Component Event Template

Event Name: Supreme Court Roundup (webinar CLE)

Event Date: January 29, 2014

Section/Division(s) Participating: FBA Corporate and Association Counsel Division ("CACD")

Brief Description of the Event: This webinar was co-sponsored by the FBA CACD and Sidley Austin LLP ("Sidley"). Sidley is among the world's ten largest law firms. Two Sidley attorneys made the presentation and they also hosted the webinar using their technology. The FBA submitted the CLE credits for participants. The program discussed the revolutionary wave of arbitration cases that have come out in the past few years. They discussed recent decisions and how they affect best practices in arbitration clause drafting and procedure, create potential pitfalls, and change the cost benefit analysis for deciding whether corporate clients should arbitrate.

Total Number of Attendees: ~ 115

Target Audience: Existing and new members of the FBA and/or its Corporate and Association Counsel Division. This presentation was designed to provide valuable takeaways not only to seasoned arbitration practitioners, but also to transactional or litigation attorneys whose practices only occasionally intersect with alternative dispute resolution issues.

Description of Marketing Efforts: The FBA staff sent emails to existing members and posted on the CACD Events Calendar webpage; Sidley sent emails to select corporate clients, and the CACD Chair posted the event on numerous LinkedIn groups.

Total Budget Amount: This event did not cost the FBA or CACD any money, other than perhaps de minimus costs associated with submitting CLE credits for certain states.

Advice for Those Replicating the Program: Partnering with a large law firm whose practice area overlaps with an FBA entity works well since it is a win-win. The FBA entity gets free visibility with the law firm's clients and the law firm gets visibility with potential clients. In addition to being a membership recruitment tool it is a good membership benefit/retention tool.

Event Contact Person: John Okray, FBA CACD Chair. johnokray@outlook.com. 617-821-4867

Sample Attachments (Marketing Emails, Agenda, Speaker Invitation Letter, Program, etc):

Agenda

- Key Supreme Court Jurisprudence
  - Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.
  - AT&T v. Concepcion
  - American Express Co. v. Italian Colors Restaurant
  - Oxford Health Plans LLC v. Sutter
- Battlegrounds for Class Action Lawyers After American Express
  - Impracticability of Arbitral Fees
  - Assent to Enter Contract In First Place
  - The Meaning of Silence Post-Oxford Health
  - Non-Signatory Litigation
  - Regulatory and Statutory Changes
  - Parens Patriae Litigation
  - Consolidated Arbitration

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FOLLOW US:

Supreme Court Roundup – Recent Decisions and Trends in Arbitration

Invitation

Join us for a Federal Bar Association webinar offering insight into the revolutionary wave of arbitration cases that have come out in the past few years. Learn how these recent decisions affect best practices in arbitration clause drafting and procedure, create potential pitfalls, and change the cost benefit analysis for deciding whether corporate clients should arbitrate.

This presentation is designed to provide valuable takeaways not only to seasoned arbitration practitioners, but also to transactional or litigation attorneys whose practices only occasionally intersect with alternative dispute resolution issues.

Date: Wednesday, January 29, 2014

Time: 12:00 - 1:00 pm Central

RSVP: By January 28 to cdeatherage@sidley.com.

Login information will be provided upon replying.

FEATURED SPEAKERS

Angela Zambrano
Partner
Sidley Austin LLP

Margaret Allen
Counsel
Sidley Austin LLP

For more information or questions, please contact Margaret Allen at margaret.allen@sidley.com.

One credit of CLE will be offered by the Federal Bar Association.

Sidley Austin LLP, 717 North Harwood, Suite 3400, Dallas, TX 75201

From: Federal Bar Association [mailto:fba@mailrelay4.com] **On Behalf Of** Federal Bar Association
Sent: Wednesday, January 22, 2014 3:44 PM
Subject: Complimentary CLE Webinar (January 29)

Supreme Court Roundup—Recent Decisions and Trends in Arbitration

The FBA's Corporate & Association Counsel Division invites you to a **complimentary** one hour CLE webinar *(one credit of CLE pending)* offering insight into the revolutionary wave of arbitration cases that have come out in the past few years. Learn how these recent decisions affect best practices in arbitration clause drafting and procedure, create potential pitfalls, and change the cost benefit analysis for deciding whether corporate clients should arbitrate.

This presentation is designed to provide valuable takeaways not only to seasoned arbitration practitioners, but also to transactional or litigation attorneys or in-house counsel whose practices only occasionally intersect with alternative dispute resolution issues.

Speakers: Angela Zambrano, *Partner, Sidley Austin LLP* and Margaret Allen, *Counsel, Sidley Austin LLP*
Date: Wednesday, January 29, 2014
Time: Noon-1:00 p.m. (Central)
RSVP: By January 28 to **cdeatherage@sidley.com**.

Login information will be provided upon replying.

For more information or questions, please contact Margaret Allen at **margaret.allen@sidley.com**.

