Individualizing the FLSA: Collective Action Waivers and the Split in the Federal Courts

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Introduction

The ability of employees to proceed collectively under the Fair Labor Standards Act (FLSA) is a well-settled right. So, too, is the employer's right to negotiate for arbitration of employment disputes. A judicial clash between these two principles has emerged with class/collective action waivers in the employment context. Introduced in the late 1990's as a means of protecting against large-scale class and collective actions,[1] class/collective action waivers can be included in otherwise ordinary arbitration provisions. Together, an arbitration provision and class/collective action waiver attempt to do two things: (1) require arbitration of all employment disputes, including FLSA claims, and (2) require arbitration (or adjudication) of all such disputes on an individual rather than collective basis. For the employer, the intended result is a far more manageable claim.

The battle over the viability of class/collective action waivers, however, is far from over. This article addresses the current split in the federal courts over the legality of class/collective action waivers in employment agreements and analyzes the historical development of the competing rights to collective action and arbitration in hopes of anticipating the direction federal courts will take going forward. Though the Supreme Court has not weighed in on the debate, at least one case sitting on its doorstep could provide an opportunity to examine the tension between its twin commitments to collective actions and arbitration.

I. The Rise of the FLSA Collective Action

Scholars and courts alike have referred to the FLSA collective action as a "unique species of litigation."[2] Though written into law more than seventy years ago, collective action suits are largely a product of the last ten to twenty years. The number of FLSA collective action suits filed in federal courts more than tripled between 2000 and 2009.[3]

The recent explosion of FLSA collective actions has forced employers to make defending these cases a priority. But defending FLSA claims in court is neither a straightforward nor easy task. For one thing, the nature and dynamics of FLSA actions can vary dramatically, as such claims are often accompanied by other federal or state-law components.[4] Employers also face an uphill battle when it comes to the real fight in FLSA collective action suits: conditional certification. A lenient approach to conditional certification in many courts has effectively stacked the deck against employers. In response, employers and defense attorneys have turned their attention to solutions outside the courtroom, primarily collective action waivers.

A. The Legislative History of the FLSA Collective Action and the Court's Decision in Hoffman-La Roche

Passed on the heels of the federal courts' standoff with President Roosevelt in 1937, the Fair Labor Standards Act of 1938 created a specific cause of action for employees with minimum-wage and overtime pay claims and included in its original form provision for the modern day collective action device.[5]

As originally enacted, the FLSA allowed employees (i) to maintain suits "for and in behalf of himself or themselves and other employees similarly situated," or (ii) "designate an agent or representative to maintain such action for and in behalf of all employees similarly situated."[6] Thus, the FLSA did not require plaintiffs to affirmatively opt-in to a suit but rather allowed plaintiffs to designate an agent or representative to maintain an action on behalf of all employees similarly situated.

In 1947, Congress amended this procedure in response to "excessive litigation spawned by plaintiffs lacking a personal interest in the outcome"[7] and the "national emergency"[8] created by a flood of suits alleging unpaid portal-to-portal pay. Though leaving in place the provision for collective actions on behalf of "similarly situated" persons, the Portal-to-Portal Act of 1947 abolished the representative action brought by plaintiffs lacking a personal stake in the outcome and required plaintiffs to file written consent in federal court to become a party in FLSA suits.[9]

The FLSA's opt-in requirement distinguishes it from class actions under Rule 23 of the Federal Rules of Civil Procedure. When Rule 23 was overhauled in 1966, the FLSA collective action was left unchanged, with express direction from Congress that the FLSA's opt-in requirement was "not intended to be affected by Rule 23, as amended."[10] From that point forward, the procedural rights of plaintiffs bringing suit under the FLSA diverged from those of many other litigants.[11] Moreover, while the jurisprudence surrounding Rule 23 class certification developed into a fairly sophisticated framework, that surrounding FLSA collective actions remained stunted. And courts read in a separation between the two bodies of law.

The Supreme Court's decision in *Hoffman-LaRoche, Inc. v. Sperling*[12] in 1989 was the Court's first real foray into FLSA collective action certification requirements. Resolving a split among the federal circuits concerning the appropriate role of the courts with respect to notice, the Court ruled that district courts "have discretion, in appropriate cases, to implement [FLSA collective actions] . . . by facilitating notice to potential plaintiffs."[13] The Court stopped short of prescribing or even suggesting a certification-type procedure for implementing its directive. It also stopped short of defining what it means to be a

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similarly-situated employee under the FLSA such that collective action is appropriate.

B. The Search for a Certification Standard and the Battle over Conditional Certification

After *Hoffman-LaRoche*, lower courts began scrambling for a workable approach to FLSA collective action certification and court-facilitated notice to potential plaintiffs. A two-step process emerged as the prevailing standard in federal courts. At the first stage, plaintiffs move, prior to the completion of discovery, for court-ordered notice to similarly-situated employees, prompting the court to either grant or deny "conditional certification." At the second stage, which typically occurs towards the close of discovery, the defendant has an opportunity to move for decertification of the class.

