Schulte Roth&Zabel

The Supreme Court's Employment Law Decisions, O.T. 2012-2013

Presented by:
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Vance v. Ball State University (cert. granted)

- **QP: Whether … the *Faragher-Ellerth* "supervisor" rule (1) applies to harassment by those whom the employer vests with authority to direct and oversee the victim's daily work, or (2) is limited to those harassers who have the power to "hire, fire, demote, promote, transfer or discipline"?**
- **Authority to take "tangible employment actions" is the defining characteristic of a "supervisor" for purposes of the *Faragher-Ellerth* rule**
  - Presumably, those who "effectively recommend" such actions are also supervisors; compare NLRA § 2(11)
- **Faragher-Ellerth may not be recognized by some states.**
  - Alternative: strict employer liability where agent was "aided in the accomplishment of tort by the existence of the agency relation." Restatement Second of Agency § 219(2)(d)
  - There might still not be employer liability on the facts of Vance

- **QP: Whether Title VII's retaliation provision and similarly worded statutes require a plaintiff to prove but-for causation… or instead require only proof that the employer had a mixed motive…**
- **"but for" causation test is the federal common law rule:**
  - follows Gross v. FBL Finan. Svcs, 557 U.S. 167 '09 (ADEA)
  - Nassar (Title VII §704(a) retaliation claims)
    - Operative language: "because he has opposed [opposition clause]… or because he has made a charge, etc. [participation clause]"
    - Both Gross and Nassar reject the "motivating factor" and burden-shift approach in the plurality and concurring opinions in Price Waterhouse
    - Open question: ADA, as amended: "No covered entity shall discriminate…." 42 U.S.C. § 12112(a)

- **QP: Whether the Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger,* 539 U. 306 (2003), permit the University of Texas at Austin's use of race in undergraduate admissions decisions**
- **Arguable nondecision: Lower courts adopted too confining a view of "strict scrutiny"; they were too deferential to university.**
- **Big open issue: J. Scalia's suggestion in Ricci v. DeStefano, 557 U.S. 557 (2009), that Title VII's disparate impact approach may violate Equal Protection because it requires employer to engage in race-conscious decision-making**
  - See also Schuette v. Coalition to Defend Affirmative Action, No. 12-682: can the state entrench a rule against race-based affirmative action programs in its state constitution?

- **QP: Whether the Federal Arbitration Act (FAA) permits courts, invoking the "federal law of arbitrability," to invalidate agreements on the ground that they do not permit class arbitration of federal-law claims?**
- **Rejection of CA 2's "effective vindication" doctrine**
  - Limitation of language in GreenTree Finan. Corp. v. Randolph, 531 U.S. 79 (2000), to cost barriers unique to arbitration vs. costs of litigating an individual claim
  - CA 2 in Parisi v. Goldman-Sachs, 710 F. 3d 483 (2013)
  - CA 2 in Sutherland v. Ernst & Young, 726 F.3d 290 (2013)

- **QP: Whether an arbitrator acts within his powers under the FAA or exceeds those powers by determining that the parties affirmatively "agreed to authorize class arbitration" based solely on their use of broad contractual language precluding litigation and requiring arbitration of any disputes under their agreement**
- **As long as the arbitrator purports to interpret the agreement…**

- **QP: Whether the Third Circuit correctly held that ERISA § 502(a)(3) authorizes courts to use equitable principles to rewrite contractual language and refuse to order the participants to reimburse the plan for benefits paid, even though the plan's terms gave it an absolute right to full reimbursement**
- **Presence of an express reimbursement provision but plan is read to implicitly incorporate the "common fund" doctrine of the equity courts**
  - CIGNA Corp. v. Amara, 131 S.Ct. 1866 (2011) (the equitable remedy of "surcharge")

- **QP: Whether a case becomes moot, and therefore beyond the judicial power of Article III, when the lone plaintiff receives an offer from defendants to satisfy all of the plaintiff's claims**
- **Arguable non-decision: both courts below concluded that the Rule 68 offer would have provided complete relief to the individual collective action named plaintiff**
  - SCOTUS does not decide whether an unaccepted offer that fully satisfies the plaintiff's claim renders the case moot
    - Mootness of individual claim is assumed
    - Collective action allegations do not keep the case justiciable
    - Arguably, a different rule for FRCP 23 class actions v. § 216(b) actions
  - E.g., Diaz v. First American Home Buyers, 2013 U.S.App.LEXIS 20327 (1ST Cir. Oct. 4, 2013): no mootness, vacating R. 12(b)(1) dismissal
- **Lesson for plaintiff: Have co-plaintiffs; seek issuance of class notice early in the game**

Wal-Mart v. Dukes (cont.)