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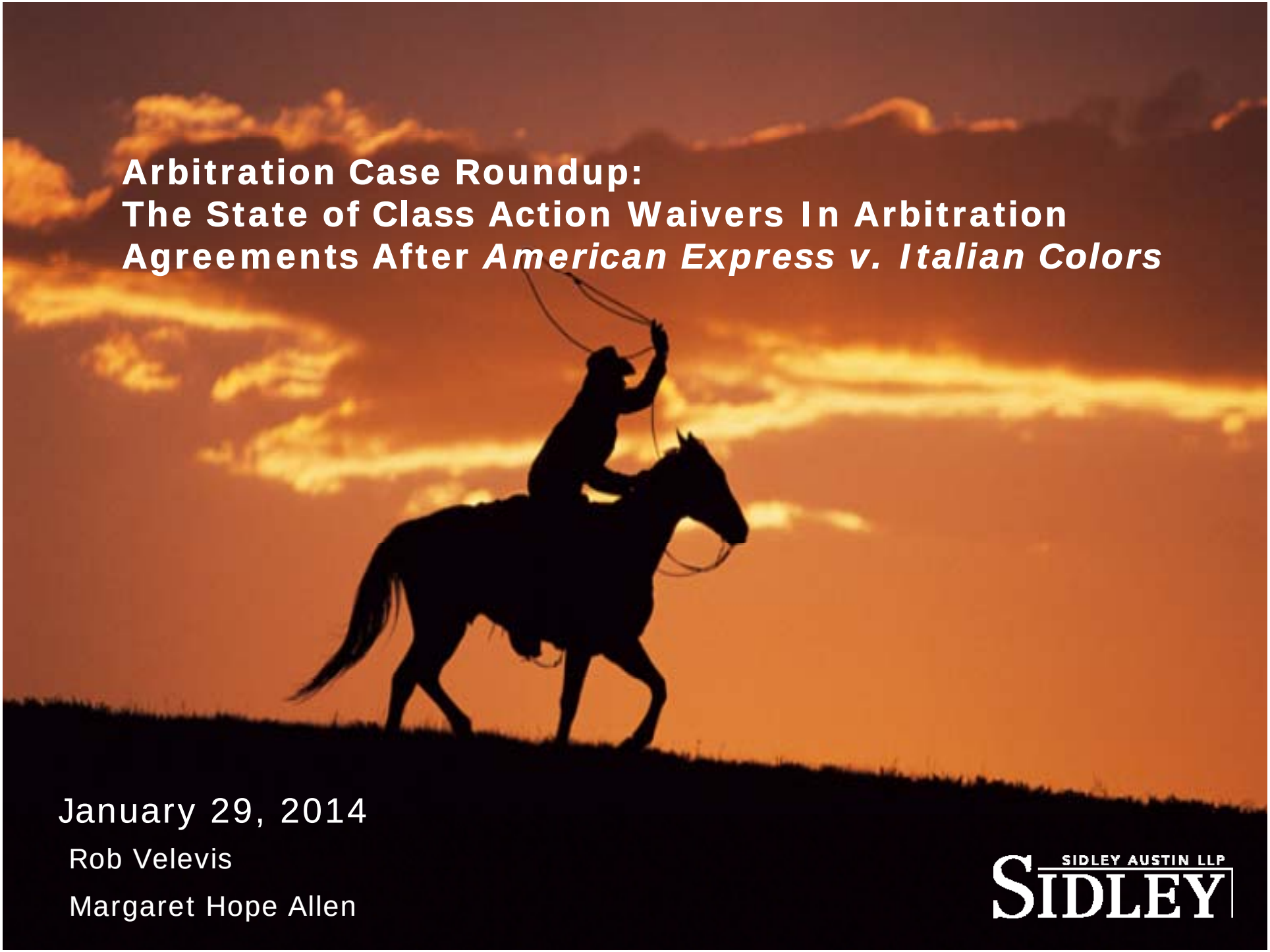

Arbitration Case Roundup: The State of Class Action Waivers In Arbitration Agreements After *American Express v. Italian Colors*

January 29, 2014

Rob Velevis

Margaret Hope Allen

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Agenda

- **Key Supreme Court Jurisprudence**
  - ***Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp*.**
  - ***AT&T v. Concepcion***
  - ***American Express Co. v. Italian Colors Restaurant***
  - ***Oxford Health Plans LLC v. Sutter***
- **Battlegrounds for Class Action Lawyers After *American Express***
  - Impracticability of Arbitral Fees
  - Assent to Enter Contract In First Place
  - The Meaning of Silence Post-*Oxford Health*
  - Non-Signatory Litigation
  - Regulatory and Statutory Changes
  - *Parens Patriae* Litigation
  - Consolidated Arbitration

Introduction

- Recent cases from the Supreme Court have repeatedly endorsed class action waivers in arbitration agreements.
- This presentation provides background on the recent evolution of Supreme Court jurisprudence on class action waivers, and then focuses on how, particularly in the months since *American Express v. Italian Colors,* the lower courts have been analyzing issues impacting class action waivers in arbitration agreements.
- We'll identify possible future hedgerows where class action plaintiffs may seek to establish new ways to bring class claims, and provide drafting tips to companies to help insulate them from class action risk.
- **Questions during the presentation? Please email mparham@sidley.com.**

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010)

- The Court held that by allowing class arbitration the arbitration panel exceeded its powers under Section 10 of the FAA.
- Question is not whether class-arbitration was expressly waived, but whether the parties *intended* that it be available, whether there is language in the contract or otherwise.
- An agreement to arbitrate is not an agreement to class-arbitrate. *Id.* at 684-85.
  - "Class-action arbitration changes the nature of arbitration." *Id.* at 685.
- Because the parties had stipulated that they had not reached agreement on the issue of class arbitration, there was no contractual basis to allow it. Therefore, doing so was improper.