During the first stage, the dominant approach is that established by the New Jersey District Court in *Lusardi v. Xerox Corp*.[14] Under *Lusardi*, the court analyzes several factors on an ad-hoc basis when deciding whether to grant conditional certification: (i) the extent to which employment settings are similar; (ii) the extent to which any potential defenses are common or individuated; and (iii) general fairness and procedural considerations.[15] The minority approach is to apply Rule 23's certification standard.[16]

The real battle for defendants in FLSA collective actions lies here, in the fight over conditional certification. Quite simply, court-ordered notice and the accompanying discovery required to provide adequate notice is expensive—very expensive. Moreover, the scale is tipped in favor of the employees. The standard for conditional certification is "fairly lenient," and "can even be met with a well-pleaded complaint prior to conducting discovery."[17] The conditional certification decision is typically based on minimal evidence and results in certification most of the time.[18] From here, employers face pressure to settle claims, regardless of merit, before reaching the second stage.[19]

Not surprisingly, this trend has prompted criticism by employers and the defense bar. Opponents of the prevailing approach typically focus on the due process concerns and fundamental fairness of "lenient" conditional certification, not to mention the enormous burden on employers of having to defend against claims that ultimately may not meet minimal standards of plausibility for class treatment. Opponents also argue[20] that the two-step approach is not supported, much less prescribed, by law and runs afoul of the stringent standards required under Rule 23 and recent cases such as *Wal-Mart Stores, Inc. v. Dukes.*[21]

But these arguments have made little headway with the courts. For example, in the case of *In re HCR Manorcare, Inc.*,[22] the employer petitioned the Sixth Circuit for a writ of mandamus on grounds that the district court's[23] approach to conditional certification violated both due process and statutory and judicial authorities. Supported by the defense bar, the employer's brief was a treatise on the ills of contemporary conditional certification, and suggested to the Sixth Circuit that it had "the rare opportunity" to provide guidance and tackle the conditional certification question head-on.[24] The Sixth Circuit denied mandamus without really addressing any of the employer's arguments.[25] The Supreme Court denied the employer's petition for certiorari.[26]

With mixed results in securing a more stringent conditional certification standard, employers have turned to a potentially more promising option: requiring employees to arbitrate FLSA claims on an individual basis.

II. The Historical Acceptance of Arbitration and the Development of the Class Waiver

Like the collective action, arbitration has been around for some time, but has found increased acceptance in the employment context in recent years. Courts have held that employers and employees may not only negotiate for the right to submit certain types of claims to arbitration, as a forum, but that parties have the right to proceed with arbitration on the procedural terms they see fit. Arbitration thus presented itself as a viable way for employers to avoid the pitfalls of FLSA collective actions.

A. The Federal Arbitration Act and the Arbitration of Statutory Rights

Since originally enacted in 1925 and reenacted and codified in 1947, the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16, embedded arbitration as a favored policy in federal law.

Mandatory arbitration of *statutory* claims, however, was slow to gain acceptance. Not until the 1980's did the Supreme Court really accept the idea that statutory claims could be subjected to an arbitral rather than judicial forum.[27] In a string of cases in the 1980's, the Court upheld the compulsory arbitration of claims under the Sherman Act, the Securities Act of 1933, the Securities Exchange Act of 1934, and the civil provisions of the Racketeering Influenced Corrupt Organization Act (RICO).[28]

Then, in 1991, the Court issued a definitive statement regarding arbitration in the employment context, ruling in *Gilmer v. Interstate/Johnson Lane Corp*.[29] to uphold the mandatory arbitration of claims under the Age Discrimination in Employment Act (ADEA). Recognizing that statutory claims could be made the subject of an arbitration agreement enforceable pursuant to the FAA, the Court observed that, by agreeing to arbitrate a statutory claim, an employee does not forego any substantive statutory rights.[30] The Court acknowledged an exception where "'Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'" The burden is on the party challenging arbitration to establish that Congress intended to preclude a waiver of the judicial forum.[31]

With *Gilmer*, the Supreme Court gave a clear instruction: statutory rights, including those under the FLSA, can be vindicated outside a judicial forum. The Court's decision left to the district courts the task of applying its instructions and figuring out what separated arbitrable statutory claims from the inarbitrable ones.

B. What Makes a Claim Arbitrable?

Gilmer mandates the arbitration of statutory claims insofar as the arbitration agreement is enforceable under the FAA and

Congress has not "evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."[32] Further, "the specific arbitral forum provided under an arbitration agreement must . . . allow for the effective vindication of that claim." This last notion comes from the Court's decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[33] which upheld compulsory arbitration of Sherman Act claims but suggested that mandatory arbitration was permissible only "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum."[34]

Parties challenging mandatory arbitration of statutory claims thus must establish one of three grounds for unenforceability: (i) unenforceability under the FAA; (ii) legislative preclusion of arbitration of the statutory rights at issue; or (iii) failure to provide a forum in which the plaintiff's rights can be vindicated.[35]

An arbitration provision is enforceable pursuant to the FAA "save upon such grounds as exist at law or in equity for the revocation of any contract."[36] Thus, state-law defenses such as fraud, duress, or unconscionability can be advanced.[37]

As for arbitration being precluded by Congress, *Gilmer* instructs that the burden is on the party challenging arbitration to show that Congress "intended to preclude a waiver of a judicial forum" for the claims at issue.[38] This is a high hurdle, and requires a clear showing of congressional intent to preclude arbitration.[39]

The last, and most litigated, basis for attacking mandatory arbitration is that the arbitral forum does not allow effective vindication of statutory rights.[40] In *Mitsubishi Motors*, the Supreme Court upheld the mandatory arbitration of federal antitrust claims pursuant to an arbitration provision containing international choice-of-forum and choice-of-law clauses, observing that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent functions."[41] In a footnote, however, the Court observed: "[I]n the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we have little hesitation in condemning the agreement as against public policy."[42]

