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Labor & Employment ADVISORY ■

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Supreme Court's *American Express* Decision Further Strengthens Employers' Ability to Enforce Class Action Arbitration Waivers

The United States Supreme Court's June 20, 2013, decision of ***American Express Co. et al. v. Italian Colors Restaurant***[1] will further bolster employers' ability to enforce class action waivers contained in arbitration agreements. Historically, in the employment context, employee-friendly states such as California have been resistant to enforce class action waivers in arbitration agreements based on concern that enforcing such waivers would violate public policy. However, recent developments in the law at the federal level indicate that, with a properly drafted arbitration agreement, it is possible to implement and enforce class arbitration waivers nationally.

In ***AT&T Mobility LLC v. Concepcion***[2] (2011), the Supreme Court held the Federal Arbitration Act (FAA) preempts state laws that purport to invalidate class arbitration waivers. ***Concepcion*** left open the question, however, of whether the FAA could trump other federal statutes. The Supreme Court closed this loop in ***American Express*** when it held that a contractual waiver to class arbitration is enforceable under the FAA even when the plaintiffs' cost of individually arbitrating a federal statutory claim is prohibitively expensive.

The case arose out of an antitrust dispute in which a merchant, Italian Colors, brought a class action against American Express Co. ("AmEx") for charging higher credit card fees than competing cards. Italian Colors had signed a class arbitration waiver, which AmEx sought to enforce. On this basis, the federal district court dismissed the case, but the Second Circuit Court of Appeals reversed and remanded. The Second Circuit held that the class arbitration waiver was unenforceable because arbitration would be prohibitively expensive to pursue on an individual basis. The Supreme Court granted *certiorari* and reversed the Second Circuit's ruling.

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1 http://www.supremecourt.gov/opinions/12pdf/12-133_19m1.pdf.

2 131 S. Ct. 1740 (2011).

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Despite Italian Colors' argument that individually bringing an antitrust action would be prohibitively expensive, Justice Scalia, writing for the majority, concluded that this argument was insufficient to invalidate a class arbitration waiver. He reiterated the overarching principle that arbitration is a matter of contract and emphasized that courts must "rigorously enforce" arbitration agreements according to their terms. Although Justice Kagan argued in dissent that the "effective vindication doctrine" barred enforcement of the AmEx class arbitration waiver because that agreement effectively insulated AmEx from federal antitrust claims, the majority reasoned that the fact that individual arbitration "is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the right to *pursue* that remedy."

Although the case arose out of an antitrust dispute, it is likely to have an impact on the employment arena. Employers can be particularly vulnerable to class action claims, especially if they have a large number of employees. The ***AmEx*** decision builds on ***Concepcion*** and thereby further strengthens employers' ability to enforce class action waivers in arbitration agreements. This decision will particularly affect the enforcement of class waivers in arbitration agreements for claims brought under numerous *federal* employment statutes. Some predict that this decision will most directly affect wage-and-hour litigation under the Fair Labor Standards Act (FLSA) and specifically the ability of employees to waive their right to pursue FLSA claims on a collective action basis. Currently courts are split as to whether the right to pursue a collective action under FLSA can be waived.[3] Moreover, despite the ***AmEx*** decision, the National Labor Relations Board (NLRB) continues to staunchly maintain that mandatory class arbitration waivers—with respect to FLSA claims and otherwise—violate the National Labor Relations Act.

In the wake of ***AmEx***, the plaintiffs' bar, with the support of the NLRB, has been claiming the Court's decision should be distinguished from the wage-and-hour context because, they claim, the right to proceed on a collective action basis under the FLSA cannot be waived. Management-side attorneys, however, maintain the Court's decision will substantially undermine this argument going forward. The full impact of ***AmEx*** on class arbitration waivers in the employment context generally—and in particular on FLSA collective action waivers—will ultimately depend on how broadly the lower federal courts construe the Court's guidance about rigorously enforcing arbitration agreements in accordance with their terms.

In any event, in light of this new development in the arbitration realm, employers may want to consider—in connection with advice from counsel—whether to implement arbitration agreements with employees, and if such agreements are already in place, whether they properly preclude class arbitration of employment claims. A well-drafted class arbitration waiver can be an effective tool for avoiding the tremendous expense and risk of an employment-related class action.

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[3] *Compare, e.g., Raniere v. Citigroup Inc.*, 827 F. Supp. 2d 294, 310 (S.D.N.Y. 2011) (right to proceed collectively under FLSA cannot be waived), *with Birdsong v. AT&T Corp.*, C12-6175 TEH, 2013 WL 1120783 (N.D. Cal. Mar. 18, 2013) (the right to bring a FLSA action collectively is a *procedural*, rather than a substantive, right and is therefore waivable).

