Proskauer

# The ERISA Litigation Newsletter

### October 2012

**Editors' Overview**

This month, we follow-up on an article from our July 2011 newsletter, analyzing the U.S. Supreme Court decision in *AT&T Mobility v. Concepcion,* and the complex issues involved in whether and when arbitration may apply to ERISA claims and whether an employer or fiduciary may wish to require arbitration. The ruling in *Concepcion,* as well as the Court's earlier opinion in*Stolt-Nielsen v. AnimalFeeds,* could permit plan sponsorsto avoid defending class action ERISA claims infederal court by conditioning employment on arbitrationagreements, as well as avoid classwide arbitration. However, as examined by the authors, the recent case law applying the Supreme Court rulings in employment claims appears to suggest that some courts may look to find means to distinguish ERISA claims and thereby preclude the use of arbitration clauses in this manner.

As always, be sure to review the section on Rulings, Filings, and Settlements of Interest.

**Prospects for Avoiding ERISA Class Actions with Arbitration Agreements***

Contributed by Russell L. Hirschhorn and Jacquelyn Weisman

It is well established that plan sponsors and fiduciaries may require plan participants and beneficiaries to participate in mandatory, binding arbitration as a means to prosecute claims under the Employee Retirement Income Security Act of 1974. It remains unclear, however, whether such arbitration agreements may preclude participants and beneficiaries from pursuing ERISA claims—including fiduciary breach claims—on a classwide basis. Two recent U.S. Supreme Court rulings[1] have brought renewed interest in these issues, as they suggest that employers may be able to avoid class litigation through the use of provisions that require participants to pursue ERISA claims in arbitration and then limit the arbitration to the pursuit of individual claims.

As discussed below, there is a lack of consensus among the lower courts as to application of these rulings in employment-related disputes, which in turn has left a great deal of uncertainty about whether class action waivers will be enforced in connection with ERISA claims; and, if so, whether these waivers can effectively preclude class litigation altogether.

**Arbitrability of ERISA Claims**

Twenty-five years ago, the U.S. Supreme Court ruled that the "duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights."[2] The case in question was brought by trustees for various pension and profit-sharing plans alleging that a brokerage firm and the financial consultant who handled their accounts violated certain securities laws. In its ruling, the Supreme Court observed that "'we are well past the time when judicial suspicion of the desirability of arbitration and the competence of arbitral tribunals' should inhibit enforcement of the [Federal Arbitration] Act 'in controversies based on statutes.'"

The court concluded that the Federal Arbitration Act (FAA) required enforcement of arbitration clauses unless either: (a) there existed a well-founded claim that the arbitration clause resulted from the sort of fraud or excessive economic power which could invalidate any contract; or (b) the party opposing arbitration demonstrated that Congress intended to prohibit waiver of judicial remedies for the statutory rights in question.

The court rejected many of the reasons offered in prior decisions as bases for refusing to enforce arbitration clauses. For example, it rejected the presumption that arbitral tribunals were incapable of handling complex disputes and that streamlined arbitration procedures entailed a diminution of substantive rights. It also saw no reason to assume that arbitrators would not follow the law, as judicial review was sufficient to ensure that they complied with the commands of federal statutes.

Consistent with the Court's ruling in *McMahon*, all circuit courts that have addressed the issue have concluded that employee benefit plans may require participants and beneficiaries to arbitrate their claims under ERISA. This includes all types of ERISA claims, such as claims for benefits, claims alleging a breach of fiduciary duty, claims based upon ERISA's substantive requirements, and discrimination and/or interference with benefits claims.[3] In so ruling, the courts have rejected various grounds for concluding that Congress intended to exempt ERISA claims from the FAA, including, for example, that: (a) ERISA confers exclusive jurisdiction on the federal courts; (b) arbitration will stifle judicial development of ERISA claims, since not all such claims will be subject to arbitration, and judges will continue to issue decisions interpreting ERISA; and (c) compulsory arbitration of ERISA claims will frustrate the legislative goal of developing a consistent body of law because there is no assurance that arbitrators will follow court precedents.