AT&T v. Concepcion, 133 S. Ct. 1740 (2011)

- *Concepcion* addressed "whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." *Id.* at 1744.
- The Court held that: "Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." 133 S. Ct. at 1748.
- The court rejected Plaintiff's argument that the rule prohibiting class waivers in arbitration agreements fell under the savings clause of Section 2 of the FAA, noting that even doctrines "normally thought to be generally applicable, such as duress or, as relevant here, unconscionability" are preempted by the FAA when they are "applied in a fashion that disfavors arbitration." 133 S. Ct. at 1747.
- In conclusion, "A court may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature could not." *Id.* at 1747.

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American Express v. Italian Colors Rest., 133 S. Ct. 2304 (2013)

- Plaintiffs (merchants who accept American Express cards) were parties to an agreement with American Express that contained a clause requiring all disputes between the parties relating to the agreement to be resolved by arbitration. The agreement also provided that "[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis."
- Petitioners moved to compel individual arbitration. In response, the merchants argued that the contractual waiver of class actions was unenforceable because the cost of individually arbitrating the antitrust claim exceeded any potential recovery.

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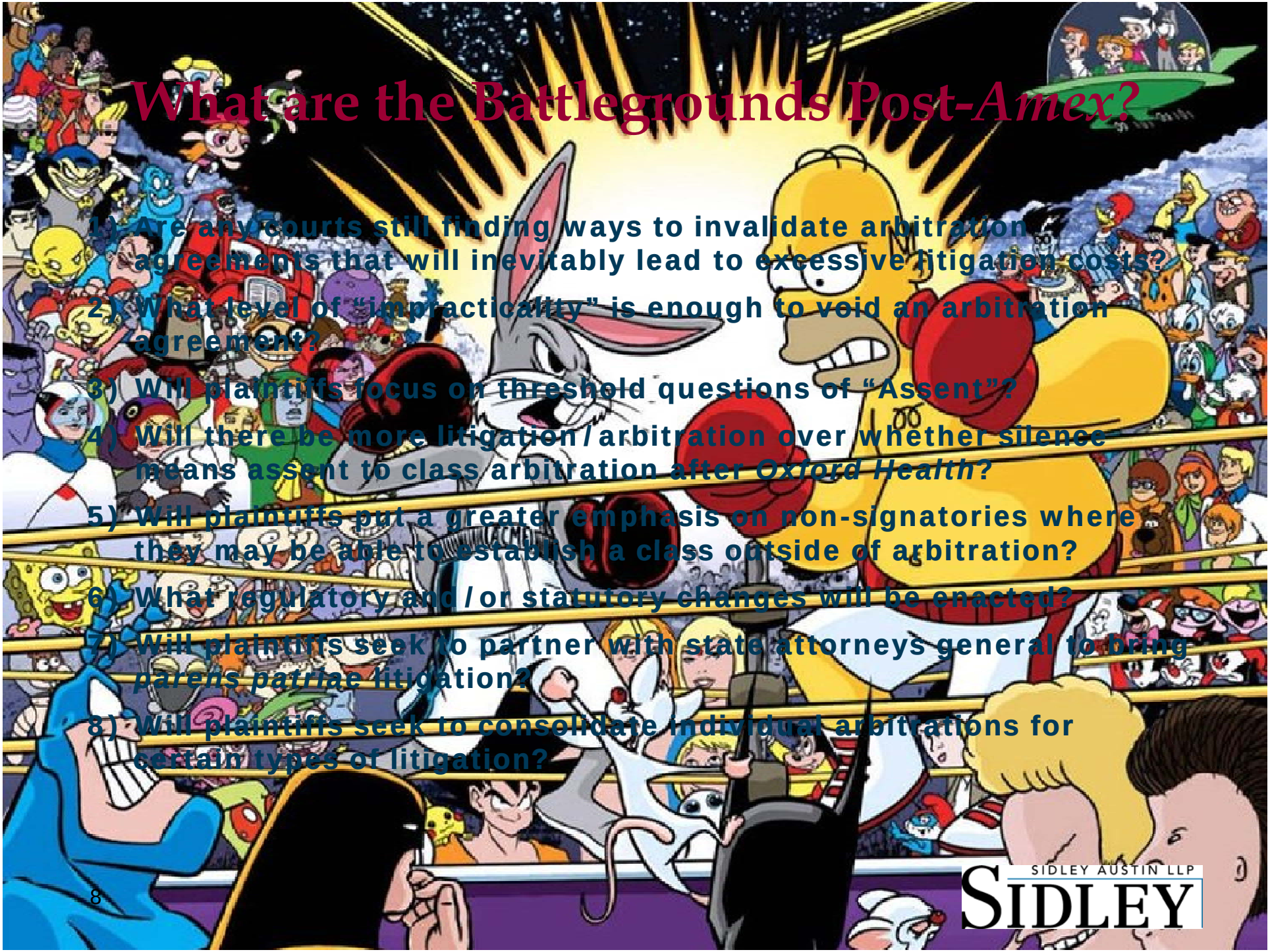
American Express v. Italian Colors Rest., 133 S. Ct. 2304 (2013)

- The Supreme Court emphasized that arbitration is a "matter of contract" and that courts must "rigorously enforce" an arbitration agreement unless it has been "overridden by a contrary congressional command."
- The Supreme Court rejected the respondents' argument that because of the prohibitive costs of individual arbitration, the enforcement of a class-action waiver would contravene the policies of the antitrust laws by providing a way for parties to avoid liability for violations of federal law.
  - "Effective vindication" may render an arbitration agreement unenforceable when it purports to waive a statutory remedy, or, "***perhaps***" when high filing and administrative fees make access to the forum "impracticable."
  - "But the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy." *Id.* at 2307.
- In sum, it held "the FAA's command to enforce arbitration agreements trumps any interest in ensuring the protection of low value claims." *Id.* at 2312 n.5.