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If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

ATLANTA

Shama Barday
404.881.7437
shama.barday@alston.com

Alexandra Garrison Barnett
404.881.7190
alex.barnett@alston.com

Ashley D. Brightwell
404.881.7767
ashley.brightwell@alston.com

Lisa H. Cassilly
404.881.7945
lisa.cassilly@alston.com

Brett E. Coburn
404.881.4990
brett.coburn@alston.com

Patrick L. Coyle
404.881.4367
patrick.coyle@alston.com

Clare H. Draper IV
404.881.7191
clare.draper@alston.com

R. Steve Ensor
404.881.7448
steve.ensor@alston.com

Kimberly L. Fogarty
404.881.4502
kim.fogarty@alston.com

Marilee Fiebig Holmes
404.881.4374
marilee.holmes@alston.com

Molly M. Jones
404.881.4993
molly.jones@alston.com

J. Thomas Kilpatrick
404.881.7819
tom.kilpatrick@alston.com

Christopher C. Marquardt
404.881.7827
chris.marquardt@alston.com

Wes R. McCart
404.881.7653
wes.mccart@alston.com

Charles H. Morgan
404.881.7187
charlie.morgan@alston.com

Edmund M. Morrell
404.881.7953
edmund.morrell@alston.com

Glenn G. Patton
404.881.7785
glenn.patton@alston.com

Robert P. Riordan
404.881.7682
bob.riordan@alston.com

Eileen M. Scofield
404.881.7375
eileen.scofield@alston.com

Alicia P. Starkman
404.881.4994
alicia.starkman@alston.com

Brooks Suttle
404.881.7551
brooks.suttle@alston.com

Kristen Willoughby
404.881.4284
kristen.willoughby@alston.com

CHARLOTTE

Susan B. Molony
704.444.1121
susan.molony@alston.com

DALLAS

Jon G. Shepherd
214.922.3418
jon.shepherd@alston.com

NEW YORK

Erin L. Connolly
212.210.9461
erin.connolly@alston.com

LOS ANGELES

Lindsay G. Carlson
213.576.1038
lindsay.carlson@alston.com

Martha S. Doty
213.576.1145
martha.doty@alston.com

James R. Evans, Jr.
213.576.1146
james.evans@alston.com

Jesse M. Jauregui
213.576.1157
jesse.jauregui@alston.com

Deborah Yoon Jones
213.576.1084
debbie.jones@alston.com

Sayaka Karitani
213.576.1026
sayaka.karitani@alston.com

Claire Lucy Readhead
213.576.1181
claire.readhead@alston.com

Nicole C. Rivas
213.576.1021
nicole.rivas@alston.com

Casondra K. Ruga
213.576.1133
casondra.ruga@alston.com

WASHINGTON, D.C.

Emily Seymour Costin
202.239.3695
emily.costin@alston.com

Charles A. Gartland II
202.239.3978
chuck.gartland@alston.com

Jonathan G. Rose
202.239.3693
jonathan.rose@alston.com

ALSTON & BIRD LLP

WWW.ALSTON.COM

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ATLANTA: One Atlantic Center ▪ 1201 West Peachtree Street ▪ Atlanta, Georgia, USA, 30309-3424 ▪ 404.881.7000 ▪ Fax: 404.881.7777
BRUSSELS: Level 20 Bastion Tower ▪ Place du Champ de Mars ▪ B-1050 Brussels, BE ▪ +32 2 550 3700 ▪ Fax: +32 2 550 3719
CHARLOTTE: Bank of America Plaza ▪ 101 South Tryon Street ▪ Suite 4000 ▪ Charlotte, North Carolina, USA, 28280-4000 ▪ 704.444.1000 ▪ Fax: 704.444.1111
DALLAS: 2828 North Harwood Street ▪ 18th Floor ▪ Dallas, Texas, USA, 75201 ▪ 214.922.3400 ▪ Fax: 214.922.3899
LOS ANGELES: 333 South Hope Street ▪ 16th Floor ▪ Los Angeles, California, USA, 90071-3004 ▪ 213.576.1000 ▪ Fax: 213-576-1100
NEW YORK: 90 Park Avenue ▪ 12th Floor ▪ New York, New York, USA, 10016-1387 ▪ 212.210.9400 ▪ Fax: 212.210.9444
RESEARCH TRIANGLE: 4721 Emperor Blvd. ▪ Suite 400 ▪ Durham, North Carolina, USA, 27703-85802 ▪ 919.862.2200 ▪ Fax: 919.862.2260
SILICON VALLEY: 275 Middlefield Road ▪ Suite 150 ▪ Menlo Park, California, USA, 94025-4004 ▪ 650-838-2000 ▪ Fax: 650.838.2001
WASHINGTON, DC: The Atlantic Building ▪ 950 F Street, NW ▪ Washington, DC, USA, 20004-1404 ▪ 202.756.3300 ▪ Fax: 202.756.3333
VENTURA COUNTY: 2801 Townsgate Road ▪ Suite 215 ▪ Westlake Village, California, USA, 91361 ▪ 805.497.9474 ▪ Fax: 805.497.8804