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LEGAL ALERT

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Broker's Wage and Hour Collective Action Dismissed in Favor of Enforcing Arbitration Agreement

The U.S. District Court for the Southern District of New York recently rejected broker Anthony Arrigo's putative Fair Labor Standards Act (FLSA) collective action based upon an arbitration provision found in his employment agreement with commodity broker Blue Fish Commodities, Inc. *Arrigo v. Blue Fish Commodities, Inc.*, No. 09 Civ. 7518, 2010 WL 391813, slip op. (S.D.N.Y. Feb. 4, 2010). The Court instead granted Blue Fish's motion to compel Arrigo to submit his claims to arbitration pursuant to the Federal Arbitration Act (FAA), which compels judicial enforcement of a wide range of written arbitration agreements. The *Blue Fish* decision is part of an active and ongoing debate about the future of pre-dispute arbitration agreements in the employment and commercial areas.

The *Blue Fish* Decision

In his complaint, Arrigo alleges that he and other account executives were denied overtime compensation in violation of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*., and the wage and hour regulations of New York and New York City. At the time of his hire, Arrigo executed an employment agreement with Blue Fish. The employment agreement includes a pre-dispute arbitration provision, which referred all employment-related claims—including "all federal and state statutory claims"—to arbitration. The employment agreement also provides that the arbitrator, and not a court, has exclusive authority to resolve any dispute relating to the interpretation or enforceability of the agreement.

After reviewing the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*., and federal public policy—both of which favor arbitration as an alternative to judicial dispute resolution—the Court rejected Arrigo's argument that the arbitration agreement was unenforceable based on ambiguity. The Court also rejected Arrigo's argument that his wage and hour claims fell outside the scope of the arbitration agreement, citing the agreement's plain language referring "all federal and state statutory claims" to arbitration. Further, the Court reasoned that even if there were a question about the enforceability or scope of the arbitration agreement, the terms of the agreement require the arbitrator—not the Court—to resolve such disputes.

Finally, the Court considered Arrigo's argument that his FLSA claim should proceed in federal court because—according to Arrigo—Congress did not intend for these claims to be subject to arbitration. Arrigo offered no support for this argument, however, and the Court concluded that Arrigo's FLSA claim was subject to arbitration. Accordingly, the Court granted Blue Fish's motion to compel arbitration and dismissed the action.

Dead in the Water: Are Pre-Dispute Arbitration Agreements in Danger?

As illustrated by the *Blue Fish* decision, courts—including the U.S. Supreme Court—generally have been willing to enforce valid pre-dispute arbitration agreements in a variety of contexts. Employers frequently have turned to arbitration to resolve both individual and class-based employment disputes in a fair, expedient and cost-efficient manner, but the future of mandatory arbitration is unclear.

During the current term, the Supreme Court will decide several cases with the potential to have far-reaching consequences regarding the enforceability of arbitration agreements. In *Stolt-Nielsen S.A. v.*

AnimalFeeds International Corp., 548 F.3d 85 (2d Cir. 2008), *cert. granted*, 129 S. Ct. 2793 (June 15, 2009) (No. 08-1198), the Supreme Court will consider whether imposing class arbitration on parties whose arbitration provisions do not address class treatment is consistent with the FAA. In *Granite Rock Co. v. International Brotherhood of Teamsters*, 546 F.3d 1169 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 2865 (June 29, 2009) (No. 08-1214), the Supreme Court will decide whether parties to a collective bargaining agreement may be required to submit any contract disputes to arbitration—including a dispute over whether a contract exists—under the terms of the agreement's arbitration provision. Similarly, in *Jackson v. Rent-A-Center West, Inc.*, 581 F.3d 912 (9th Cir. 2009), *cert. granted*, 2010 WL 144073 (Jan. 15, 2010) (No. 09-497), the Supreme Court will decide whether an arbitration provision can give an arbitrator authority to determine whether the arbitration provision is enforceable, or whether a court must make this decision.

Strong Supreme Court decisions in favor of mandatory arbitration agreements could ultimately lead to a contradictory result, however, if Congress responds by enacting legislation to reverse these decisions. For example, the Arbitration Fairness Act of 2009 (AFA)—which is already pending before Congress—may restrict use of pre-dispute arbitration provisions in employment, consumer, and franchise agreements. The AFA's proponents argue that a series of Supreme Court decisions have extended the FAA beyond Congress's original intentions, which—they argue—favored the use of arbitration in disputes between commercial entities, but not between a commercial entity and employees or consumers.

This legislation could have a huge impact on employment and commercial disputes because of the potential for increased litigation costs and an increased risk of large jury verdicts. This unsettled area of the law remains an area of great interest for employers and the business community at large.

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