While the precise reach of *Mitsubishi Motors* is uncertain,[43] it provided a framework for invalidating arbitration clauses that prevented the vindication of statutory rights. Prohibitively high cost is typically the lynchpin of a plaintiff's argument here, though any number of factors may come into play.[44] The Supreme Court set the standard and burden of proof for such arguments in *Green Tree Financial Corp. v. Randolph*,[45] providing that, where a party challenges arbitration as prohibitively costly, "that party bears the burden of showing the likelihood of incurring such costs."[46] Though contemplating a shift in the burden of proof, the Court stopped short of establishing when the party seeking arbitration must come forward with contrary evidence; the parties never reached this question in *Green Tree* itself.[47]

Among the questions presented in *Green Tree* was "whether an arbitration agreement that does not mention arbitration costs and fees is unenforceable because it fails to affirmatively protect a party from potentially steep arbitration costs."[48] The Court answered in the negative but cautioned: "It may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum."[49] The Court's decision has become a guide for the premise that costs (or any other arbitration feature) effectively prevent a party from vindicating statutory rights in an arbitral forum. All federal courts of appeal have adopted the *Green Tree* standard.[50]

C. Introduction to the Class/Collective Action Waiver and the Supreme Court's Decision in Concepcion

Challenges to class and/or collective action waivers generally mirror those against the mandatory arbitration of statutory rights. That is, waivers have been challenged based on state-law defenses, as facially inconsistent with an underlying substantive federal statute, and as unenforceable for failure to allow effective vindication of statutory rights. State-law unconscionability doctrine found traction as a viable challenge to class waivers in certain states, most notably California, for a number of years.[51] However, in 2011, the Supreme Court pushed back against state-law attacks. Abrogating the California Supreme Court's ruling in *Discover Bank v. Superior Court* (commonly known as the "Discover Bank rule"),[52] the Supreme Court, in *AT&T Mobility v. Concepcion*, held that the FAA preempts state laws that effectively condition the enforceability of arbitration agreements on the availability of class-wide arbitration.[53]

Though stopping short of a wholesale endorsement of class/collective action waivers, *Concepcion* reaffirmed a federal policy favoring arbitration and suggested that such waivers are a permissible option for defendants wishing to reduce risk and exposure through individualized, non-aggregated arbitration. However, *Concepcion* did not involve a dispute over statutory rights, much less employment-related statutory rights; it centered on a dispute over consumer contracts and allegations of fraud and false advertising. Further, the arbitration agreement at issue contained features favorable to consumers: a choice of forum clause; an allocation of all costs to AT&T for non-frivolous claims; a specification that the arbitrator could award any form of individual relief; a provision for a minimum award and twice the amount of the claimant's attorney's fees where the customer received an award greater than AT&T's last written offer; and so forth.[54] In sum, the agreement was structured such that arbitration was in no way less favorable for the consumer than litigation.

All of which is to say, while *Concepcion* set forth a principle favoring arbitration and cast doubt on any "device [or] formula" that might provide a vehicle for "judicial hostility towards arbitration,"[55] it stopped short of answering the more contentious questions regarding the permissibility of class/collective action waivers in the employment context. It also firmly shifted the focus to the *Green Tree* framework and arguments premised on the failure of the arbitral forum to allow effective vindication of statutory rights.

III. The Circuit Split and the Clash in Supreme Court Precedent

While *Concepcion* changed the parameters of the debate, tension between federal policies favoring arbitration and the right of employees to collective action under the FLSA has produced a split in the federal circuits on the issue of whether an employee may waive the right to collective action under the FLSA. Short of guidance from the Supreme Court, it is likely the circuits will remain divided and employers will face uncertainty as to the protection provided by class/collective action waivers.

A. The Minority Position and the Search for Clarity in the Second Circuit

The Second Circuit has been a hot-spot for challenging class/collective action waivers in the employment context. A number of cases currently working their way through the Second Circuit present not only the broader question of whether and under what circumstances individualized arbitration might allow effective vindication of FLSA rights, but whether, instead, the FLSA collective action might be a substantive right such that waivers of that right are per se unenforceable.

1. The Minority Position: Collective Action Waivers are Per Se Unenforceable

The pending appeal in *Raniere v. Citigroup, Inc.*[56] raises the issue of whether the ability to pursue a FLSA collective action constitutes a substantive right. The suit involves allegations by employees (lending specialists) that their employer (Citigroup) misclassified them as exempt and wrongfully denied them overtime compensation under the FLSA. Citigroup moved to compel individualized arbitration under an arbitration agreement and collective action waiver contained in its employee handbook. The employees argued that the class waiver was unenforceable.

The district court judge considered two primary arguments: (i) that collective action waivers are per se unenforceable because collective actions are "unique animal[s]" and an integral part of the FLSA's remedy structure;[57] and, (ii) that the class waiver was unenforceable because, as a practical matter, it precluded the plaintiffs from effectively vindicating their rights under the FLSA.[58] The court rejected the latter argument, observing that the potential for adequate individual recoveries and mandatory shifting of attorneys' fees under the arbitration agreement ensured that the plaintiffs could effectively vindicate their rights on an individual basis.[59] In short, the plaintiffs failed to meet the *Green Tree* burden.[60]

As to the first argument, however, the trial judge took a more sympathetic view. Distinguishing *Gilmer* as limited to the general arbitrability of FLSA claims, as opposed to the waiver of collective treatment in arbitration, the court found collective action waivers "unenforceable as a matter of law" because the collective action itself is a substantive right afforded by the statute.[61]

Though in the minority, this decision does not stand alone. In *Chen-Oster v. Goldman, Sachs & Co.*,[62] the district court denied Goldman Sachs' motion to compel individual arbitration of Title VII claims, holding that class treatment of pattern discrimination claims constitutes a substantive right insofar as "a pattern or practice claim under Title VII can only be brought in the context of a class action."[63] *Chen-Oster* is also pending before the Second Circuit.[64] Whether the district court's decision will stand in light of *Wall-Mart Stores, Inc. v. Dukes*, remains to be seen.