What are the Battlegrounds Post-*Amex*?



1) Are any courts still finding ways to invalidate arbitration agreements that will inevitably lead to excessive litigation costs?
2) What level of "impracticality" is enough to void an arbitration agreement?
3) Will plaintiffs focus on threshold questions of "Assent"?
4) Will there be more litigation/arbitration over whether silence means assent to class arbitration after *Oxford Health*?
5) Will plaintiffs put a greater emphasis on non-signatories where they may be able to establish a class outside of arbitration?
6) What regulatory and/or statutory changes will be enacted?
7) Will plaintiffs seek to partner with state attorneys general to bring *parens patriae* litigation?
8) Will plaintiffs seek to consolidate individual arbitrations for certain types of litigation?

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1. Courts Do Not Appear to Be Invalidating Arbitration for Low-Value Claims

- **No matter how high the litigation expenses or how small the recovery, courts appear to be unwilling to find class-arbitration waivers unenforceable simply because the costs of effectively litigating the claim exceed the potential recovery.**
  - *Morris v. Ernst & Young LLP*, No. C-12-04964 RMW, 2013 WL 3460052 (N.D. Cal. July 9, 2013)
    - Enforcing arbitration agreement in an action that would require the litigants to spend close to $200,000 for potential recoveries of only $17,000 and $28,000.
  - *Byrd v. SunTrust Bank*, No. 2:12-cv-02314-JPM-cgc, 2013 WL 3816714 (W.D. Tenn. July 22, 2013)
    - Plaintiffs had not established their burden of showing that a fee-shifting provision amounted to a de facto elimination of their right to pursue their statutory claim even though it would have required the plaintiff to pay the bank's attorneys' fees if the bank prevailed.
  - *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013)
    - Finding a class action waiver enforceable even though evidence showed that it would cost approximately $200,000 to prosecute the claim with potential recovery limited to $2,000.

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1. Courts Do Not Appear to Be Invalidating Arbitration for Low-Value Claims

- *State ex rel. Ocwen Loan Servicing, LLC v. Webster*, No. 13-0151, 2013 WL 6050723 (W.Va. Nov. 13, 2013)
  - Citing *Amex* in reversing a lower court's decision finding that a contract was substantively unconscionable because it included a class-action waiver that precluded vindication of the Plaintiff's claim (which it assessed as approximately $1,100).
- *Porreca v. Rose Grp.*, C.A. No. 13-1674, 2013 WL 6498392 (E.D. Pa. Dec. 11, 2013)
  - Considering an FLSA class-action brought by waiters of Applebee's alleging the company paid employees less than the minimum wage for untipped work. The court held that, in light of *Concepcion*, *Amex*, *Gilmer*, and *Quilloin*, collective action waivers of Plaintiff's FLSA claims were not unconscionable.
  - "This current state of legal affairs is lamentable . . . How many waiters and waitresses, newly hired by Applebee's, when presented with the dispute resolution program, seek legal advice about their options? This Court will hazard a guess that the number is very few . . . The increasing frequency with which these . . . class action waivers are employed is unfortunate, and in many situations, unjust." *Id. at* *15-16.
- *Lewis v. Advance Am., Cash Advance Ctrs. of Illinois, Inc.*, No.13-cv-942-JPG-SCW, 2014 WL 47125 (S.D. Ill. Jan. 6, 2014)
  - Rejecting plaintiff's argument that the high costs of litigation in relation to the potential recovery for claims brought under the Illinois Wage Assignment Act rendered the class waiver provision in plaintiff's arbitration agreement unenforceable.

1. Courts Do Not Appear to Be Invalidating Arbitration for Low-Value Claims

- The Massachusetts Supreme Court reverses course after *Amex*
  - *Feeney v. Dell, Inc.*, 465 Mass. 470 (Mass. June 12, 2013)
    - Plaintiffs brought a class action against Dell for pricing policies it argued violated Massachusetts law. Dell sought to compel individual arbitration, per its Terms and Conditions of Sale.
    - The court held that the FAA and *Concepcion* do not foreclose a court "from invalidating an arbitration agreement that includes a class action waiver where a plaintiff can demonstrate that he or she effectively cannot pursue a claim against [a] defendant in individual arbitration according to the terms of the agreement, thus rendering his or her claim nonremediable."
  - *Feeney v. Dell*, 466 Mass. 1001 (Mass. Aug. 1, 2013)
    - In light of *Amex*, "*Concepcion* [was] not entitled to the reading [the Court] afforded it." Rather, neither the value of the claim nor the Plaintiff's ability to affirmatively show prohibitively high costs are relevant.
    - "Although we regard as untenable the Supreme Court's view that 'the FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims,' we are bound to accept that view as a controlling statement of federal law." 466 Mass. at 1003.

