

Archive – Summaries of U.S. Supreme Court Decisions on Arbitration (2008-2012)

***Nitro-Lift*: Arbitrators in the First Instance, not Courts, Decide Validity of Underlying Contract**

In its *per curiam* decision in *Nitro-Lift Technologies v. Howard*, 133 S.Ct. 500 (2012), the Supreme Court vacated the Oklahoma Supreme Court decision that a non-compete contract with an arbitration clause was void under state law. The Court reiterated its long-standing holding that the Federal Arbitration Act declares “a national policy favoring arbitration.” *Id.* at 4, quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). Here, the contract had a valid arbitration clause, as found by the trial court and not questioned by the Oklahoma Supreme Court. Therefore, once the arbitration clause was found enforceable, the arbitrator in the first instance, and not the court, decides the validity of the underlying non-compete contract. *Id.*, citing *Preston v. Ferrer*, 552 U.S. 346, 349 (2008); and *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). Copy of opinion at http://www.supremecourt.gov/opinions/12pdf/11-1377_3e04.pdf.

Court Slaps Down West Virginia Decision. In *Marmet Health Care Center, Inc., et al. v. Clayton Brown et al.*, 132 S.Ct. 1201 (2012), the U.S. Supreme Court reversed the holding of the West Virginia Supreme Court of Appeals that, as a matter of state public policy, all pre-dispute arbitration agreements applied to wrongful death and personal injury claims against nursing homes were unenforceable and that the Federal Arbitration Act did not preempt the state public policy. The state court, misreading and disregarding U.S. Supreme Court precedent, did not follow controlling federal law that state and federal courts must enforce the Federal Arbitration Act with respect to all arbitration agreements covered by the Act. A categorical rule prohibiting arbitration of a certain type of claim is contrary to the Act. The Court remanded the case for further consideration of an alternative holding below that the arbitration clauses in two of the consolidated cases were unconscionable.

U.S. Supreme Court Enforces Pre-Dispute Binding Arbitration Clause. *CompuCredit Corp. et al. v. Greenwood et al.*, 132 S.Ct. 665 (2012) involved a class action alleging violations of the Credit Repair Organizations Act (CROA). The consumers’ credit card agreement included a pre-dispute binding arbitration clause. The district court denied the defendants’ motion to compel arbitration, and the Ninth Circuit Court of Appeals affirmed. Reversing the Ninth Circuit, the U.S. Supreme Court found that the CROA is silent on whether claims under the Act can proceed in an arbitration. It held that the Section 2 of the Federal Arbitration Act (FAA) requires enforcement of the arbitration agreement. The Court noted the long-standing interpretation of Section 2 as establishing “a liberal federal policy favoring arbitration,” citing *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Slip op. at 2. The FAA requires courts to enforce arbitration agreements according to their terms, even if a federal statutory claim is at issue, unless a “a contrary congressional command “overrides the FAA’s requirement, citing *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987). Slip op. at 2-3. The Court rejected the consumers’ argument that there is such a congressional command, given the CROA’s disclosure and non-waiver provision. The disclosure provision requires credit repair organizations to give a written statement to consumers that, “You have a right to sue a credit repair organization that violates the [Act],” 15 U.S.C. §1679c(a). The CROA’s anti-waiver provision in 15 U.S.C. §1679f(a) states that any waiver of any protection under the CROA “(1) shall be treated as void; and (2) may not be enforced by any Federal or State court or any other person.” The Court found that the disclosure provision does not give consumers a right to sue in a court of law - it creates only an “obligation on credit repair organizations to supply consumers with a specific statement . . . in the statute.” Slip op at 4. That does not override the FAA’s mandate. Moreover, the Court’s interpretation does not mean that the CROA “effectively requires that credit repair organizations mislead consumers.” Slip op at 7. Lastly, when Congress passed the CROA in 1996, arbitration clauses such as the one at issue were not rare in consumer contracts. If Congress

wanted to prohibit pre-dispute binding arbitration in the CROA, it would have done so “in a manner less obtuse than what the [consumers] suggest.” Slip op. at 8.