Similar reasoning as that in *Raniere* only recently came before the Eighth Circuit.[65] In *Owen v. Bristol Care, Inc.*,[66] the district court held that class waivers are per se unenforceable in the employment context because collective actions constitute a substantive right under the "plain language of the FLSA" and *Concepcion* is "not controlling" in the employment context.[67] The district court's holding in *Owen* is therefore in line with that of the district court in *Raniere:* waivers of the right to proceed collectively under the FLSA are unenforceable as a matter of law.

The Eighth Circuit, however, disagreed. Finding nothing in the text or legislative history of the FLSA to suggest any congressional intent to preclude individual arbitration of claims under the statute, and no inherent conflict between the FLSA and the FAA, the court reversed the district court's decision and sent the case back for individual arbitration in accordance with the arbitration agreement between the parties.[68] In its decision, the court declined to follow *Chen-Oster* as well as the National Labor Relations Board's (NLRB) 2012 decision in *In re D.R. Horton, Inc.*,[69] wherein the NLRB refused to enforce a class action waiver in the context of an FLSA challenge based on Section 7 of the National Labor Relations Act.[70] Deferring instead to the pro-arbitration tone of more recent Supreme Court precedent, the court noted its alignment with decisions emerging from the other circuit courts of appeal.[71]

2. Tension in the Second Circuit

Raniere does not command unanimous support in the Second Circuit, or for that matter even in the district court that decided it.[72] Indeed, the very district court responsible for *Raniere* has also, albeit by the pen of a different judge, explicitly rejected its reasoning.[73] Such tension extends throughout the Second Circuit.

In *D'Antuono v. Service Road Corp.*,[74] for example, the district court granted an employer's motion to compel individualized arbitration of FLSA overtime claims brought on behalf of two exotic dancers who worked in the defendants' clubs. The suit centered on the enforceability of an arbitration clause that contained a class action waiver, a cost and fee-shifting provision, and a statute of limitations provision.[75] The defendants stipulated that they would not enforce the fee-shifting and limitations provisions.[76] With these concessions, the court found the arbitration clause, even with the waiver of collective action, enforceable under both state law[77] and the FLSA under the *Mitsubishi Motors-Green Tree* framework.[78] Looking to the remedies available to the plaintiffs, the court found persuasive the fact that, even with the potential for a "low" recovery, the FLSA provided for double damages and American Arbitration Association (AAA) rules shifted the bulk of arbitration costs to the defendant.[79] Also evident in the decision is the district court's attention to the pro-arbitration spirit of the Supreme Court's decision in *Concepcion*.[80] An interlocutory appeal of the

court's decision was denied.[81]

A similar ruling was issued in *Pomposi v. Gamestop, Inc.*,[82] decided even before *Concepcion*. The court granted the defendant-employer's motion to compel individualized arbitration of FLSA claims brought by one of the defendant's store managers. Citing the federal policy favoring arbitration and case law from other circuits, and distinguishing the Second Circuit's decision in *In re American Express Merchant Litigation*,[83] the court found the arbitration clause and waiver enforceable under both state law and federal arbitrability doctrine.[84] As in *D'Antuono,* the court noted that attorneys' fees and costs were available under the FLSA as well as the arbitration clause.[85]

Cited in both *Pomposi* and *D'Antuono*, the Second Circuit's ruling in *In re American Express Merchants' Litigation* (*AmEx*) is the primary word from the Second Circuit thus far concerning the permissibility of class waivers, though not in the FLSA context. The litigation actually includes two cases, "*AmEx I*"[86] and "*AmEx II*,"[87] and involves antitrust claims rather than employment-related allegations. In *AmEx I*, the court, ruling prior to the Supreme Court's decisions in *Concepcion* and *Stolt-Nielsen v. AnimalFeeds International Corp*,[88] refused to enforce a mandatory arbitration clause and accompanying class action waiver where plaintiffs showed that they would incur prohibitively high costs sufficient to deprive them of effective vindication of their substantive rights under federal antitrust statutes.[89] In so doing, the court was careful to note that their decision "[did] not decide whether class action waiver provisions are either void or enforceable *per se*."[90] Revisiting this decision in 2012, the Second Circuit ruled in *AmEx II* that the Supreme Court's decisions in *Stolt-Nielsen* and *Concepcion* and did not change its reasoning.[91]

On July 30, 2012, American Express filed a petition for certiorari with the U.S. Supreme Court.[92] The Supreme Court granted certiorari on November 9, 2012.[93] Taking the opportunity to weigh in on the enforceability of class waivers in the antitrust context, the Court could issue a decision with reverberating effects in the employment context.

B. Using the Mitsubishi Motors-Green Tree *Framework*

Short of viewing the FLSA collective action as a substantive right in itself, the federal courts are scattered along a spectrum of views as to what makes a class waiver enforceable in the FLSA context. Case-by-case evaluation using the *Green Tree* standard is the dominant approach, with courts looking at whether the particular aspects (typically costs) of arbitration make it more or less amenable to the effective vindication of statutory rights. A court's own deference to the "uniqueness" of the FLSA collective action and/or the federal policy favoring arbitration inevitably informs this evaluation.