- **QP: Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis**
- **"[I] is clear that … respondents' model falls far short of establishing that damages are capable of measurement on a classwide basis. Without presenting another methodology, respondents cannot show Rule 23(b)(3) predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class."**
- **Does this mean no (b)(3) certification unless damages are capable of classwide treatment?**
  - Systemic DT and backpay under Teamsters?
  - Any implications for issue-only certification?

Pending Cases, O.T. 2013

- **QP: Whether the Seventh Circuit erred in holding … that state and local government employees may avoid the federal Age Discrimination in Employment Act (ADEA)'s comprehensive remedial regime by bringing age discrimination claims directly under the Equal Protection Clause and 42 U.S.C. § 1983**
- **Cert. dismissed (10/15/13)- plaintiff revealed in complaint that he may have been a policymaking employee not covered by ADEA**
  - Not clear why this made the case unsuitable.

- **QP: When should a statute of limitations accrue for judicial review of an disability adverse benefit determination under the Employee Retirement Income Security Act?**
- **Insurance industry 3-year standard from proof claim**
  - In this case, the plaintiff had a year from completion of the internal plan administrative process?
  - Should the SOL be tolled during that process?

- **QP: Whether a state violates the Equal Protection Clause by amending its constitution to prohibit race- and sex-based discrimination or preferential treatment in public-university admissions decisions**

Questions Presented for Review

- **QP: What constitutes "changing clothes" within the meaning of Section 203(o) of the Fair Labor Standards Act**

- **QP: Whether an employee of a privately held contractor or subcontractor of a public company is protected from retaliation by Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A**

- **QP: Whether an employer and union may violate Section 302 of the Labor-Management Relations Act, 29 U.S.C. § 186, by entering into an agreement under which the employer exercises its freedom of speech by promising to remain neutral to union organizing, its property rights by granting union representatives limited access to the employer's property and employees, and its freedom of contract by obtaining the union's promise to forego its rights to picket, boycott, or otherwise put pressure on the employer's business**

- **Is voluntary recognition of a union in peril?**

Arbitrability: Preconditions to Arbitration

- **QP: Whether, in disputes involving a multi-staged dispute resolution process, a court or the arbitrator determines whether a precondition to arbitration has been satisfied**

Disparate Impact Claims Cognizable Under the Fair Housing Act

- **QP; Whether disparate impact claims are cognizable under the Fair Housing Act**

- QP: (1) Whether the President's recess-appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between enumerated sessions of the Senate;
- (2) whether the President's recess-appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess; and
- (3) whether the President's recess-appointment power may be exercised when the Senate is convening every three days in pro forma sessions

- **QP: Whether severance payments made to employees whose employment was involuntarily terminated are taxable under the Federal Insurance Contributions Act, 26 U.S.C. §§ 3101 et seq.**

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CLASS ARBITRATION AND CLASS ACTION WAIVERS

Zachary D. Fasman
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Employment Law Institute 2013
October 21, 2013

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010)

- An arbitration agreement that is silent concerning the arbitration of class actions implies that class claims cannot be arbitrated
- Class actions are substantially different than individual disputes and mere silence about their arbitrability cannot be deemed assent to class arbitration
- Parties in *Stolt* stipulated no meeting of the minds on the arbitration of class claims: absent meeting of the minds no consent to class arbitration

- ***Stolt* altered pre-existing law: many courts had presumed that silence could be deemed assent**
  - **Parties in *Stolt* stipulated no meeting of the minds; absent such stipulation, how should a silent clause be construed?**
    - May a party still claim that a silent clause was actually intended to allow class arbitration?
    - What evidence of intent may be introduced?
    - Is discovery required/allowed?
    - What is the burden of proof?
    - What scope of review applies to an arbitrator's ruling that class actions are appropriate?