Cert Denied in *Jock*. The U.S. Court denied certiorari in *Sterling Jewelers Inc. v. Laryssa Jock et al*, 132 S. Ct. 1742 (2012), leaving intact the Second Circuit Court of Appeal’s decision in *Jock v. Sterling Jewelers Inc.*, No. 10-3247-CV (2nd Cir. July 1, 2011). Distinguishing *Jock* from *Stolt-Nielsen*, the Second Circuit reversed a trial court’s decision to vacate an arbitration award allowing class arbitration. The district court granted the plaintiffs’ motion to stay the litigation and refer the matter to arbitration. The arbitrator decided (before the Supreme Court had issued its decision in *Stolt-Nielsen*) the plaintiffs could proceed with a class arbitration. Construing the parties’ arbitration agreement against its drafter, Sterling, the arbitrator noted the agreement did not include an express prohibition of class claims and did not mention class claims. The agreement did include, however, arbitration provisions more broadly worded than the agreement in *Stolt-Nielsen*: employees may “seek and be awarded equal remedy through [Sterling’s] REVOLVE [dispute resolution] program” and the arbitrator had “the power to award any types of legal or equitable relief that would be available in a court of competent jurisdiction.” Sterling had chosen not to revise its RESOLVE contract, even though several arbitral decisions in the past had permitted class claims. The district court vacated the arbitrator’s award, finding the case factually indistinguishable from *Stolt-Nielsen*. The Second Circuit reversed, holding that the lower court had “improperly substituted its own interpretation of the parties’ arbitration agreement for that of the arbitrator’s to conclude that the arbitrator had reached an incorrect determination that the parties’ arbitration agreement did not prohibit class arbitration.” The district court substituted its own legal analysis for the arbitrator’s and failed to conduct the proper inquiry: “whether, based on the parties’ submissions or the arbitration agreement, the arbitrator had the authority to reach an issue.” The stipulated “silence” of the parties in *Stolt-Nielsen* was interpreted by the Supreme Court to mean the parties “had not reached any agreement on the issue of class

arbitration.” That is, there was no explicit or implicit agreement to submit to class arbitration. Also, simply agreeing to arbitrate “does not equal an agreement to class-action arbitration.” The issue in this case is whether the arbitrator had the power to reach a certain issue, not whether the issue was correctly decided. An arbitrator exceeds her authority by considering issues beyond those submitted by the parties or reaching issues clearly prohibited by law or by the terms of the parties’ contract. Section 10(1)(4) imposes a high hurdle for vacating an award. The district court erred in engaging in a substantive review of the arbitrator’s decision. The question of class arbitration was properly submitted to the arbitrator. Neither the law nor the parties’ agreement categorically barred the arbitrator from deciding the issue – *Stolt-Nielsen* does not stand for the proposition that arbitration agreements can only be construed as permitting class arbitrations where they have express provisions permitting class arbitrations. The agreement in this case does not prohibit the arbitrator from determining whether the agreement contemplates class arbitration. She had a colorable justification for her decision under Ohio law – Ohio law does not bar class arbitration. An intervening change of law, standing alone, is not grounds for vacating an otherwise proper award. Unlike the arbitrator in *Stolt-Nielsen*, the arbitrator here did not base her decision on public policy grounds.

FAA Preempts California Law That Had Made Consumer Contract Class Action Waivers Unconscionable. In *AT&T Mobility LLC, v. Vincent Concepcion et ux.*, 131 S.Ct. 1740 (2011), the U.S. Supreme Court interpreted the provision in the Federal Arbitration Act which makes arbitration agreements “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. §2. As stated in the lower court’s decision, the case “involves a class action claim that a telephone company’s offer of a ‘free’ phone to anyone who signs up for its service is fraudulent to the extent the phone company charges the new subscriber sales tax on the retail value of each ‘free’ phone.” AT&T Mobility demanded that the plaintiffs submit their claims to individual arbitration, under the contracts’

arbitration clause, which requires arbitration but bars class actions.