In *Kristian v. Comcast Corp.*,[94] for example, the First Circuit observed in the antitrust context that, while the class action (and class arbitration) is a "procedure for redressing claims," it has "substantive implications" which courts cannot ignore.[95] With this in mind, the court refused to enforce a class waiver where the large costs of arbitration effectively prevented plaintiffs from vindicating statutory rights on an individualized basis. Important to the court were the particularly high costs and complexity of antitrust litigation as opposed to other types of claims.[96] Turning to the employment context in 2007, the court upheld the striking of a class waiver in the FLSA context on state law unconscionability grounds, but stopped short of a wholesale condemnation of FLSA class waivers.[97] Reaching their decision "[b]ased on the particular facts of [the] case," the court expressly did "not reach the argument that waivers of class actions themselves violate either the FLSA or public policy." [98]

Adopting a decidedly pro-arbitration stance, the Fourth Circuit took the position early on that the burden of showing costs large enough to invalidate individualized arbitration is squarely on the plaintiff; while it is "certainly possible" that costs might preclude a plaintiff from effectively vindicating statutory rights, nothing in the text, legislative history, or purpose of the FLSA suggests that Congress "intended to confer a non-waivable right to a class action under [the] statute."[99] Conclusory allegations regarding costs will not suffice here. The Fourth Circuit refused to invalidate an arbitration clause and class action waiver where the plaintiffs failed to provide evidence of basic economic considerations, such as the specific financial status of each plaintiff, the money at stake, and an estimation of the fees and costs potentially incurred.[100]

Other circuits have adopted a similar approach. In 2005, the Eleventh Circuit refused to invalidate a class action waiver on state-law unconscionability grounds based on *Gilmer*, recognizing that "the fact that certain litigation devices may not be available in an arbitration is part and parcel of an arbitration's ability to offer 'simplicity, informality, and expedition.'"[101] At least one district court has since recognized that "the law of the Eleventh Circuit upholds the enforcement of arbitration agreements waiving an individual's right to pursue collective claims under the FLSA."[102] In so doing, the court recognized its decision as squarely at odds with case law from the Second Circuit and the NLRB's *D.R. Horton* decision.[103]

The Fifth Circuit has also rejected the argument that the collective action is a substantive right under the FLSA—it affirmed individualized arbitration of FLSA overtime claims against consumer lender Countrywide.[104] At the same time, however, the court affirmed the district court's decision to sever a fee-shifting provision in the parties' arbitration agreement and impose all costs of arbitration on the defendant, acknowledging that prohibitive costs can invalidate individualized arbitration under *Green Tree.*[105] How the court will treat challenges based on the NLRA remains to be seen.[106]

And then there is the mix-up in the Second Circuit. As mentioned above, the district court granted motions to compel individualized arbitration in both *D'Antuono* and *Pomposi*, among others As with the split over *Raniere*, the Southern District of New York has reached different conclusions even where it has refused to endorse a wholesale condemnation of class waivers. In *Cohen v. UBS Financial Services, Inc.*[107] and *LaVoice v. UBS Financial Services, Inc.*,[108] for example, the district judge found that the respective plaintiffs had failed to meet their burden of showing costs so prohibitive as to make individualized arbitration unenforceable and went on to grant the defendant's motion to compel in both cases. In *Sutherland*

v. Ernst & Young, LLP, the district judge reached a different result.[109] Suggesting a bias towards the uniqueness of the FLSA collective action, and finding *Stolt-Nielsen* and *Concepcion* largely inapplicable, the judge in *Sutherland* refused to enforce individualized arbitration of FLSA claims against the accounting firm based on the Second Circuit's *AmEx* decisions and its belief that the plaintiff had met the *Mitsubishi Motors-Green Tree* burden. Ernst & Young had "ensur[ed] that fees and costs would be recoverable in arbitration to the same degree as in court."[110] The actual loss to the plaintiff totaled just over $1,800. Citing the *AmEx* decisions, the court found that the plaintiff had met her burden of showing costs significant enough to preclude vindication of her statutory rights.[111] An interlocutory appeal of the decision is pending.[112]

IV. Looking Ahead: The Federal Circuits and Employers' Search for a Permissible Waiver

Waivers may not spell the end of the FLSA collective action, but they certainly re-shape the collective action landscape. However, the fate of the class action waiver in the employment context is up in the air: In the Second Circuit, district courts are divided as to the status of the collective action as a substantive right under the FLSA and the circumstances, if any, under which the right to proceed collectively can be waived. While courts in the other federal circuits have largely accepted that the right to proceed collectively under the FLSA is waivable, they disagree as to what makes a permissible waiver and the stringency courts should apply in their review. The First Circuit and several district courts in the Second Circuit seem to favor a high hurdle for the employer. The Fourth, Fifth, Eleventh, and now Eighth Circuits, on the other hand, seem far more sympathetic to the notion that an employee can waive her right to proceed collectively, finding waivers permissible provided that there is protection for the employee against prohibitive costs, unreasonable limitations periods, and so forth.

For the time being, class/collective action waivers in employment arbitration provisions are an important tool for employers. Presently, the weight of authority is that the waivers are enforceable if drafted correctly. The cases offer some pointers for drafting, evaluating and contesting such agreements:

• Procedural Conscionability. State-law attacks on class action waivers may be largely in the past, but employers cannot run afoul of procedural conscionability in their drafting of arbitration clauses and waivers. Ambiguity in agreement language or waivers buried at the end of a document in small print are not likely to find sympathy with courts—nor will unilateral termination and/or modification provisions.