Class Arbitration and Class Action Waivers

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- Arbitrators have concluded that silence allows class actions:
  - ***Jock v. Sterling Jewelers*** (Second Circuit)
  - ***Sutter v. Oxford Health Plans*** **U.S. __ (2013)**
    - Arbitration clause stated:
    - "No civil action … shall be instituted before any court, and all such disputes shall be subject to final and binding arbitration"
      - » Parties agreed to submit to the arbitrator whether this language allowed class arbitration
    - Arbitrator held that this language allowed class arbitration
    - Third Circuit upheld, on the basis of limited judicial review of arbitration awards

Supreme Court affirmed 9-0

Class Arbitration and Class Action Waivers

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- Court concluded that by submitting the class action question to the arbitrator (twice), the employer tacitly conceded this was not a "gateway" question of arbitrability but contract construction, and intimated that questions of arbitrability are subject to de novo review
- But questions of contract construction are not, and Court concluded that the narrow scope of review of the merits of an award applied here
- Court distinguished *Stolt-Nielsen* as a case where the parties stipulated there was no meeting of the minds on class arbitration
- Here there was some evidence from the contract language of intent, and thus some basis for the arbitrator's award.
- Justice Alito, joined by Justice Thomas, raises the interesting question whether absentee class members would be bound by an award, even with actual notice.

How do you avoid this result?

- Make it explicit that class arbitration is precluded
- Make it explicit that the arbitrator has no authority to entertain class proceedings or to consolidate cases
- Make it explicit that the availability of class procedures is a threshold question of arbitrability that is subject to de novo judicial review

- ***AT&T Mobility v. Concepcion, 131 S. Ct. 1740 (2011)***
  - Even more significant than *Stolt-Nielsen* on class arbitration
  - Question was whether a state – California – could by judicial decision find that arbitration agreements containing class action waivers were unconscionable and unenforceable
  - California's so-called *Discover Bank* rule provided that in any adhesion contract an arbitration clause, a provision precluding class arbitration is unenforceable
  - AT&T provision in that case provided that if plaintiff prevailed at arbitration in an amount greater than AT&T's final offer, plaintiff would get award plus $7500 plus legal fees

- 5-4 ruling written by Justice Scalia
  - California rule is preempted by the FAA
  - The *Discover Bank* rule is not arbitration-neutral, but actually disfavors arbitration by requiring that every arbitration clause allow class arbitration
  - Class arbitration is inconsistent with the essential premises of arbitration: speed and flexibility
  - Examples of a state rule providing that arbitration must be conducted under FRCP, or that cases must be decided by a 12 person jury; each is facially neutral but in fact disfavors the speed and informality of arbitration
  - Relies heavily upon *Stolt-Nielsen*'s conclusion that class arbitration is incompatible with normal arbitration principles
  - Ruling also depends on limited legal review of arbitral awards as reason not to allow class arbitration

- ***CompuCredit Corp. v. Greenwood,* 132 S. Ct. 665 (2012)**
  - *Concepcion* initially dismissed as a preemption case inapplicable to arbitration involving federal statutory claims.
  - *CompuCredit:* The FAA "requires courts to enforce agreements to arbitrate according to their terms."
  - This is true even where the underlying statute states that a plaintiff has the "right to sue"; this right may be satisfied in arbitration

Class Arbitration and Class Action Waivers

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- Majority (6): "That is the case even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.'"

- Uses as example statutes that specifically say that pre-dispute arbitration agreements are forbidden; in contrast, CROA gave a "right to sue" which Court held may be vindicated in arbitration.

- Concurrence (2): "Claims alleging a violation of a statute … are generally subject to valid arbitration agreements unless Congress evinces a contrary intent in the text, history or purpose of a statute.") (Sotomayor, J., concurring)

Class Arbitration and Class Action Waivers

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Summary from the Supreme Court

- Class arbitration is not consistent with the underlying premises of the FAA
- Class action waivers are generally consistent with the underlying premises of the FAA
- Class action waivers may be invalidated through normally applicable contractual defenses (failure to agree, outside the scope) and state unconscionability standards so long as the standards are uniformly applicable, neutral in effect and consistent with federal arbitration policy
- The same principles apply to federal statutory claims
- None of this matters if an arbitrator has ruled that class actions were agreed upon, so long as there is some evidence of intent to agree