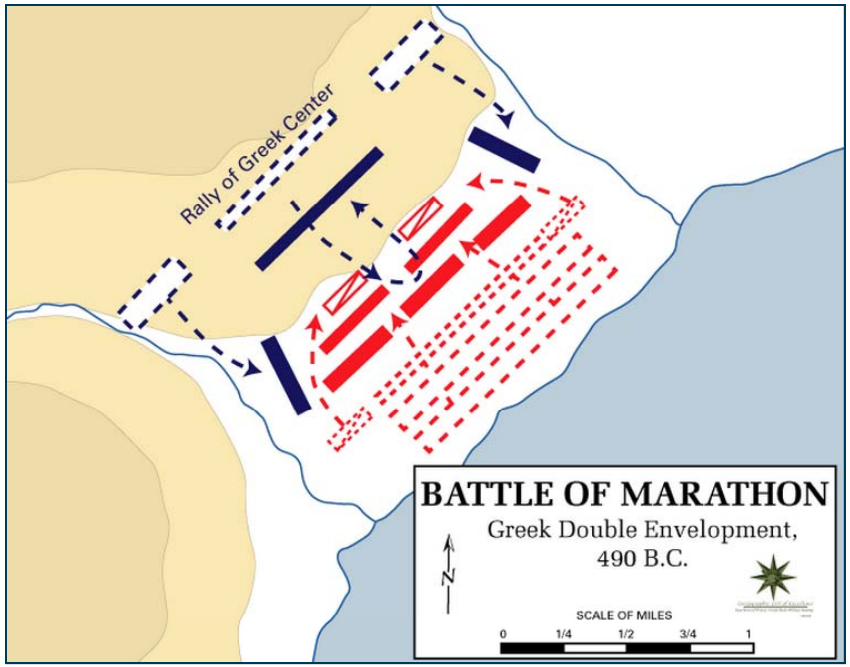
1. Courts Do Not Appear to Be Invalidating Arbitration for Low-Value Claims

- California and PAGA claims may provide an exception
  - California's Private Attorney General Act ("PAGA") allows a litigant to bring a lawsuit for civil monetary penalties for violations of California's Labor Code. Such penalties could otherwise only be enforced by law enforcement agencies.
  - *Cunningham v. Leslie's Poolmart, Inc.*, No. CV 13-2122 CAS (CWx), 2013 WL 3233211, at *9 (C.D. Cal. June 25, 2013)
    - The court distinguished *Amex* in finding that a claim made pursuant to PAGA was not a class action, but rather a *qui tam* action. Further, such a claim could *only* be brought in a representative capacity. Therefore, requiring individual arbitration would preclude the assertion of a statutory right.
  - *But see Goss v. Ross Stores, Inc.*, A133895, 2013 WL 5872277, at *5 (Cal. App. Oct. 31, 2013) (unpublished/noncitable)
    - Court rejected plaintiff's attempt to bring representative claim under PAGA on the ground that "[u]nder the rationale of *Concepcion*, the public policy reasons underpinning the PAGA do not allow a court to disregard a binding arbitration agreement."

2. The Battlefield Moves to Impracticality Based on Arbitral Forum Fees

- *Amex* did not foreclose the possibility that an arbitration agreement imposing high **administrative and filing fees** could make access to an arbitral forum "impracticable," thereby constituting "a prospective waiver of the party's right to pursue a statutory remedy." *Amex*, 133 S. Ct. at 2310.

- Thus, courts/plaintiffs will likely shift their focus on the costs of the forum itself rather than the costs of litigating (such as attorneys' or expert fees).



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2. The Battlefield Moves to Impracticality Based on Arbitral Forum Fees

- In *Chavarria v. Ralphs Grocery Co.*, the Ninth Circuit seized on the *Amex* Court's qualification in finding an arbitration agreement unconscionable where it required a litigant to pay half of the arbitrator's fees up-front.
- This, the Ninth Circuit found, would cost a litigant around $3,500 to $7,000 for each day of the arbitration.
- Such fees, the court held, would make bringing many claims "impracticable." 733 F.3d 916, 925 (9th Cir. 2013).

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2. The Battlefield Moves to Impracticality Based on Arbitral Forum Fees

- In *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett,* 734 F.3d 594 (6th Cir. 2013), the Sixth Circuit arrived at the opposite conclusion.
- It considered an arbitration provision that required all arbitrations to be brought in Dayton, Ohio, where the company was headquartered, provided for the customer to pay its own fees, even if the customer prevailed, and makes the customer "split the tab for arbitrator's fees."
- The Sixth Circuit recognized that the clause was grossly one-sided, adhesive in nature, and that it all but foreclosed the litigant from seeking redress. Still, the court held the contract enforceable under *Amex*.