• Time Limitations. Even those courts that have upheld class action waivers in the FLSA context have frowned upon attempts to shorten limitations periods for employees and have suggested that such provisions might void an otherwise valid agreement.

• Damages/Recovery Restrictions. Restrictions or bars on damages or certain types of recovery, such as treble damages or otherwise, can increase the chance a waiver will be deemed unenforceable.

• Attorneys' Fees. Attorneys' fees and the provision for fee-shifting have been critical issues for the courts that have found class action waivers permissible. Since the FLSA provides for the recovery of attorney fees, preserving that in the arbitration agreement makes it more likely to be enforceable.

• Arbitration Costs. The lynchpin of most attacks on class waivers is that the costs of arbitration, and especially arbitration on an individual basis, are prohibitive. Cost-shifting provisions can help moot this concern, as can provisions for the shifting of attorneys' fees. Employers can even offer to pay all costs.

• Choice-of-Forum/Choice-of-Law Clauses. While it is not clear that a choice-of-forum or choice-of-law favorable to the plaintiff is necessary to a permissible arbitration agreement and class action waiver, clauses that impose a burden on plaintiffs will likely weigh against permissibility.

• "Extras." In *Concepcion*, AT&T secured the enforceability of its class action waiver in part due to its inclusion of features particularly favorable to plaintiffs, including a provision for a minimum award and double attorney's fees under certain circumstances. These features may not be necessary, but they further the argument that an agreement is permissible because it ensures that individual arbitration is as favorable as litigation.

• Severance Clause. To the extent an arbitration agreement includes an impermissible clause, a severance clause can help save the rest of the arbitration agreement.

Conclusion

There is no universal, definitive standard for a viable class/collective action waiver within an employment arbitration agreement, but, current case law offers tips on what may or may not make such a waiver more or less acceptable. For employers, the device offers protection from runaway collective action costs. For employees, the waiver need not be a negative so long as the employee protections discussed here are found in the agreement.

Endnotes

1 *See generally* Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 Mich. L. Rev. 373, 375, 395 (2005).

2 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1807 (3d ed.); *see also, e.g.*, Raniere v. Citigroup Inc., 827 F. Supp. 2d 294, 311 (S.D.N.Y. 2011) ("Collective actions under the FLSA are a unique animal.").

3 *See generally* William C. Martucci and Jennifer K. Oldvader, *Addressing the Wave of Dual-Failed Federal FLSA and State Law "Off-the-Clock" Litigation: Strategies for Opposing Certification and a Proposal for Reform*, 19 Kan. J.L. & Pub. Pol'y 433, 433 (2010).

4 *See generally* Rachel K. Alexander, *Federal Tails and State Puppy Dogs: Preempting Parallel State Wage Claims to Preserve the Integrity of Federal Group Wage Actions*, 58 Am. U. L. Rev. 515, 516–518 (2009) (discussing the "explosion" of dual-filed FLSA and state-law wage claims in recent years).

5 Statutory "collective actions" today include minimum-wage and overtime pay suits brought under the FLSA, equal-pay claims under the Equal Pay Act (EPA), and age-discrimination actions for non-federal employees under the

Age Discrimination in Employment Act (ADEA). The FLSA, however, is the source of enforcement powers, procedures, and remedies in collective action suits, and its provisions are incorporated by reference in statutes such as the ADEA.

6 Fair Labor Standards Act of 1938, 52 Stat. 1060, 1069 (1938) (current version at 29 U.S.C. §§ 201–219 (2006)).

7 Hoffman-La Roche, Inc. v. Sperling, 493 U.S. 165, 173 (1989).

8 Arrington v. National Broadcasting Co., Inc., 531 F. Supp. 498, 500 (D.D.C. 1982).

9 *See generally Hoffman-La Roche*, 493 U.S. at 173. In its current form, § 216(b) of the FLSA provides that a suit "may be maintained . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. § 216(b).

10 Fed. R. Civ. P. 23, advisory committee notes (1966).

11 *See generally* Craig Becker and Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards*, 92 Minn. L. Rev. 1317, 1322 (2008).

12 493 U.S. 165 (1989).

13 *Id.* at 169.

14 118 F.R.D. 351, 359 (D.N.J. 1987).

15 *Id; see also, e.g.*, Johnson v. Big Lots Stores, Inc., 561 F. Supp. 2d 567, 572 (E.D. La. 2008).

16 *See, e.g.*, Shushan v. Univ. of Colorado, 132 F.R.D. 263 (D. Colo. 1990).

17 *See, e.g.*, Creely v. HCR Manorcare, Inc., 789 F. Supp. 2d 819, 821 (N.D. Ohio 2011) (conditionally certifying nationwide class of more than 58,000 employees of defendant), *writ denied*, No. 11-3866, 2011 WL 7461073 (6th Cir. Sept. 28, 2011), *cert. denied*, 132 S. Ct. 1146 (Jan. 23, 2012).

18 *See* Basco v. Wal-Mart Stores, Inc., No. 00-3184, 2004 WL 1497709, at *6 (E.D. La. July 2, 2004); *see also* Martucci & Oldvader, *supra* note 3, at 436.

19 Alexander, *supra* note 4, at 541 (internal citations omitted) (observing that conditional certification opens the way for potentially many more claims and costly, class-wide discovery).

20 For a general summary of the arguments made on behalf of defendants in opposition to conditional certification, see Brief of Amicus Curiae in Support of Petitioners, *In Re* HCR Manorcare, Inc., No. 11-3866, 2011 WL 7461073 (6th Cir. Sept. 28, 2011).

