, specializing in litigation, wage and hour class actions, ERISA litigation, and appellate law. If you have questions about your workplace obligations, please contact Michele Ballard Miller (mbm@millerlawgroup.com) or Michael Cole (mmc@millerlawgroup.com), or call (415) 464-4300. To learn more about our firm, visit our website at www.millerlawgroup.com.

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