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ARBITRATION

Expert Analysis

Arbitration Agreements Waiving FLSA Collective Actions

The Supreme Court has made clear that although arbitral awards are subject to extremely limited review,[1] a class and collective action waiver provision in an otherwise enforceable arbitration agreement is likely to be upheld. In 2011, in *AT&T Mobility v. Concepcion*,[2] the U.S. Supreme Court invalidated as preempted by the Federal Arbitration Act[3] (FAA) California decisional law treating certain class arbitration waivers as unconscionable because the state law impermissibly conditioned enforcement of an otherwise valid arbitration agreement on the company's submission to a class-wide arbitration proceeding. The next year, the Supreme Court decided *CompuCredit v. Greenwood*,[4] which held that arbitration agreements in the context of the Credit Repair Organizations Act[5] could be enforced despite "right to sue" language in that statute.

Most recently, in *American Express v. Italian Colors Restaurant*[6] (*Amex IV*), the Supreme Court rejected a Second Circuit panel decision holding that arbitration of an antitrust claim could not be compelled because the claimant could not "effectively vindicate" its claim except on a class action basis. The Supreme Court explained that the "effective-vindication" doctrine was limited to express limits on statutory remedies in the agreement or costs unique to arbitration. Specifically, *Amex IV* held that the high cost to a plaintiff of bringing an arbitration on an individual basis (as opposed to a class or a collective basis) was the same whether the case was brought in litigation or arbitration, and hence did not present a cost barrier unique to arbitration.

The application of these decisions in the employment context is of particular interest to employers, employees, and their representatives. In a pair of recent cases—*Sutherland v. Ernst & Young*[7] and *Raniere v. Citigroup*[8]—the U.S. Court of Appeals for the Second Circuit applied *Amex IV* to sustain collective-action waivers under the federal Fair Labor Standards Act of 1938[9] (FLSA).

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'Sutherland v. Ernst & Young'

From September 2008 through December 2009, Ernst & Young LLP (E&Y) employed Stephanie Sutherland as an audit employee performing mostly "'preprofessional training' and…clerical work" at an annual salary of $55,000 and treated her as FLSA-exempt. Upon accepting employment with E&Y, Sutherland signed an offer letter acknowledging that "if an employment related dispute arises between [Sutherland] and the firm, it [would] be subject to mandatory mediation/arbitration under the terms of the firm's alternative dispute resolution program, known as the Common Ground Program."

A copy of the program attached to the letter explicitly stated that FLSA claims were subject to the program and that Sutherland could not bring a FLSA claim in court. The program also prohibited class or collective actions, providing that "Covered Disputes pertaining to different [e]mployees will be heard in separate proceedings."

In a pair of cases, the Second Circuit applied 'Amex IV' to sustain collective-action waivers under the federal Fair Labor Standards Act of 1938.

On April 20, 2010, Sutherland, at this point no longer an E&Y employee, brought a putative Fed. R. Civ. P. Rule 23 class action and FLSA collective action, on behalf of herself and all others similarly situated, against E&Y in the Southern District of New York. Her suit sought unpaid overtime wages under the FLSA and the New York Labor Law (NYLL). When E&Y moved to dismiss the complaint and compel individual arbitration, Sutherland argued that enforcement of the individual arbitration agreement would "prevent[] her from 'effectively vindicating' her rights under the FLSA and the NYLL" because she was seeking only $1,867.02 in individual damages but would need to spend about $200,000—the sum of approximately $160,000 in attorney fees, $6,000 in costs, and a minimum of $25,000 for expert testimony—to pursue an individual arbitration.

Sutherland also argued that the FLSA's legislative history demonstrated Congress' intention to create a non-waivable substantive right to bring a collective action under the FLSA. Relying on the Second Circuit's decision in *In re American Express Merchants' Litigation*[10] (*Amex II*), the district court agreed with Sutherland and denied the motion to dismiss, stating that "'[e]nforcement of the class waiver provision in this case would effectively ban all proceedings by Sutherland against E&Y' because of the nature of her 'low-value, high-cost claim.'"