**U.S. Supreme Court Rulings on Class Action Waivers**

In the past two years, the U.S. Supreme Court has issued two rulings that have profoundly impacted the legal landscape of class arbitration claims. First, in *Stolt-Nielsen v. AnimalFeeds*, the Supreme Court held that, absent a mutual agreement to participate in classwide arbitration, a party could not be compelled to arbitrate classwide claims. At issue in *Stolt-Nielsen* was a shipping agreement that required the parties to arbitrate any dispute arising from their commercial relationship.

In 2005, AnimalFeeds served Stolt-Nielsen with a demand for class arbitration. While the parties agreed that they had to arbitrate the dispute pursuant to their contract, they also agreed that the arbitration clause was silent on the issue of class arbitration. They therefore submitted the question of class arbitration to a panel of arbitrators, who concluded, based on the rationale that public policy favors class arbitration, that class arbitration was permissible. Upon Stolt-Nielsen's motion to vacate the award, the U.S. District Court for the

Southern District of New York held that the panel had erred in basing its decision on policy grounds, and that it should have considered whether existing law provided instruction as to how to interpret a silent contract. The Supreme Court agreed. It also observed that while the panel made a few references to the parties' intent, its award did not clarify how intent informed its decision. The Court then turned to the FAA for guidance in how to treat the silent arbitration clause and concluded that, although some "silent" agreements may lend themselves to inferences regarding parties' intent, this particular agreement did not.

Second, in *AT&T v. Concepcion*, the Supreme Court held that the FAA preempted a California rule prohibiting certain arbitration contracts that prevented individuals from arbitrating class claims. The dispute concerned a promotion in which AT&T Mobility advertised a free or discounted phone for customers who entered into an agreement for cellular phone service. As a part of the service agreement, customers had to agree to resolve disputes through arbitration. When customers received their new phones and first bills, they were charged sales tax on the full retail value of the phone, ranging from approximately $10 to $30.

Several groups of plaintiffs filed claims alleging unfair competition and deceptive practices, in violation of California law. The suits were consolidated in federal court. AT&T filed motions to compel individual arbitrations of the claims. The district court determined that the class waiver provision was unconscionable, relying on the California rule first established by existing state precedent. The court thus invalidated the provision and allowed the class claim to proceed in federal court. The Ninth Circuit affirmed.

The Supreme Court reversed and determined that the FAA preempted the state-law rule, as the rule interfered with the FAA's goal of promoting arbitration and its expeditious results. The Court reasoned that the FAA reflected a liberal approach toward arbitration and required, as one of its fundamental precepts, that arbitration agreements be held on equal footing with any other contractual agreements. Therefore, arbitration agreements should only be struck down for reasons that could nullify other contracts, such as fraud, duress, or unconscionability. Here, no such reason justified striking down the class waiver clause.

**Application of Stolt-Nielsen and Concepcion**

As of the writing of this article, there do not appear to be any published decisions directly addressing the enforceability of class action waivers under ERISA, although the Middle District of Alabama recently touched on the issue and compelled arbitration of plaintiffs' ERISA claims seeking reimbursement of excess health insurance premiums withheld from their paychecks. In *Hornsby v. Macon County Greyhound Park Inc.*,[4] the district court concluded that, under Alabama's default rule, the arbitration agreement's silence meant that the plaintiffs were not permitted to pursue their claims as class claims. In so ruling, the court rejected plaintiffs' argument that it was unconscionable under Alabama law to preclude class claims where, as here, it would be more efficient to proceed as a class.

There have been a number of decisions, not all of which have reached consistent conclusions, that have ruled on the enforceability of class action waiver provisions in labor and employment law disputes.

