February 9, 2012

Two recent New York federal district court decisions illustrate the ongoing debate regarding the enforceability of class action waivers in the employment context following *AT&T Mobility v. Concepcion* and *D.R. Horton and Michael Cuda.* In *Sutherland v. Ernst & Young,* 2012 WL 130420 (S.D.N.Y. 2012), Judge Kimba M. Wood of the Southern District of New York invalidated an employment class action waiver on the ground that it prevented the employee from vindicating her statutory rights, notwithstanding *Concepcion.* In *LaVoice v. UBS Financial Services,* 2012 WL 124590 (S.D.N.Y. 2012), on the other hand, another judge (Judge Barbara S. Jones) in the same district court enforced a class action waiver, notwithstanding *D.R. Horton.* As discussed in more detail below, these two cases demonstrate that at least two federal district court judges in New York have held that class action waivers are not *per se* unenforceable and that courts may focus their enforceability analyses on whether an individual action would be prohibitively expensive (when compared to the potential recovery for the individual).

In *AT&T Mobility v. Concepcion,* 131 S.Ct. 1740 (2011), which we **previously reported on**, the United States Supreme Court held that the Federal Arbitration Act permits companies to require customers to arbitrate their complaints individually, precluding class action claims. In *D.R. Horton and Michael Cuda* 357 NLRB No. 184 (Jan. 3, 2012), which we also **previously reported on**, the National Labor Relations Board held that an employer that requires employees as a condition of their employment to sign an agreement that precludes them from filing joint, class or collective claims addressing their wages, hours or other working conditions against the employer in any forum, has engaged in an unfair labor practice under the National Labor Relations Act.

In *Sutherland v. Ernst & Young,* plaintiff Stephanie Sutherland brought a class action against her former employer Ernst & Young under the Fair Labor Standards Act ("FLSA") and New York law. Sutherland alleged that she was wrongfully classified as an exempt employee and that Ernst & Young failed to properly compensate her for overtime hours. Sutherland further alleged that she worked 151.5 hours of unpaid overtime, which amounted to $1,867.02 in unpaid wages. Ernst & Young moved to dismiss the proceeding and compel arbitration. Ernst & Young argued that Sutherland signed an arbitration agreement as a condition of her employment which required binding arbitration and permitted arbitration only on an individual (but not class) basis.

On January 13, 2012, Judge Wood invalidated the class action waiver on the grounds that it did not allow Sutherland to vindicate her statutory rights. Judge Wood stated that class action waivers must be analyzed on a case-by-case basis. In particular, Judge Wood found that under the arbitration agreement Sutherland would likely have to bear certain arbitration related costs and expenses, the cost of discovery would be significant, and Sutherland may not be able to recover attorneys' fees. For these reasons, it was deemed cost-prohibitive for Sutherland to bring an individual claim, given the small amount of her potential recovery ($1,867.02). The court distinguished *Concepcion,* holding that the agreement in that case allowed plaintiffs to vindicate their statutory rights because it was consumer friendly, provided that AT&T would pay all arbitration-related costs for non-frivolous claims, and provided that AT&T could not recover attorneys' fees. The court also emphasized that in *Concepcion,* the Supreme Court determined that pursuing a claim in arbitration under the agreement would actually be more favorable to the consumer than pursuing a class action.

In *LaVoice v. UBS Financial Services,* plaintiff Larry LaVoice brought class and collective action claims against UBS, alleging violations of the FLSA and New York law. In response, UBS moved to compel arbitration on the ground that LaVoice had signed an arbitration agreement under which he agreed to individually arbitrate these claims. On January 13, 2012, Judge Jones rejected LaVoice's argument that the FLSA guarantees the right to collective action which cannot be waived in a non-negotiated arbitration agreement. The *LaVoice* court found that such an argument was precluded in light of *Concepcion.* Specifically, the court stated that it "must read AT&T Mobility as standing against any argument that an absolute right to collective action is consistent with the FAA's

‘overarching purpose' of ‘ensur[ing] the enforcement of arbitration agreements according to their terms so as to facilitate proceedings.'" Notably, the court rejected LaVoice's argument that *D.R. Horton and Michael Cuda* supported his position.

The *LaVoice* Court also rejected LaVoice's argument that the arbitration agreement precluded him from exercising his statutory rights. The Court stated that the enforceability of a class action waiver in an arbitration agreement must be considered on a case-by-case basis, concluding that the waiver signed by LaVoice would not prevent him, as a practical matter, from exercising his statutory rights. The Court noted that LaVoice's estimated overtime damages claims were between $127,000 to $132,000, that the arbitration agreement permitted LaVoice to recover attorneys' fees and that his estimated costs were highly speculative. For these reasons, LaVoice was held not to have shown the likelihood of incurring "prohibitively expensive" costs that would deter him from bringing his claims in an individual capacity.

These two cases demonstrate that at least two federal district court judges in New York have held that class action waivers are not *per se* unenforceable and that courts may in the future focus their enforceability analyses on whether or not an individual action would be prohibitively expensive (when compared to the potential recovery for the individual). Further, given the clearly divided lines of opposition for and against class action waivers, various court and NLRB holdings on both sides of the issue, and the Supreme Court's recent focus on arbitration, we anticipate that the issue of the enforceability of class waivers in the employment context may ultimately be decided by the Supreme Court. In the meantime, employers and employees will continue to have arguments for and against the enforceability of class action waivers under recent court and NLRB decisions.

Because of the continued state of flux on these issues, we strongly recommend that any current arbitration agreements (particularly those that include class, collective and/or representative action waivers) be reviewed for enforceability. Such review should include a close examination of severability provisions allowing a court to sever any unenforceable language and enforce the remaining agreement.

Our attorneys have deep counseling and litigation experience on these issues. If you would like to discuss these issues further or have questions about this *Alert,* please contact one of the attorneys listed above.

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