E&Y appealed, and on Aug. 9, 2013, a Second Circuit panel consisting of Judges Ralph Winter, Jose Cabranes, and Chester Straub reversed and remanded in a per curiam opinion. Quoting *Amex IV*, the court observed that the Supreme Court has "reminded lower courts to 'rigorously enforce arbitration agreements according to their terms, including terms that specify with whom [the parties] choose to arbitrate their disputes, and the rules under which that arbitration will be conducted.'" The panel proceeded with a two-step inquiry "[c]onsistent with the Supreme Court's recent analysis in [*Amex IV*]" to determine whether the class action waiver should be invalidated: (1) Does the FLSA contain any "contrary congressional command" prohibiting class arbitration waivers? (2) If the FLSA does not contain any such command, is Sutherland nonetheless unable to "effectively vindicate" her rights through arbitration on an individual basis? (In a footnote, the court noted that "[i]n declining to compel arbitration, the District Court did not distinguish between Sutherland's federal and state law claims." Because the FLSA claim was subject to individual arbitration, the parties also would have to arbitrate the NYLL claim on an individual basis.)

The court answered the first question—whether the FLSA contains a "contrary congres-

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sional command"—in the negative. The panel noted that it had never previously addressed this question but identified a consensus among federal appellate courts that nothing in the FLSA prohibits collective action waivers. Even though the text of Section 16(b) of the FLSA expressly provides that "[a]n action…may be maintained against any employer…in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated," the court held the provision to be a permissive reference only rather than congressional evidence of "an intention to preclude a waiver of class-action procedure."

Because Section 16(b) "also requires an employee with a FLSA claim to affirmatively opt-in to any collective action," an employee must be able to waive such a right, even assuming one exists. The court drew support from the Supreme Court's observation in *Gilmer v. Interstate/Johnson Lane Corp.*,[11] a decision holding arbitrable claims under the Age Discrimination in Employment Act of 1967[12] (ADEA), "that even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation"—including, presumably, attempts by way of pre-dispute arbitration agreement—"were intended to be barred."

The Second Circuit noted that it could not accept Sutherland's request "to limit the scope of *Gilmer*" because *Amex IV* "referred to *Gilmer* with approval." The court also cited the Supreme Court's ruling in *Concepcion*. Thus, "Supreme Court precedents inexorably lead to the conclusion that the waiver of collective action claims is permissible in the FLSA context."

Turning to the second question—whether the absence of class procedures prevented Sutherland from "effective vindication" of her rights—the court rejected her argument that individual arbitration would be "prohibitively expensive" due to the disparity between the damages she sought and her expected legal costs. As the court explained, the effective-vindication doctrine invalidates "a prospective waiver of a party's right to pursue statutory remedies." In *Amex IV*, the Supreme Court clarified that "the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy." *Amex IV* limited the effective-vindication doctrine to "a provision in an arbitration agreement forbidding the assertion of certain statutory rights" and "filing and administrative fees attached to arbitration that are so high as to make access to the forum impractical."

Furthermore, the panel referred to recent Second Circuit precedent "explain[ing] that the procedural 'right' to proceed collectively presupposes, and does not create, a non-waivable, substantive right to bring such a claim." Moreover, the court noted, plaintiffs could not bring class action lawsuits prior to 1938 (the original promulgation date of the Federal Rules of Civil Procedure) and that individual lawsuits "did not suddenly become 'ineffective vindication'" when class actions became available. Because individual arbitration would be no more costly than individual litigation, Sutherland could effectively vindicate her claim by pursuing individual arbitration under E&Y's Common Ground Program and recovering approximately $2,000 in damages if the arbitrator accepted her claim.

'Sutherland' and 'Raniere' are also important because a panel of the Second Circuit held, for the first time, that the FLSA does not categorically bar collective action waivers despite expressly establishing a procedure for collective actions.

