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Arbitration Agreements with Class and Collective Action Waivers Enforced

Second Circuit applies Supreme Court's recent ruling in American Express *case and further rules that the FLSA collective action procedure can be waived and class and collective action waivers do not violate the NLRA.*

In August 2013, the U.S. Court of Appeals for the Second Circuit handed down two decisions enforcing arbitration agreements with class and collective action waivers. These decisions continue the trend of enforcing arbitration agreements with class and collective action waivers in accordance with their terms.

On August 9, in *Sutherland v. Ernst & Young LLP*,[1] the Second Circuit applied the U.S. Supreme Court's recent decision in *American Express Co. v. Italian Colors Restaurant*[2] and reversed the district court's denial of Ernst & Young's (E&Y's) motion to compel arbitration. The Second Circuit ruled that the allegation that it would cost the plaintiff far more to litigate her claim for overtime under the Fair Labor Standards Act (FLSA) than the claim is worth was insufficient to avoid enforcement of the arbitration agreement. The court also ruled that the FLSA collective action procedure can be waived and refused to defer to the National Labor Relations Board's (NLRB's) decision in *D.R. Horton* that class and collective action waivers violate the National Labor Relations Act (NLRA).

On August 12, the court reaffirmed that ruling in *Raniere v. Citigroup Inc.*,[3] relying on *Sutherland II* and *Amex II* to reverse the district court's rulings that "(1) 'a waiver of the right to proceed collectively under the FLSA is unenforceable as a matter of law,' and (2) 'if any one potential class member meets the burden of proving that his costs preclude him from effectively vindicating his statutory rights in arbitration, the clause is unenforceable as to that class or collective[.]'"[4]

Background

Sutherland concerned an arbitration agreement entered into between E&Y and plaintiff Stephanie Sutherland, an auditor who sought to bring a putative class and collective action against the company for unpaid overtime. The arbitration agreement contained a waiver of the right to bring class or collective actions in arbitration or in court. Sutherland argued that the arbitration agreement was unenforceable for a host of reasons, including that she could not effectively vindicate her federal statutory rights under the FLSA through individual arbitration because the process would be too expensive. Specifically, Sutherland sought to recover only $1,867.02 in unpaid overtime and claimed that the costs and fees associated with prosecuting her claims on an individual basis would be nearly $200,000, dwarfing her potential recovery. The U.S. District Court for the Southern District of New York agreed, denying E&Y's motion to compel arbitration. In so doing, the district court relied heavily on the Second Circuit's holding in *In re American Express Merchants' Litigation*,[5] which invalidated an arbitration agreement barring class

1. *Sutherland v. Ernst & Young LLP* (*Sutherland II*), No. 12-304-cv, 2013 WL 4033844 (2d Cir. Aug. 9, 2013), *available at* http://www.ca2.uscourts.gov/decisions/isysquery/3753bc5d-d56f-4a7e-b9bb-4c953928a4df/13/doc/12-304_opn.pdf.

2. *American Express Co. v. Italian Colors Rest.* (*Amex II*), 133 S. Ct. 2304 (2013).

3. *Raniere v. Citigroup Inc.* (*Raniere II*), No. 11-5213-cv (2d Cir. Aug. 12, 2013) (summary order reversing district court decision), *available at* http://www.ca2.uscourts.gov/decisions/isysquery/147758ca-c9d5-40ef-b5b7-baa2d9b5f344/1/doc/11-5213_so.pdf.

4. *Raniere II*, No. 11-5213-cv, slip op. at 5 (quoting *Raniere v. Citigroup Inc.* (*Raniere I)*, 827 F. Supp. 2d 294, 314, 317 (S.D.N.Y. 2011)).