2. The Battlefield Moves to Impracticality Based on Arbitral Forum Fees

- *Sherman v. RMH, LLC*, No. 13cv1986-WQH-WMc, 2014 WL 30318 (S.D. Cal. Jan. 2, 2014)
  - In determining whether a class-arbitration waiver precluded plaintiff from bringing claims under the Telephone Consumer Protection Act, **the court distinguished between high filing and administrative fees and the costs of effectively proving a claim**. While the latter would not preclude effective vindication under *Concepcion* and *Amex*, the former may. In this instance, however, the court found that a provision requiring the **defendant to advance a consumer's arbitration fees precluded such a finding**.
- *Damato v. Time Warner Cable, Inc.*, No. 13-CV-994 ARR RML, 2013 WL 3968765 (E.D.N.Y. July 31, 2013)
  - Plaintiff argued that the AAA Rules imposed prohibitive filing and administrative fees. Similar to *Sherman*, the court distinguished between the costs of accessing an arbitral forum and costs that preclude a litigant from effectively *proving* a claim. However, **the court held that a litigants access was not precluded because the AAA's Supplementary Procedures for Consumer-Related Disputes applied, and imposed far lower fees ($200 from consumer and $1500 from business, capped arbitrator costs that are entirely borne by the business).**
- *In re Sprint Premium Data Plan Mktg. & Sales Practices Litig.*, No. 10-cv-6334 (SDW)(MCA), 2013 WL 4773972, at *4 (D.N.J. Sept. 4, 2013)
  - The court rejected Plaintiffs argument that they would be foreclosed from bringing an arbitration due to high administrative costs on the ground that "Sprint . . . Proffered evidence demonstrating that it ha[d] the practice and policy of paying for arbitral costs when customers seek individual arbitration."

3. Renewed Focus on Class Arbitration Where Agreement Is Silent

- *In Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013) the Supreme Court held that an arbitrator had not exceeded his authority in finding that the arbitration agreement allowed class arbitration. Where parties had agreed that the arbitrator would determine whether the agreement allowed for class arbitration, "the question for a judge is not whether the arbitrator construed the parties' contract correctly, but whether he construed it at all. Because he did, and therefore did not 'exceed his powers,' we cannot give Oxford the relief it wants."
- Companies should attempt to avoid situations where (1) the arbitration agreement does not expressly preclude class arbitration; and (2) the parties delegate to the arbitrator by stipulation or in the agreement the question of whether the parties agreed to class arbitration.

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4. Will Courts, State Legislatures, and Plaintiffs Begin to Focus on Threshold Questions of Assent?

- *Smith v. Jem Grp., Inc.*, 737 F.3d 636 (9th Cir. 2013)
  - Plaintiffs brought a class action against legal service providers for various violations of Washington state law related to debt settlement. Defendants moved to compel arbitration pursuant to the terms of an arbitration agreement included in an attorney retainer agreement (ARA). The ARA consisted of 4 pages of fine-print included within the 21 page contract between Plaintiffs and the debt-relief companies.
  - The district court held that the ARA was unconscionable under Washington law because it violated the Washington Rules of Professional Conduct. Those rules required "reasonable and fair disclosure of material elements of [a] fee agreement."

- The Ninth Circuit affirmed, distinguishing *Concepcion* on the following grounds:
  1) Requiring disclosure of the terms of an ARA does unduly burden arbitration;
  2) Washington's rule was concerned with "**defects in the process of contract formation**", not with how the arbitration was to be conducted;
  3) The Rule was not limited to arbitration agreements, but rather applied to all material terms of an ARA.

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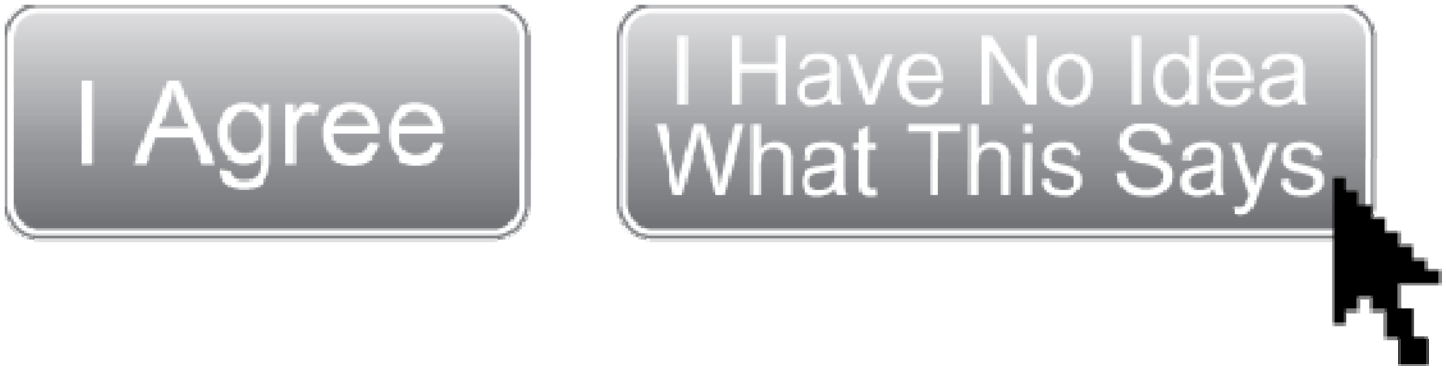
4. Will Courts, State Legislatures, and Plaintiffs Begin to Focus on Threshold Questions of Assent?