Shortly after the Supreme Court issued its decision in *Concepcion*, the National Labor Relations Board (Board) held that an employer could not, as a condition of employment, require that employees waive their right to bring class and collective claims before an arbitrator or a judge.[5] In *D.R. Horton*, the arbitration agreement stated that employees must bring employment-related claims before an arbitrator, and the arbitrator could only hear individual claims. The Board concluded that by foreclosing the possibility of group action in any forum, the agreement violated Section 7 of the National Labor Relations Act (NLRA), which provides for employees' rights to engage in concerted activities for the purpose of mutual aid or protection. The Board purported to distinguish *Concepcion* on the grounds that: (a) D.R. Horton's agreement violated employees' statutorily protected rights, while no such rights were at play in the *Concepcion* consumer context; and (b) *Concepcion* involved a conflict between state and federal law, whereas *D.R. Horton* involved two federal laws, the FAA and the NLRA, that did not in fact conflict with each other, since the FAA protects parties' rights to arbitrate only insofar as the parties do not forgo any substantive rights afforded by statute.

Federal district courts also have had several occasions to determine the enforceability of class action waivers in the employment arena. For example, in *Chen-Oster v. Goldman Sachs & Co.*,[6] the court denied Goldman Sachs' motion to compel arbitration of plaintiffs' "pattern and practice" gender discrimination claims. Although the court concluded that the arbitration agreement encompassed these claims and that the policy's silence with respect to the availability of class arbitration rendered class arbitration unavailable, the court nevertheless held that the arbitration clause should not be enforced because federal law creates a substantive right to be free of "pattern or practice" discrimination by an employer, and compulsory arbitration would preclude plaintiffs from enforcing this right. At issue, according to the court, was "not a right to proceed, procedurally, as a class, but rather the right, guaranteed by Title VII, to be free from discriminatory employment practices." The court thus concluded that *Concepcion* was not applicable.[7]

Two district courts recently reached opposite conclusions with respect to the same arbitration policy applicable at certain Citigroup-affiliated entities (collectively, Citigroup). This particular policy provided that arbitration was the exclusive forum for resolving all employment-related disputes, and that employees could not submit any class or collective actions under the policy. In both cases, plaintiffs alleged that they were denied overtime compensation as a result of having been misclassified as exempt from the wage and hour provisions of the Fair Labor Standards Act (FLSA). After plaintiffs separately commenced their claims as collective actions, Citigroup moved to compel individual arbitration pursuant to the arbitration agreement.

In *Raniere v. Citigroup Inc*.,[8] the Southern District of New York denied Citigroup's motion to compel individual arbitration. The court concluded that *Concepcion* was distinguishable because that case concerned whether a state law was preempted by the FAA, and Raniere's claim was based entirely on federal law. The court observed that the FAA requires a court to declare an otherwise operative arbitration clause unenforceable if enforcement would prevent plaintiffs from vindicating their statutory rights. Here, the court concluded that the right to proceed collectively under the FLSA could not be waived as a matter of federal law. The court reasoned that the FLSA collective action is a ''unique animal,'' whose procedures and legislative history justify different treatment from class actions brought under Rule 23 of the Federal Rules of Civil Procedure. For instance, whereas Rule 23 class actions require would-be plaintiffs to opt out if they do not wish to be included in the class, the FLSA requires that plaintiffs affirmatively opt in if they want their claims adjudicated. This feature of the FLSA reflected Congress's desire to give plaintiffs the advantage of lower costs associated with pooled resources.

Six months after *Raniere*, the Middle District of Florida granted a similar motion by Citigroup and concluded that, by virtue of the same policy at issue in *Raniere*, the lead plaintiff and five opt-ins had legally waived their right to bring an FLSA collective action.[9] The court relied on two earlier decisions by the Eleventh Circuit, one that had enforced a waiver of collective action rights under the FLSA, and another that, like *Concepcion*, held that a class action waiver in a commercial arbitration agreement was enforceable. In light of these precedents, the court summarily rejected plaintiffs' assertion that *Concepcion* was inapplicable in the employment context.