The U.S. District Court had found the arbitration provision in AT&T's consumer contract unconscionable because the contract disallowed classwide proceedings. The Ninth Circuit affirmed, holding that: 1) the provision was unconscionable under California law (the California Supreme Court decision in *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 113 P.3d 1100 (2005), classifying most class action waivers in consumer contracts as unconscionable); and 2) the California *Discover Bank* rule was not preempted by the FAA.

In a 5-4 decision, the U.S. Supreme Court reversed, holding that the FAA preempts California's *Discover Bank* rule. The Court noted that FAA Section 2 permits invalidating agreements through "generally applicable contract defenses" . . . but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." Although Section 2's saving clause preserves generally applicable contract defenses, it does not suggest "an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." The California *Discover Bank* rule "interferes with the fundamental attributes of arbitration." Although the California rule "does not require classwide arbitration, it allows any party to a consumer contract to demand it ex post." As noted in the *Stolt-Nielsen* case, the "changes brought about by the shift from bilateral arbitration to class-action arbitration" are "fundamental." Class arbitration includes absent parties and sacrifices informality (making the process "slower, more costly and more likely to generate procedural morass than final judgment"), "increases risks to defendants," and is "poorly suited to the higher stakes of class litigation." The absence of multilayered review by appellate courts "makes it more likely that errors will go uncorrected." That risk of error "will often become unacceptable" when alleged damages are aggregated and decided at once. Arbitration is "poorly suited to the higher stakes of class litigation. In litigation, a defendant may appeal a [class] certification decision . . . and a final judgment as well." In contrast, 9 U.S.C. §10

allows a court to vacate an arbitral award only on quite limited grounds. The California rule is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (citation omitted). Therefore, the FAA preempts the California *Discover Bank* rule.

Piecemeal Proceedings. In *KPMG LLP v. Robert Cocchi et al.*, 132 S.Ct. 23 (2011), the Florida Court of Appeal had upheld a trial court's decision, denying KPMG's motion to compel arbitration. The Supreme Court found that the lower court erred in refusing arbitration solely on the basis that two out of four claims in the lawsuit were nonarbitrable. The Court of Appeal had failed to determine whether the other two claims were arbitrable. Therefore, the Court vacated the Court of Appeal's judgment and remanded the case for further proceedings. The Court reiterated that arbitration is required for arbitrable claims, "even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." Slip op. at 4, quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217 (1985). .

High Court decides *Rent-A-Center* and *Granite Rock* Arbitration Cases. *Rent-A-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772 (2010), an employment discrimination case, implicates *First Options* "gateway" and *Prima Paint* "severability" concepts. Respondent employee signed a separate, pre-dispute arbitration agreement as a condition of employment with Petitioner employer. In response to the employer's motion to compel arbitration, the employee asserted that the arbitration agreement was unenforceable due to unconscionability. In a 5-4 decision, the U.S. Supreme Court acknowledged the factual difference in *Prima Paint*, *Buckeye* and *Preston* where "arbitration provisions" were contained in contracts unrelated to arbitration. *Rent-A-Center* at 8. Nevertheless, an unconscionability attack here on the contract as a whole (even though the entire contract was itself an arbitration agreement) is an issue for the arbitrator, not the courts. Id. The Court faulted the employee for failing to challenge, pursuant to Section 2 of the Federal Arbitration Act, the precise "written provisions" in the arbitration agreement that constituted a delegation of

authority to the arbitrator. *Id.* at 7-9. In the courts below, the employee attacked the contract as a whole, not the precise provision delegating jurisdiction to the arbitrator. *Id.* at 9-11. The Court declined to consider a new argument, not raised below, that the provision giving the arbitrator jurisdiction over gateway issues was now substantively unconscionable because the provision's quid pro quo, that the employee would receive "plenary post-arbitration review" was eliminated by the Hall case. *Id.* at 12. Justice Stevens noted in his dissent that the arbitration agreement is "one part of the broader employment agreement between the parties." *Rent-A-Center*, dissent slip op. at 2. In his view, "a general revocation challenge to a stand-alone arbitration agreement is, invariably, a challenge to the 'making' of the arbitration itself . . . and therefore, under *Prima Paint*, must be decided by the Court." *Id.* at 10.

