CL&P Blog

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Yet another loss for access to the courts and for class actions under the Federal Arbitration Act

by Brian Wolfman

The Second Circuit issued a decision yesterday enforcing arbitration in a Title VII employment discrimination case. It rejected an argument that requiring arbitration would undermine effective vindication of federal statutory rights.The decision is *Parisi v. Goldman Sachs*.

To simplify a bit, here's what happened: Three plaintiffs brought a putative employment discrimination class action against Goldman Sachs, saying that the company engaged in an ongoing "pattern and practice" of discrimination against certain types of female employees on the basis of sex. A pre-dispute arbitration agreement demanded that employment disputes be arbitrated. The agreement was silent as to class actions, but the Supreme Court has held that, generally, when an arbitration agreement is silent as to class actions, you can't pursue one -- *even in arbitration*. That's the Supreme Court's interpretation of the Federal Arbitration Act in the *Stolt-Nielsen* case.

But the district court refused to enforce the arbitration agreement here. It said that the plaintiffs wanted to pursue a "pattern and practice" theory of Title VII liability -- that is, they wanted to show that Goldman Sachs discriminates systematically --and that theory could only be vindicated through a class action. In other words, according to the district court, non-class arbitration would mean that the plaintiffs' federal statutory rights could not be vindicated effectively.

The Second Circuit reversed. It agreed that a "pattern and practice" suit can only be pursued through a class action. But an allegation of "pattern and practice" does not seek to vindicate a federal "right" under Title VII, the court said. Rather, it constitutes only a "method of proof" under Title VII. Therefore, the case would have to be pursued individually in a private arbitration. No "pattern and practice" case; no public trial; no binding precedents.

This decision is not surprising. It just underscores the reality. Employers big and small can insist on arbitration (typically, in take-it-or-leave-it contracts). And when they do, they not only escape court, but they escape ever having to face aggregate litigation over a dispute arising out of the employment relationship. And that's okay even when individual arbitration would effectively limit a key "method of proof" that federal law has recognized for years.

Bottom line: Employees are out of court, and they are on their own.

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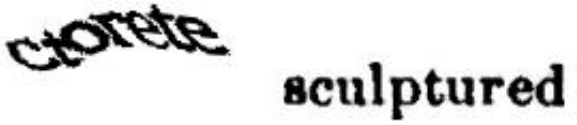

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