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LEGAL ALERT

Legal Alert: Second Circuit Addresses Class-Action Waivers in Arbitration Agreements after Supreme Court's Stolt-Nielsen Decision

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This article is a continuation of Ford & Harrison LLP's focus on the use of arbitration agreements to protect employers from collective/class-action exposure under the Fair Labor Standards Act.

In March 8, 2011, the Second Circuit issued *In re American Express Merchants' Litigation*, ("*Amex*") regarding the enforceability of a class-action waiver, specifically in light of the Supreme Court's *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010). Previously, in *Stolt-Nielsen*, the Supreme Court reversed the Second Circuit on the issue of whether silence in an arbitration agreement would allow parties to arbitrate on a class basis. Although the Court in *Amex* ultimately held that the class-action waiver was not enforceable, the basis of the Court's decision likely would not apply to a class-action waiver in the context of the Fair Labor Standards Act. (A copy of the decision is available by clicking here or on the Second Circuit's web site at: http://www.ca2.uscourts.gov/decisions.)

American Express stipulated that all merchants with annual charge volume less than $10 million agreed to be governed by a Card Acceptance Agreement. The Agreement contained a broad mandatory arbitration clause that encompasses virtually every kind of claim that a merchant could bring. The Agreement also contained a class-action waiver clause, expressly waiving the right to participate in a class action.

A group of companies accepting American Express cards sought to represent a class of merchants in a lawsuit alleging that American Express violated antitrust laws. The issue before the court was the enforceability of the mandatory arbitration clause, which contained a class-action waiver. In 2007, the Second Circuit determined that "because enforcement of the clause would effectively preclude any action seeking to vindicate the statutory rights asserted by the plaintiffs," the class-action waiver was unenforceable. The United States Supreme Court vacated the decision and remanded it to the Second Circuit for reconsideration in light of *Stolt-Nielsen*. There, the Supreme Court held that "a party may not be compelled under the [Federal Arbitration Act] to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." (For more information on the *Stolt-Nielsen* decision, please see our May 4, 2010 Legal Alert, "Supreme Court Holds that Parties Who Have not Agreed to Class Arbitration Cannot be Required to Submit to Class Arbitration," available at:

http://www.fordharrison.com/shownews.aspx?show=6159.)

American Express argued that, based on "*Stolt-Nielsen*'s holding that courts may not impose class arbitration on unwilling parties," courts cannot invalidate "the parties' agreement…based on the absence of class procedures." However, the Second Circuit determined that a clause barring class arbitration is not *per se* enforceable. The Court relied on the plaintiff's evidence that the costs of pursuing individual claims, rather than class arbitration, would drastically outweigh the value of the plaintiff's expected claim. The plaintiffs submitted an affidavit stating that the cost of producing a study necessary to pursue an antitrust case would be at least several hundred thousand dollars. However, the average merchant could only expect approximately $5,000 in damages. Based on this evidence, the Court held that: "the record evidence before us establishes, as a matter of law, that the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws."

Application to FLSA Class Action Waiver

Although the outcome of the case was that the Court did not permit enforcement of American Express's class waiver, the justifications for the Court's decision should not apply in the context of an FLSA class-action waiver. The court specifically held that: "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.'" First, unlike the claims brought by the *Amex* merchants, the FLSA specifically provides that a successful claimant is entitled to reasonable attorneys' fees and costs, which provides a greater incentive for an attorney to pursue an FLSA claim. Second, the nature of the FLSA differs from antitrust statutes. Liability and damages are expressly provided in the statute and are relatively straight forward. Third, plaintiffs frequently pursue FLSA claims on an individual basis, which alleviates the public policy concern that precluding a class-action would leave a plaintiff without recourse.

Employers' Bottom Line

The *Amex* decision provides additional insight as to how courts will treat class-action waivers in arbitration agreements, but it is distinguishable from arbitration agreements in the context of the FLSA. Employers should consider whether using an arbitration agreement, including a class-action waiver, would suit their employment needs.

If you have any questions regarding this decision or the issues addressed in this Alert, please contact the authors, John Allgood, jallgood@fordharrison.com, Jeff Mokotoff, jmokotoff@fordharrison.com, or Henry Warnock, hwarnock@fordharrison.com, or the Ford & Harrison attorney with whom you usually work.