In *Granite Rock Co. v. International Brotherhood of Teamsters et al.*, 130 S.Ct. 2847 (2010) the U.S. Supreme Court decided a case involving employer Granite Rock's suit seeking damages and an injunction against a 2004 strike. Granite Rock asserted, and the defendant unions agreed, that the district court had federal jurisdiction over the suit under §301(a) of the Labor Management Relations Act (LMRA). The Court's majority opinion states that the unions argued that a new collective bargaining agreement (CBA) with Granite Rock was "not validly ratified on July 2, 2004 (or at any other time relevant to the July 2004 strike)" by a vote of the local's members, so the CBA's no-strike clause did not provide a basis for Granite Rock to challenge the strike. Slip op. at 4. The district court denied the local union's motion for an order requiring arbitration of the parties' dispute over the CBA's ratification date, ruling that the issue of when ratification of the CBA occurred was not subject to arbitration. After a jury concluded that the CBA was ratified on July 2, 2004, the court ordered arbitration of Granite Rock's breach of contract claims. On appeal, the Ninth Circuit reversed the arbitration order, holding that the ratification date dispute was a matter for an arbitrator to decide under the CBA's arbitration clause. The Supreme Court determined that the when the CBA was ratified was a contract formation issue in this case, *id.* at

13, and concluded that the Ninth Circuit erred in characterizing the case as involving whether Granite Rock's claim to enforce no-strike provisions arose under the CBA. *Id.* at 18. It held: 1) "the parties' dispute over the CBA's formation date was for the District Court, not an arbitrator, to resolve," *id.* at 19; and 2) the Ninth Circuit properly declined to recognize a new federal common-law cause of action under LMRA §301(a) for IBT's alleged tortious interference with the CBA, *id.* at 22. Two justices dissented on the Court's first holding, asserting that the parties had agreed to have their ratification dispute resolved by an arbitrator, given the undisputed fact that the parties signed a binding CBA in December that was retroactively effective as of May 2004. The majority of the Court did not consider this because the union had failed to raise the argument at the Court of Appeals and waived it by not raising it in its opposition to Granite Rock's certiorari petition.

Court Addresses Class Arbitration. In *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662 (2010), the U.S. Supreme Court held that, when parties to a contract with an arbitration clause have not agreed to authorize class arbitration of disputes, imposing class arbitration is not consistent with the Federal Arbitration Act. The Court concluded that the arbitration panel in the case exceeded its powers by imposing its own policy choice regarding class arbitration. The arbitration panel erroneously thought *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 required an arbitrator (not a court) to decide whether a contract permits class arbitration when, in fact, *Bazzle* involved a plurality decision. It also incorrectly thought *Bazzle* established a rule to be applied in deciding the class arbitration question. The Court determined that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." Slip op. at 20. Because of the significant differences between an agreement to arbitrate a single dispute between parties to a single contract and an agreement to a class arbitration, "[a]n implicit agreement to authorize class-action arbitration . . . is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. *Id.* at 21. The Court declined to decide whether

the "manifest disregard" standard survived its decision in *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576 (2008), as an independent ground for review or as a judicial gloss on the FAA's enumerated grounds for vacating an arbitration award.

NRAB Rule Requiring Conferencing Before Arbitration Is Not A Jurisdictional Rule. In *Union Pacific R. Co v. Brotherhood of Locomotive Engineers and Trainmen*, 588 U.S. 67 (2009), the U.S. Supreme Court addressed a procedural rule of the National Railroad Adjustment Board (NRAB), requiring disputing parties to engage in a settlement conference prior to arbitration of minor disputes before the NRAB. The Court held that this is a "claim-processing rule" and not "jurisdictional" in nature. Therefore, it was error for the NRAB to dismiss the case for lack of jurisdiction on its own motion, due to the absence of proof of conferencing. If no conference takes place, resort to the NRAB would "ordinarily be objectionable as premature," 2009 WL 4573275 at *10, and the parties could cure any lapse in the conferencing requirement during an adjournment of the NRAB case.

