Patterson Belknap Webb & Tyler LLP

Employment Law Alert April 2013

Updates from the Second Circuit and Supreme Court About Arbitration Provisions and Potential Impact on Employers

Decision Alert: Second Circuit Holds There is No Substantive Right to Pursue Title VII Pattern-or-Practice Claims

Last week, the Second Circuit weighed in again on the enforceability of an arbitration provision in *Parisi v. Goldman, Sachs & Co*., No. 11-5229-cv (2d Cir. Mar. 21, 2013). The provision at issue required employees to pursue any employment-related claims in arbitration rather than in the court system and did not provide for class arbitration. The Second Circuit held that the district court should have compelled arbitration, finding that there is no substantive statutory right to pursue Title VII pattern-or-practice claims. In the employment context, a Title VII pattern-or-practice claim alleges that an employer intentionally discriminated against a protected class of employees. Plaintiffs typically establish these claims via 1) statistical evidence of discrimination by the employer (e.g., salary information, demographic data, etc.) and 2) "anecdotal evidence," or testimony from employees describing the discrimination they suffered or observed.

The Second Circuit did not disturb the district court's finding that Title VII pattern-or-practice claims can only be pursued in the class action context. Nor did it question the "vindication of rights" doctrine, which states that an arbitration clause is unenforceable if it precludes a plaintiff from vindicating a substantive right. Instead, it found that employees do not have a substantive right to pursue these claims, as "pattern-or-practice" simply refers to the method of presenting proof in a discrimination lawsuit. The *Parisi* decision can be viewed in its entirety here.

Case Alert: Oral Argument Held on *Amex*

American Express Co. v. Italian Colors Restaurant is another case concerning the enforceability of an arbitration provision that is on appeal from the Second Circuit. On February 27, 2013, the Supreme Court heard oral argument regarding the enforceability of an arbitration provision that prohibited plaintiffs (small merchants) from pursuing an antitrust suit against American Express on a class basis. The merchants had argued that the only economically feasible way to bring their antitrust claims was as a class, but the arbitration provision in their contracts with American Express barred them from doing so.

The district court found that the arbitration agreement was unenforceable, as did the Second Circuit. Later on, the Second Circuit twice reconsidered its decision in response to intervening Supreme Court cases[1] that demonstrated a strong federal policy favoring the enforcement of arbitration provisions, but reaffirmed the lower court's decision on both occasions. American Express appealed, and the Supreme Court granted certiorari on the issue of "whether the Federal Arbitration Act ("FAA") permits courts, invoking the 'federal substantive law of arbitrability,' to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim."

At oral argument, Justice Breyer voiced skepticism about the validity of the "vindication of rights" doctrine itself. Calling it an "odd doctrine," he noted that it "says, plaintiff by plaintiff, you can ignore an arbitration clause if you can get a case that's expensive enough." (27:15-18). However, the majority of the argument focused on factual issues related to whether it was economically feasible to bring the antitrust claims at issue on an individual basis. The transcript of oral argument can be found here.

If the Court ultimately chooses to address the broad question regarding the enforceability of an arbitration provision that precludes bringing a federal law claim as part of a class, this decision could provide much-needed guidance to employers attempting to draft enforceable arbitration provisions.

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[1] *Stolt-Nielsen v. Animalfeed Int'l Corp.*, 130 S. Ct. 1758 (2010) (parties cannot be compelled to submit claims to class arbitration when an arbitration clause is silent on the question of class arbitration.); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (California law prohibiting class action waivers in arbitration agreements was preempted by Federal Arbitration Act.).

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