- *Lee v. Intelius Inc.*, 737 F.3d 1254 (9th Cir. Dec. 16, 2013)
  - The court considered a complex internet contract where the consumer thought it was purchasing a credit report from one entity, but ultimately was charged for a product from another entity.
  - The court found that there was no assent to the contract in the first place, and therefore no agreement to arbitrate. "Even an exceptionally careful consumer, who understood that he or she was being asked to enter into a contract for an additional product, would likely have thought that the contracting party was Intelius. Adaptive's name appeared nowhere on the new webpage." *Id.* at 1260.
  - The court also suggested, without deciding, that a "click" may not constitute an objective manifestation of assent as a matter of Washington law. *See id.*

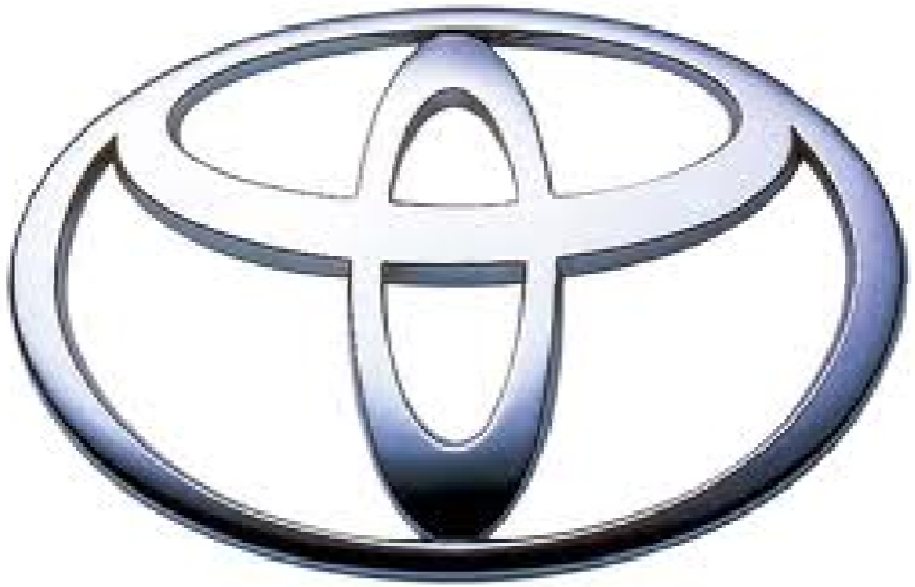


5. Focus Shifts to Non-Signatories as Class Action Targets

- ***Kramer v. Toyota Motor Corp.***, 705 F.3d 1122 (9th Cir. 2013)
  - Plaintiffs, owners of Toyota cars, brought a class action against Toyota related to their cars' faulty break systems. They entered into contracts with only the dealerships.
  - The 9th Circuit distinguished the issue of "who" should decide arbitrability from the question of "whether" a dispute is arbitrable. While the latter is presumed to be a question for the arbitrator, the former is presumed to be a question for a court. *Id.* at 1127.
  - The issue is one of contract formation, and in this instance, the contracts did "not contain clear and unmistakable evidence that Plaintiffs and Toyota agreed to arbitrate arbitrability." *Id.*
  - In the absence of such evidence, the court considered it irrelevant that Toyota disagreed about the arbitrability of the terms of arbitration agreement. Disputes with Toyota were simply not contemplated under the express terms of the agreement. *Id.* at 1128.

5. Focus Shifts to Non-Signatories as Class Action Targets

- The court also rejected Toyota's argument that the Plaintiff's should be equitably estopped from avoiding arbitration because their claims relied on the terms of Purchase Agreements. **The Plaintiff's claims, it held, were not "intimately founded in and intertwined with the underlying contract obligations."** *Id.* at 1129. Rather, even someone who paid with cash, and did not enter into such an agreement, could have brought a claim. *Id.* at 1132.
- The Supreme Court denied cert.



5. Focus Shifts to Non-Signatories as Class Action Targets

- *In re Wholesale Grocery Prods. Antitrust Litig.*, 707 F.3d 917 (8th Cir. 2013)
  - Retail Grocer Plaintiffs brought antitrust claims against wholesalers
  - The 8th Circuit expressly acknowledged that, "In an effort to avoid arbitration, each Retailer brought claims only against the Wholesaler with whom they did not have a supply and arbitration agreement." *Id*. at 920.
  - Nonetheless the Court held that the non-signatory wholesalers could not compel arbitration based on the theory of equitable estoppel because the antitrust claims were not "so intertwined with the agreement containing the arbitration clause that it would be unfair to allow the signatory to rely on the agreement in formulating its claims but to disavow availability of the arbitration clause of that same agreement." *Id*. at 923.

5. Focus Shifts to Non-Signatories as Class Action Targets

- *Hirsch v. Amper Fin. Servs.*, LLC, 71 A.3d 849 (N.J. 2013)
  - In connection with their purchases of securitized notes, Plaintiffs signed contracts containing arbitration agreements with broker-dealer SAI. When Plaintiffs lost their investment as a result of a Ponzi scheme, Plaintiffs commenced an arbitration against SAI.
  - Plaintiffs also brought a lawsuit against non-signatories - their financial services firm and accounting firm. When the non-signatories sought indemnification and contribution against SAI, SAI (joined by the non-signatories) filed a motion to compel Plaintiffs to arbitrate against the non-signatories under the theory of equitable estoppel.
  - The New Jersey Supreme Court held that, regardless of the "intertwinement" of the parties and claims, equitable estoppel would not apply to compel arbitration because there was no proof that the non-signatories expected to arbitrate the disputes in detrimentally reliance on Plaintiffs' conduct or otherwise knew about the arbitration clause. *Id*. at 193.