'Raniere v. Citigroup'

Raniere and Bodden, former home lending specialists employed by Citigroup Inc. and related entities (Citi), filed a putative FLSA collective action in the Southern District against Citi alleging that Citi had misclassified them as exempt employees and owed them overtime wages. Both Raniere and Bodden had agreed to be bound by Citi's arbitration policy expressly requiring individual arbitration of any FLSA claim. The district court denied Citi's motion to compel arbitration.

On appeal, the Second Circuit reversed in an unpublished opinion. Raniere and Bodden argued that a "right to collective action is an integral and fundamentally substantive element of the FLSA that cannot be subject to waiver," but the court rejected this argument as "directly foreclosed" by *Sutherland*, which involved claims "virtually identical to those" in *Raniere*.

Raniere and Bodden contended, in the alternative, that the Second Circuit's previous decisions in the *Amex* case required invalidation of the waiver because courts may not enforce collective action waivers if "any putative member of the class or collection would be unable to vindicate their statutory rights." The court rejected this argument, relying on *Amex IV*, noting that the Supreme Court had made clear that "the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy."

Implications

Sutherland and *Raniere* demonstrate the extent to which *Amex IV* has changed the legal landscape in the Second Circuit. After the Supreme Court's decision in *Amex IV*, an arbitration agreement that authorizes the arbitration of statutory claims and the award of statutory remedies for a violation and does not impose significant arbitral forum or arbitrator costs must be enforced, even if the economic value of individual claims will not attract competent counsel.[13] *Sutherland* and *Raniere* are also important because a panel of the Second Circuit held, for the first time, that the FLSA does not categorically bar collective action waivers despite expressly establishing a procedure for collective actions. The Second Circuit has made clear that it will not hold that a statute precludes collective action or class action waivers without a signal of congressional intent clearer than a provision merely authorizing a collective action mechanism.

The influence of the Supreme Court's endorsement of arbitration agreements containing class action waivers has also been brought to bear in other statutory contexts. In *Parisi v. Goldman, Sachs*,[14] for example, the Second Circuit held that an individual plaintiff had no non-waivable right to bring a "pattern or practice" class action under Title VII of the Civil Rights Act of 1964[15]; hence, a clause requiring individual arbitration of Title VII claims could be enforced even though the plaintiff was seeking to bring a "pattern or practice" class action.

Conclusion

The Second Circuit has extended the Supreme Court's pro-arbitration jurisprudence to the labor and employment context through *Parisi*, *Sutherland*, and *Raniere*. Employers and employees can expect courts in this circuit routinely to uphold arbitration agreements that, while they preclude class or collective actions, authorize the arbitrator to apply statutory law and statutory remedies for any violation and do not impose high arbitral forum or arbitrator fees.

1. *Oxford Health Plans v. Sutter*, 133 S. Ct. 2064 (2013).
2. 131 S. Ct. 1740 (2011).
3. 9 U.S.C. §1 et seq.
4. 132 S. Ct. 665 (2012).
5. 15 U.S.C. §1679 et seq.
6. 133 S. Ct. 2304 (2013).
7. 726 F.3d 290 (2d Cir. 2013) (per curiam).
8. No. 11-5213-cv, 2013 WL 4046278 (2d Cir. Aug. 12, 2013).
9. 29 U.S.C. §201 et seq.
10. 554 F.3d 300 (2d Cir. 2009).
11. 500 U.S. 20 (1991).
12. 29 U.S.C. §621 et seq.
13. In a footnote, the *Amex IV* majority disagreed with the dissent's claim that the plaintiffs had also waived their rights to other cost-sharing arrangements with regard to the arbitration. *Amex IV*, 133 S. Ct. at 2311 n.4. This point was not essential to *Amex IV's* holding, however.
14. 710 F.3d 483 (2d Cir. 2013).
15. 42 U.S.C. §2000e et seq.

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