21 131 S. Ct. 2541 (2011).

22 2011 WL 7461073.

23 Creely v. HCR Manorcare, Inc., 789 F. Supp. 2d 819.

24 Petition for Mandamus, at 1, *In re* HCR Manorcare, Inc., No. 11-3866, 2011 WL 7461073 (6th Cir. Sept. 28, 2011).

25 *In re HCR Manorcare*, 2011 WL 7461073.

26 HCR Manorcare, Inc. v. Zouhary, 132 S. Ct. 1146 (Jan. 23, 2012).

27 *See generally* Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306, 312 (6th Cir. 2000) (discussing historical progression towards mandatory arbitration of statutory rights).

28 *Id.*

29 500 U.S. 20 (1991).

30 *Id.* at 26 (internal citations omitted).

31 *Id.*

32 *Id.* at 26.

33 473 U.S. 614, 637 (1985).

34 *Id.*

35 *See generally* Gilles, *supra* note 1, at 399–408 (discussing what the author terms "first-wave" and "second-wave" challenges).

36 9 U.S.C. § 2 (2006).

37 *See generally* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1746 (2011); Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2776 (2010); *Gilles*, *supra* note 1, at 399.

38 Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 26, 26 (1991).

39 *Gilles*, *supra* note 1, at 405–06

40 Ineffective vindication of statutory rights and/or congressional intent to preclude arbitration have also been analyzed together as part of a two-step, federal common law arbitrability doctrine. *See, e.g.*, D'Antuono v. Service Rd. Corp., 789 F. Supp. 2d 308, 331 (D. Conn. 2011). In such cases, congressional intent, as outlined above, is analyzed as a first step or basis for unenforceability and ineffective vindication of rights as a second step or basis. *See, e.g.*, *id.*

41 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985).

42 *Id.* at 637 n.19.

43 *See generally, e.g.*, *D'Antuono*, 789 F. Supp. 2d at 333 ("The United States Supreme Court's statement in the *Mitsubishi Motors* footnote does not specify whether the source of law that could permit a court to strike down such an agreement is state contract law—in that case, the Puerto Rico's contract law—or some federal law source. . . . In addition, it does not specify whether it sets forth a generally-applicable rule, or one whose application is limited to the antitrust context.") (internal citations omitted).

44 For example, *Mitsubishi Motors* involved the question of whether international choice-of-forum and choice-of-law clauses effectively prevented vindication of the statutory rights at issue.

45 531 U.S. 79 (2000).

46 *Id*. at 92.

47 *Id.*

48 *Id*. at 82.

49 *Id*. at 90.

50 *See generally* D'Antuono v. Service Rd. Corp., 789 F. Supp. 2d 308, 331, 334 (D. Conn. 2011) (collecting case law).

51 *See, e.g.*, Circuit City Stores, Inc. v. Adams, 279 F.3d 889 (9th Cir. 2002) (finding arbitration of employment claims unconconscionable and thus unenforceable under California law where arbitration clause contained a fee-splitting provision, limited the remedies available, and limited the statute of limitations); Comb v. Paypal, Inc., 218 F. Supp. 2d 1165, 1173 (N.D. Cal. 2002) (denying defendant's motion to compel arbitration on individual, non-aggregated basis); ACORN v. Household Int'l, Inc., 211 F. Supp. 2d 1160, 1174 (N.D. Cal. 2002)(same); Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005) (finding waiver of class arbitration in consumer contract of adhesion unconscionable and unenforceable under California law). For a more recent analysis, *see also generally*, Steele v. Am. Mortg. Mgmt. Servs., No. 12-00085, 2012 WL 5349511, at *8 (E.D. Cal. Oct. 26, 2012) (using unconscionability doctrine to evaluate class waiver but ultimately finding agreement not so "permeated by unconscionability" as to warrant non-enforcement).

52 *Discover Bank*, 113 P.3d 1100.

53 131 S. Ct. 1740, 1744, 1748 (2011). Citing *Concepcion*, the Ninth Circuit issued a similar ruling in 2012 regarding a Washington state-law rule that effectively deemed class waivers substantively unconscionable. *See* Coneff v. AT&T Corp., 673 F.3d 1155 (9th Cir. 2012). The Court kicked the case back to the district court, however, on the question of procedural unconscionability, recognizing a carve-out of sorts in the *Concepcion* jurisprudence.

In California, state courts have struggled with the extent to which *Concepcion* affects class waivers in the state. Prior to *Concepcion*, the California Supreme Court in 2007 issued a ruling extending the *Discover Bank* rule and observing that, in the employment context, "class arbitration waivers should not be enforced if a trial court determines…that class arbitration would be a significantly more effective way of vindicating the rights of affected employees than individual arbitration." Gentry v. Superior Court, 165 P.3d 556, 559 (Cal. 2007). *Concepcion* threw doubt on the viability of this rule. In *Iskanian v. CLS Transp. of Los Angeles, LLC*, the appeals court found that *Concepcion* effectively overruled *Gentry*'s instruction. 142 Cal.Rptr.3d 372, 379 (Cal Ct. App. 2d 2012). The California Supreme Court subsequently granted review of the court's ruling, 147 Cal. Rptr. 3d 324 (Cal. Sept. 19, 2012), setting up a decision that could both determine the landscape for class waivers in California itself and have effects on the larger question of what role state-law doctrines will play in the class waiver jurisprudence generally.

54 *Concepcion*, 131 S. Ct. at 1744.