5. Focus Shifts to Non-Signatories as Class Action Targets

- ***But see*** *In re A2P SMS Antitrust Litig.*, No. 12 CV 2656 (AJN) 2013 WL 5202824 (S.D.N.Y. Sept. 16, 2013)
  - The plaintiffs asserted a putative class action—based on claims that an antitrust conspiracy raised prices for bulk commercial text messages—against several providers of wireless service and others, including Sprint Nextel Corp., AT&T Mobility LLC, and Verizon Wireless LLC.
  - Plaintiffs did not sue Neustar, the company that leases the necessary codes for plaintiffs' texts, but the Court nonetheless permitted the non-signatory defendants to use the plaintiffs' contract with Neustar, containing an arbitration agreement (and waiver of class arbitration), to compel arbitration against the defendant.
  - The Court held that equitable **estoppel applied to compel plaintiffs to arbitrate** because the claims against non-signatories arose from the same subject matter as the contract and there is a close relationship between the parties. *See id*. at 10. Unlike other cases, the court did not require a showing of detrimental reliance.

6. Federal Regulatory and/or Statutory Changes to Preclude Class Waivers

- Effective June 1, 2013, the Consumer Financial Protection Bureau (CFPB) banned arbitration in consumer mortgage and home equity loan agreements under its authority to implement new TILA Section 129C(e) under the Dodd-Frank Act.
- In April 2013, it initiated a study pursuant to Section 1028(a) of Dodd-Frank regarding the use of forced arbitration in non-mortgage consumer financial products and services.
- On December 12, 2013, it released its "Arbitration Study Preliminary Results." Preliminary results published by the CFPB indicate that approximately 90% of contracts for consumer financial products contain class-arbitration waivers.
- The CFPB has the power to pass regulations prohibiting or limiting the use of pre-dispute arbitration agreements in contracts for consumer financial products, if it is "in the public interest and for the protection of consumers."

6. Federal Regulatory and/or Statutory Changes to Preclude Class Waivers

- On May 7, 2013, Sen. Al Franken (D-Minn.) and Rep. Hank Johnson (D-Georgia) reintroduced the Arbitration Fairness Act, a bill that would amend the FAA to ***prohibit*** predispute arbitration agreements that require arbitration of employment, consumer, antitrust, or civil rights disputes.

- Of its 23 co-sponsors in the Senate and 71 co-sponsors in the House, all are Democrats with one independent.
- Unlikely to be passed in this political climate.

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7. *Parens Patriae* Lawsuits

- *Parens Patriae* lawsuits are lawsuits brought by state attorneys general on behalf of state citizens (or private attorneys working under the auspices of state attorneys general).
- In *Mississippi ex rel. Hood v. AU Optronics Corp.*, the attorney general of Mississippi brought a suit on behalf of Mississippians who had been injured by the price fixing scheme of LCD manufacturers and sellers.
  - The state argued that, pursuant to its *parens patriae* authority and Mississippi statute, the case was not a class-action, and thus not removable under CAFA. The Fifth Circuit disagreed.
  - But on January 14, 2014, the Supreme Court reversed the Fifth Circuit and held that such claims were not a "mass action," and thus not properly removable under CAFA.

8. Consolidated/Coordinated Arbitrations

- Another strategy that class action plaintiffs may pursue in certain situations is coordination of multiple individual arbitrations.
- It is important to check the rules of the arbitral forum regarding consolidation.
- Strongly-worded contractual waivers of consolidation and confidentiality provisions may address this issue.

Takeaways

1. Don't have silent arbitration provisions!

> *Arbitration shall proceed solely on an individual basis without the right for any claims to be arbitrated on a class action basis or on bases involving claims brought in a purported representative capacity on behalf of others. The arbitrator's authority to resolve and make written awards is limited to claims between you and the Company alone. Claims may not be joined, coordinated, or consolidated unless agreed to in writing by all parties.*

2. *Concepcion* circumscribed courts' ability to apply traditional contract defenses to arbitration agreements.
3. After *Amex*, it is clear that class-arbitration waivers are enforceable even if the cost of effectively litigating the plaintiff's claim far exceeds any potential recovery. This appears to apply equally whether the underlying claim arises under state or federal law.
4. Courts may still find an arbitration agreement unenforceable if the agreement imposes high administrative and filing fees on a Plaintiff, thereby making access to the arbitral forum "impracticable." Although the impact of *Amex* on this issue is still unclear.
5. Courts – especially the Ninth Circuit – and in states that disagree with *Amex* may renew their focus on whether the parties ever agreed to a contract in the first place.
6. Unless expressly stated, a non-signatory to an arbitration agreement may find it difficult to convince a court to refer gateway issues of arbitrability to an arbitrator, including whether a non-signatory was intended to have the ability to compel individual arbitration.
7. Change may be on the horizon, as the CFPB is currently reviewing the wisdom of allowing arbitration contracts concerning consumer financial products. Further, Congress could drastically limit the availability of consumer arbitration agreements.
8. Watch for developments in *parens patriae* jurisprudence, and whether it is being used as a substitute to traditional class litigation.

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