Non-signatories to Arbitration Agreement May Appeal Denial of Stay Motion. In a 6-3 decision reversing the Sixth Circuit Court of Appeals, *Arthur Andersen LLP et al v. Carlisle et al*, 556 U.S. 624 (2009), the U.S. Supreme Court held that: 1) appellate courts have jurisdiction under §16(a) of the Federal Arbitration Act (FAA) to review denials of stays requested by litigants who were not parties to the relevant arbitration agreement, regardless of whether the litigant is actually eligible for a stay; and 2) if applicable state contract law allows a litigant to enforce the arbitration agreement, then even a litigant who was not a party to the arbitration agreement may invoke FAA §3.

Collective Bargaining Agreement Provision Requiring Arbitration of Age Discrimination Claims Enforceable. In a 5-4 decision, the Court held in *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009), that "a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law." Relying

on *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) and other cases favoring arbitration, the Court resolved a question left unanswered in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 82 (1998) where the waiver at issue was not "clear and unmistakable" and narrowed the reach of *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

Federal Question Jurisdiction Issue Resolved. In *Vaden v. Discover Bank*, 556 U.S. 49 (2009) the U.S. Supreme Court considered two issues: 1. "Whether a suit seeking to enforce a state-law arbitration obligation brought under Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, "aris[es] under" federal law, see 28 U.S.C. § 1331, when the petition to compel itself raises no federal question but the dispute sought to be arbitrated—a dispute that the federal court is not asked to and cannot reach— involves federal law"; and 2. "If so, whether a "completely preempted" state-law counterclaim in an underlying state-court dispute can supply subject matter jurisdiction." *Vaden v. Discover Bank*, No. 07-773 (questions presented). The Court took the case to resolve a split in the circuits on the authority of courts under Section 4 of the FAA to "look through" to underlying claims to determine federal question jurisdiction. In an opinion authored by Justice Ginsburg reversing the Fourth Circuit Court of Appeals, the Court held that a federal court may "look through" a §4 petition to determine whether it is predicated on a controversy that "arises under" federal law. In keeping with the well-pleaded complaint rule as amplified in *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U. S. 826 however, a federal court may not entertain a §4 petition based on the contents of a counterclaim when the whole controversy between the parties does not qualify for federal-court adjudication.

FAA Overrides State Statute Vesting Initial Jurisdiction in Administrative Agency. In *Preston v. Ferrer*, 552 U.S. 346 (2008), the Court decided whether the Federal Arbitration Act "overrides not only state statutes that refer certain state-law controversies initially to a judicial forum, but also state statutes that refer certain disputes initially to an administrative agency." The case involved a dispute between an attorney seeking unpaid fees and a client, a TV personality who

claimed their contract was void and unenforceable because the attorney had served as an unlicensed talent agent. The client sought a stay of any arbitration, pending a decision from the California Labor Commissioner in an administrative proceeding. Following *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), the U.S. Supreme Court held that when parties agree to arbitrate all questions arising under a contract, the FAA supercedes state laws that lodge primary jurisdiction in another forum, whether judicial or administrative. Unlike the situation in *Volt Information Services, Inc. v. Bd. of Trustees*, 489 U.S. 468 (1989), in *Preston* there was no third party who was not bound by the parties' arbitration agreement. The parties' contract adopted an American Arbitration Association rule that the arbitrator had the power to decide the existence or validity of their contract, but it also had a choice of law clause incorporating California state law. Relying on *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), the Court decided the best way to harmonize these provisions is to read the adoption of California law as governing the parties' substantive rights, but not California rules limiting the arbitrator's authority. To do otherwise would undercut the FAA's basic policy to achieve efficiency through agreements to arbitrate. The Court declined to take up *Preston's* invitation to overrule *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (holding that FAA requires application of federal substantive law regarding arbitration in state as well as federal courts).