AMERICAN EXPRESS v. ITALIAN COLORS RESTAURANT **570 U.S. __ (2013)**

- Antitrust plaintiffs sought to avoid a class action waiver by introducing extensive (and unrebutted) evidence that proceeding on an individual basis in arbitration was cost-prohibitive due to small recovery
- Remanded twice by the Supreme Court for reevaluation; in *Amex III*, the Second Circuit adhered to its initial ruling:

> "[W]e do not conclude here that class action waivers in arbitration agreements are per se unenforceable. We also do not hold that they are per se unenforceable in the context of antitrust actions. Rather, we hold that each case which presents a question of the enforceability of a class action waiver in an arbitration agreement must be considered on its own merits, governed with a healthy regard for the fact that the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements."

Supreme Court reversed 5-3 (Sotomayor took no part)

- Majority held that unavailability of class action devices not a barrier to enforcement of an otherwise valid arbitration agreement
- Reinforces the basic rule that arbitration agreements must be enforced as written
- Nothing in the antitrust laws precludes application of normal arbitration law to antitrust claims, nor requires class actions for enforcing rights under that statute
- Congress did not mandate that class action procedures are always available, even if they make enforcement of statutory rights easier or less costly

Court rejects "vindication of statutory rights" theory

- Court states that this theory applies only where an arbitration agreement specifically precludes the enforcement of a statutory right (e.g., a clause forbidding the assertion of a statutory right, or perhaps a clause imposing very high filing fees or forbidding a statutory remedy)
- This is not such a case, because all the plaintiffs here allege is that it is more expensive to enforce such rights, which still may be asserted in arbitration
- The situation is no different than was the case prior to Rule 23 in 1966, when an individual lawsuit was the sole way to enforce a statutory right

Class Arbitration and Class Action Waivers

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- Powerful dissent by Justice Kagan, claiming that by outlawing class procedures in arbitration, American Express effectively insulated itself from antitrust liability, no less than if it precluded the assertion of antitrust claims under the arbitration clause.
- Vindication of statutory rights theory is designed to prevent just such a result

- **Is there anything left of the vindication of statutory rights theory?**
  - Specific exception of certain types of claims is not enforceable
  - Perhaps a truly excessive filing fee is unenforceable
  - Also probably not tenable to create limits on full statutory recovery
    - Numerous cases involving a limitation on recovery or a shortened statute of limitations: facial challenges are common and well-founded

Do these principles apply to Fair Labor Standards Act claims?

- Yes, Second Circuit holds in Sutherland v. Ernst & Young LLP, 2013 U.S. App. LEXIS 16513 (Aug. 9, 2013)
  - Question was whether Congress decreed that collective actions are required for FLSA claims
  - Plaintiffs claimed Section 216(b) collective actions are a prescribed statutory procedure and thus evidence a congressional command not to allow class action waivers
  - Court concluded that while Congress authorized FLSA collective actions, it did not require them and did not foreclose an individual waiver of them
  - Second Circuit applied American Express and rejected "effective vindication argument
  - Raniere v. Citigroup reaches the same conclusion

Do these principles apply to Title VII disparate treatment claims?

- Second Circuit holds that they do in *Parisi v. Goldman, Sachs & Co.*
- District Court had relied on effective vindication theory
  - Judicial holdings in SDNY find that pattern or practice claims may not be litigated in individual Title VII actions
  - Assuming an arbitrator would follow these cases, remitting a potential class plaintiff to individual arbitration would prevent her from litigating a pattern or practice claim
  - Therefore an arbitration agreement is not enforceable because its silent clause would bar class arbitration

Class Arbitration and Class Action Waivers

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- Second Circuit held that "[T]here is no substantive statutory right to pursue a pattern-or practice claim"
- That term simply refers to a method of proof and does not create a separate cause of action.
- The exact same principles apply as in any other arbitration context
- There is no evidence of congressional intent requiring suspension of normally applicable arbitration principles

Class Arbitration and Class Action Waivers

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Is a class action waiver lawful under the National Labor Relations Act?