55 *Concepcion*, 131 S.Ct. at 1747. *See also D'Antuono*, 789 F. Supp. 2d at 331 ("[T]his Court reads the *AT&T Mobility* decision as casting significant doubt on virtually any 'device [or] formula' which might be a vehicle for 'judicial hostility toward arbitration.'") (internal citation omitted).

56 827 F. Supp. 2d 294 (S.D.N.Y. 2011), *appeal docketed,* No. 11-5213 (2d Cir. Dec. 19, 2011).

57 *Raniere*, 827 F. Supp. 2d at 311–12.

58 *Id.* at 314.

59 *Id*. at 316–17.

60 *Id*. at 314.

61 827 F. Supp. 2d at 314.

62 785 F.Supp.2d 394 (S.D.N.Y. 2011), *reconsideration denied*, No. 10-6950, 2011 WL 2671813 (S.D.N.Y. July 07, 2011).

63 *Id*. at 397.

64 Parisi v. Goldman, Sachs & Co., a*ppeal docketed*, No. 11-5229 (2d Cir. Dec. 15, 2011).

65 Owen v. Bristol Care, Inc., No. 12-1719, 2013 WL 57874 (8th Cir. Jan. 7, 2013)

66 No. 11-04258, 2012 WL 1192005 (W.D. Mo. Feb. 28, 2012), *appeal docketed,* 12-1719 (8th Cir. March 27, 2012).

67 *Id*. at *5.

68 Owen, 2013 WL 57874, at *3-4.

69 357 NLRB No. 84, 2012 WL 36274 (Jan. 3, 2012). An appeal in the case is now pending before the 5th Circuit. D.R. Horton, Inc. v. NLRB, *appeal docketed*, 12-60031 (5th Cir. Jan. 13, 2012).

70 *Id.*

71 Owen, 2013 WL 57874, at *4.

72 *See, e.g.*, Cohen v. UBS Fin. Servs., Inc., No. 12-2147, 2012 WL 6041634, at *4 (S.D.N.Y. Dec. 4, 2012) (explicitly rejecting *Raniere* and its reasoning); LaVoice v. UBS Fin. Servs., Inc., No. 11-2308, 2012 WL 124590 (S.D.N.Y. Jan. 13, 2012).

73 *See, e.g.*, Cohen, 2012 WL 6041634, at *4

74 789 F. Supp. 2d 308 (D. Conn. 2011).

75 *Id.* at 317–18.

76 *Id.*

77 *Id.* at 327.

78 *Id*. at 332, 342–44.

79 *Id.* at 343.

80 *See, e.g., id.* at 331 ("[T]his Court reads the *AT&T Mobility* decision as casting significant doubt on virtually any 'device [or] formula' which might be a vehicle for 'judicial hostility for arbitration.'").

81 No. 11-2451 (2d Cir. Oct. 8, 2011).

82 No. 09-340, 2010 WL 147196 (D. Conn. Jan. 11, 2010).

83 554 F.3d 300 (2d Cir. 2009).

84 *Pomposi*, 2010 WL 147196.

85 *Id.* at *7.

86 554 F.3d 300.

87 667 F.3d 204 (2d Cir. 2012).

88 130 S.Ct. 1785 (2010). *Stolt-Nielsen* involved the question of whether parties could be subjected to class-wide arbitration where their agreement to arbitrate was silent as to class treatment. Observing that arbitration is a matter of contract and that parties are free to set the terms of arbitration, the Court ruled that class-wide arbitration cannot be imposed where parties do not expressly agree to it.

89 554 F.3d at 316.

90 *Id*. at 304.

91 667 F.3d 204.

92 Petition for Writ of Certiorari, American Express Co. v. Italian Colors Restaurant, *petition for cert. filed*, filed (July 30, 2012) (No. 12-133).

93 Am. Express Co. v. Italian Colors Restaurant, 133 S.Ct. 594 (2012).

94 446 F.3d 25 (1st Cir. 2006).

95 *Id.* at 54.

96 *Id.* at 58–59.

97 *Id*. at 51–52.

98 Skirchak v. Dynamics Research Corp., 508 F.3d 49, 51 (1st Cir. 2007).

99 Adkins v. Labor Ready, Inc., 303 F.3d 496, 502–03 (4th Cir. 2002).

100 *Id.* at 503.

101 Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1378 (11th Cir. 2005) (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 26, 31 (1991) (internal citations omitted)).

102 De'Oliveira v. Citicorp North America, Inc., No. 12-0251, 2012 WL 1831230 (M.D. Fla. May 18, 2012) (granting defendant's motion to compel individualized arbitration of FLSA claims).

103 *Id*. at *2 (citing *In re D.R. Horton, Inc.*, 357 NLRB No. 184 (2012)). The district court in *Cohen* also explicitly rejected the National Labor Relations Board's decision and reasoning in *In re D.R. Horton, Inc. See* 2012 WL 6041634, at *4.

104 Carter v. Countrywide Credit Indus., Inc., 362 F.3d 294 (5th Cir. 2004).

105 *Id.* at 300.

106 *See supra* note 69 and accompanying text.

107 2012 WL 6041634.

108 2012 WL 124590.

109 847 F. Supp. 2d 528 (SDNY 2012).

110 *Id*. at 532.

111 *Id*. at 531-33.

112 Sutherland v. Ernst & Young, LLP, 847 F. Supp. 2d 528 (S.D.N.Y. 2012), *appeal docketed*, No. 12-304 (2d Cir. Jan. 24, 2012).