5. *In re American Express Merchs.' Litig.* (*Amex I*), 554 F.3d 300 (2d Cir. 2009).

actions where plaintiffs would be unable to vindicate their statutory rights if that provision was enforced because individual arbitration would be prohibitively expensive.[6]

Following the district court's ruling in *Sutherland I*, however, the U.S. Supreme Court reversed the Second Circuit's *Amex I* decision, finding that the Federal Arbitration Act (FAA) requires the enforcement of an arbitration agreement in accordance with its terms, including a class action waiver, and that the expense of proving an individual claim in arbitration is not a basis to refuse to enforce the arbitration agreement.[7]

Like *Sutherland*, *Raniere I* concerned an arbitration agreement that made individual, nonclass "arbitration the required and exclusive forum for the resolution of all disputes arising out of or in any way related to employment . . ." including actions under the FLSA. The district court found that plaintiffs had agreed to arbitrate the claims at issue but nonetheless declined to compel arbitration, reasoning that the arbitration agreement was not enforceable because the right to pursue a collective action under the FLSA cannot be waived. This district court also found that, although the named plaintiffs could vindicate their statutory rights in individual arbitration, the plaintiffs had shown that at least one potential class member proved that "'his costs preclude him from effectively vindicating his statutory rights in arbitration.'"

Second Circuit Decisions

On the heels of *Amex II*, the Second Circuit in *Sutherland II* found that "in light of the Supreme Court's holding that the 'effective vindication doctrine' cannot be used to invalidate class-action waiver provisions in circumstances where the recovery sought is exceeded by the costs of individual arbitration, we are bound to conclude that Sutherland's arguments are insufficient to invalidate the class-action waiver provision at issue here."[8]

Similarly, in *Raniere II*, the Second Circuit applied the rationales from *Amex II* and *Sutherland II* to "conclude that the District Court erred in concluding that . . . if any one potential class member meets the burden of proving that his costs preclude him from effectively vindicating his statutory rights in arbitration, the clause is unenforceable as to that class or collective."[9]

In addition, the court also ruled in both *Sutherland II* and *Raniere II* that the right to proceed as a collective action under the FLSA can be waived, noting that "'every Court of Appeals to have considered this issue has concluded that the FLSA does not preclude the waiver of collective action claims.'"[10] Finally, in *Sutherland II,* the court considered—and expressly declined to follow—the NLRB's decision in *In re D.R. Horton, Inc.*,[11] which held that a waiver of the right to pursue an FLSA claim collectively violates the NLRA, stating that it "owe[d] no deference" to the NLRB's decision and questioning the validity of that decision.[12] The Second Circuit's rejection of *D.R. Horton* follows the U.S. Court of Appeals for the Eighth Circuit's similar decision earlier this year and a host of district court decisions also rejecting the NLRB's holding.

Conclusion

The Second Circuit's decisions in *Sutherland II* and *Raniere II* continue the trend of enforcing arbitration agreements with class and collective action waivers in accordance with their terms. In light of this trend, companies should consider the risks and benefits of alternative dispute resolution programs with class and collective actions waivers in deciding an approach that meets the needs of the company.

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6. *Sutherland v. Ernst & Young LLP* (*Sutherland I*), 768 F. Supp. 2d 547, 549 (S.D.N.Y. 2011).

7. For a full discussion of the Supreme Court's *Amex II* decision and its implications for employers, see our June 21, 2013 LawFlash, "Supreme Court Again Enforces an Arbitration Agreement with a Class Action Waiver," available at http://www.morganlewis.com/pubs/ClassActions_LF_SCEnforcesArbitrationAgreementWithClassActionWaiver_21june13.

8. *Sutherland II*, 2013 WL 4033844, at *6.

9. *Raniere II*, No. 11-5213-cv, slip op. at 5 (internal quotations omitted).

10. *Sutherland II*, 2013 WL 4033844, at *4; *Raniere II*, No. 11-5213-cv, slip op. at 5 (quoting *Sutherland II*, 2013 WL 4033844, at *4).

11. *In re D.R. Horton, Inc.*, 357 N.L.R.B. No. 184 (Jan. 3, 2012).

12. *Sutherland II*, 2013 WL 4033844, at *5 n.8.

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