- In D.R. Horton, Inc., 357 N.L.R.B. No. 184 (2012), the employer required employees as a condition of employment to sign a Mutual Arbitration Agreement ("MAA"), which contained a class and collective action waiver
- The Board found that employees have a § 7 right that forbids class action waivers, even where employees were not discharged or disciplined for filing a class action
- Board held that the class action waiver in and of itself limited employees' ability to engage in protected concerted activity, which included the filing of class or collective actions
- Analogy to "Yellow Dog" contracts whereby employees must give up legal rights to continue to work

Class Arbitration and Class Action Waivers

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- The Board found that the Supreme Court's decisions in *Stolt-Nielsen* and *Concepcion* were not controlling.

  "Neither [case] involved the waiver of rights protected by the NLRA or even employment agreements."

  – Board also held that an arbitration agreement that did not carve out the right to file NLRA charges was unlawful

  – Two person panel decision issued just after January 1, 2012 (no vote by Republican member Brian Hayes)

  – Two individuals included Member Becker, whose term expired on December 31, but who was involved in the decision during his term

Class Arbitration and Class Action Waivers

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Board's own stated limitations on *D.R. Horton*

- Does not apply to exempt managerial or supervisory employees
- Does not reach individual waivers, as opposed to broad arbitration policy made a condition of employment
- Does not prevent arbitration of statutory claims, as long as arbitration may be had on a class or collective basis

- On appeal to the 5th Circuit
- Routinely rejected by other circuits, including the Second, Eighth and Ninth Circuits: followed only occasionally by district courts
- Also called into serious question by *Noel Canning*

Excerpt from Daily Labor Reports:

Arbitration Pact's Class Action Waiver Enforceable Against FLSA Claims, Second Circuit Rules

Posted August 9, 2013, 5:07 P.M. ET

A former Ernst & Young employee alleging she was denied overtime pay in violation of the Fair Labor Standards Act and New York state law must arbitrate her statutory claims on an individual basis even if the cost of pursuing her claims dwarfs her potential recovery, the U.S. Court of Appeals for the Second Circuit ruled today (Sutherland v. Ernst & Young LLP, 2d Cir., No. 12-304, 8/9/13).

Reversing a district court's denial of Ernst & Young's motion to compel arbitration, the court said the U.S. Supreme Court decision in American Express Corp. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013), invalidated the Second Circuit precedent on which the district court had relied to rule Ernst & Young could not enforce a class action waiver in its arbitration agreement.

The district court had cited the Second Circuit's 2009 decision in the American Express litigation (554 F.3d 300 (2d Cir. 2009)), in which the appeals court had held a class action waiver cannot be enforced if plaintiffs show "they would incur prohibitive costs if compelled to arbitrate" on an individual basis and if enforcing the arbitration agreement would deprive plaintiffs of "substantive rights" under another federal statute.

Plaintiff Stephanie Sutherland submitted evidence that to "effectively vindicate" her FLSA and state law claims in an individual arbitration, she would have to spend approximately $200,000 to recover less than $2,000. Based on that showing, the district court had denied Ernst & Young's motion to compel arbitration and enforce the class action waiver, ruling Sutherland could not effectively vindicate her statutory rights absent access to an FLSA collective action.

But the Second Circuit said the Supreme Court in Italian Colors ruled the Federal Arbitration Act generally requires that arbitration agreements should be enforced according to their terms and a class action waiver is enforceable absent a "contrary congressional command."

The FLSA does not contain a contrary congressional command precluding enforcement of a class action waiver, the appeals court said.

Sutherland argued a "judge-made" exception to the Federal Arbitration Act that permits courts to invalidate arbitration agreements that "prevent the 'effective vindication' of a federal statutory right" applies in the FLSA context because pursuing individual arbitration would be "prohibitively expensive" compared with her potential recovery.

"Despite the obstacles facing the vindication of Sutherland's claims, the Supreme Court's recent decision in Italian Colors, which reversed our decision in In re American Express Merchants' Litigation, 667 F.3d 204 (2d Cir. 2012) ("Amex III"), compels the conclusion that Sutherland's class action waiver is not rendered invalid by virtue of the fact that her claim is not economically worth pursuing individually," the appeals court said.

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Class-Action Arbitration Cannot Be Compelled Absent Evidence of Consent

by Stuart M. Gerson and Evan J. Spelfogel

May 2010

On April 27, 2010, a divided U.S. Supreme Court (5-3, with Sotomayor, J., recused) held that the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* ("FAA"), does not permit forcing unwilling parties to participate in a class arbitration to which they have not consented. This is a case of potentially great significance to entities whose contractual relationships include arbitration provisions and that generally oppose class-action treatment of cases against them—particularly employers of all kinds, but also health care providers and financial services companies, among others. *Stolt-Nielsen S.A., et al. v. AnimalFeeds International Corp.,* No. 08-1198, 559 U.S. ____ (2010).

Stolt-Nielsen involved a dispute in a maritime setting, alleging unlawful price fixing and governed by a charter that included a provision mandating arbitration pursuant to the FAA, but which was silent as to whether such an arbitration could be conducted on a class-action basis, *i.e.*, whether absent parties could be included in the case. While insisting that the bi-party matter must be arbitrated, the defendant opposed class-action treatment.

The parties stipulated to submit to the arbitration panel the question of whether their arbitration agreement allowed for class arbitration under the class rules of the American Arbitration Association ("AAA"), ostensibly following the Supreme Court's elusive majority holding in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003).

The arbitration panel determined that the arbitration clause at issue did not expressly preclude—and, thus, permitted—class arbitration. A federal district court vacated, holding that the arbitration ruling was made "in manifest disregard" of the law. The U.S. Court of Appeals for the Second Circuit reversed.

In vacating the Second Circuit's decision, 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. Here, the Supreme Court noted, the parties concurred that they had reached "no agreement" on that issue.

Further, the Supreme Court said that an implicit agreement to authorize class-action arbitration is not a term that an arbitrator may infer solely from the fact that the parties have agreed to arbitrate. This is so, the Supreme Court said, because class-action arbitration so fundamentally changes the nature of arbitration involving only two parties that it cannot be presumed that the parties consented to it simply by agreeing to submit their disputes to arbitration.

On May 3, 2010, the U.S. Supreme Court summarily vacated and remanded for reconsideration, in light of *Stolt-Nielsen*, the decision of the Second Circuit in *American Express Co., et al. v. Italian Colors Restaurant, et al.*, a case concerning an anti-trust dispute between American Express and a putative class of businesses that accepted payment with the American Express card. The parties' agreement included an arbitration clause with a waiver of class claims. The Second Circuit had ruled that the question of whether such a waiver was "unconscionable" was for the courts, not an arbitrator, and that the waiver was, indeed, unconscionable. The Supreme Court has now ordered the Second Circuit to take another look at its position (559 U.S. ___ (2010)).

The significance of *Stolt-Nielsen* to employers, service providers and others is both obvious and far reaching, but we note several caveats—issues left open by the Supreme Court than might be obviated by clear arbitration agreements. On the face of the Supreme Court's decision, defendants in arbitration cases who have not consented to class treatment may move to dismiss such demands with a great likelihood of success. Where an arbiter has compelled class-wide determination, an employer or other defendant may move to have the decision enjoined or vacated as manifestly in disregard of the law. Given at least two issues reserved by the Supreme Court, however, we suggest that parties not currently involved in arbitrations consider strengthening their agreements in two specific ways.

First, because the parties in *Stolt-Nielsen* stipulated that the class determination question could be decided by the arbitral panel, the Supreme Court did not reach the question, left open in the earlier *Bazzle* case, of whether, absent such an agreement, this should be a question for a court or for an arbitrator. Second, given the *Stolt-Nielsen* parties' additional stipulation that their maritime charter agreement contained "no agreement" as to class-action arbitration, the Supreme Court went no further. However, the Supreme Court suggested that, where a contract is ambiguous on the subject, evidence of custom and usage, particularly relevant under maritime law and the law of New York State (and perhaps other jurisdictions) may be admissible to establish intent to permit class-action arbitration. Accordingly, companies reviewing their contracts that contain arbitration provisions might wish to be very specific in seeking agreement as to who decides questions of jurisdictional law and, most significantly and most likely, that nothing in the agreement or otherwise should be read as consenting to class actions.

As employers and service providers have come to learn, the defense of single-claimant cases in arbitration proceedings is far less time-consuming and costly than a determination in class proceedings. Especially in our current litigious climate, these entities should take particular care in the crafting and revision of their agreements that call for arbitration.

EBG represents a variety of commercial entities involved in arbitration of disputes, including employers, health care providers, hospitality companies and financial services providers. For advice concerning the effects of the *Stolt-Nielsen* decision or about arbitration agreements more generally, please contact:

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