Two other federal district courts have reached opposite conclusions as to the enforceability of arbitration clauses to preclude class claims, based on differing views as to the relevance of policy concerns such as whether or not plaintiff's expenses in pursuing her claim on an individual basis would have dwarfed her maximum potential recovery.[10]

**Proskauer's Perspective**

In combination, the rulings in *Stolt-Nielsen* and *Concepcion* could conceivably permit employers/plan sponsorsto avoid defending class action ERISA claims infederal court by conditioning employment on arbitrationagreements, and avoiding classwide arbitration byeither making no allowance for such claims in the arbitration agreement or, alternatively, specifically providing that the arbitrations will be limited to individual claims.

The recent case law applying the Supreme Court rulings in employment claims suggests that some courts may look to find means to distinguish ERISA claims and thereby preclude the use of arbitration clauses in this manner. There are arguments for distinguishing these anti-arbitration rulings in the ERISA contexts, however. For instance, to the extent some courts have determined that the FLSA confers a substantive right to proceed as a collective action, that reasoning would not appear to apply under ERISA. Similarly, to the extent the one court's reasoning was based on its belief that plaintiffs are required to pursue Title VII "pattern and practice" claims as class actions, that reasoning also would not appear to apply under ERISA since there is no requirement to pursue any type of ERISA claim, including a claim for breach of fiduciary duty seeking planwide recovery, as a class claim.

Given the current state of the law, there appears to be enough of a possibility to prevail on enforcing class waivers in arbitration agreements that plan sponsors and fiduciaries should include them in their arbitration agreements and plan documents if perceived to be an advantage. Even if enforced, however, their impact remains unclear in light of the fact that, as mentioned, a single participant may commence a lawsuit in a representative capacity under ERISA,[11] without resorting to the class action devices available under the Federal Rules of Civil Procedure.

If plan sponsors and fiduciaries decide to require class action waivers, arbitration agreements should expressly state that claims in arbitration are limited to individual claims. These polices should appear in the plan document and summary plan description and should be made clearly known to all participants and beneficiaries.

**Rulings, Filings, and Settlements of Interest**

**Retiree Benefits**

- In *Reese v. CNH Am. LLC,* Nos. 11-1359, 11-1857, 11-1969, --- F.3d ---, 2012 WL 40009695 (6th Cir. Sept. 13, 2012), the Sixth Circuit for the second time reversed the decision of the district court and held that an employer could reasonably yet unilaterally alter lifetime healthcare benefits for retirees without engaging in collective bargaining. CNH Corporation (CNH) entered into successive collective bargaining agreements (CBAs) from 1974 to 2004 with the United Auto Workers (UAW), in which the parties agreed that retirees and their surviving spouses would receive free lifetime healthcare benefits. CNH filed a declaratory action seeking the right under ERISA and the Labor Management Relations Act (LMRA) to modify or terminate retiree health benefits for all UAW-represented employees who retired on or after July 1, 1994. In 2009, the Sixth Circuit held that eligibility for lifetime healthcare benefits "vested," but at the same time rejected the suggestion that the scope of this commitment meant that CNH could make no changes to the healthcare benefits provided to retirees since vesting in the context of healthcare benefits provides an evolving, not a fixed, benefit. Accordingly, the court concluded that CNH could make "reasonable" changes to the retirees' plan and remanded the case to the district court to determine whether CNH's proposed modifications were reasonable. On remand, the district court did not reach the reasonableness question, and instead found that CNH lacked the ability to modify any benefits. The Sixth Circuit found that the district court erred when it disregarded its holding that the company may make reasonable modifications to the retirees' healthcare benefits, and remanded the case again to the district court to determine whether the new plan provides benefits "reasonably commensurate" with the old plan, the changes are "reasonable in light of changes in health care," and the benefits are "roughly consistent with the kinds of benefits provided to current employees." In making this evaluation, the Sixth Circuit instructed the district court to consider evidence regarding: (1) the annual total out-of-pocket expenses under the old and new plans; (2) the average per-beneficiary cost to CNH under the old and new plans; (3) any premiums, deductibles, and co-payments under the old and new plans; (4) any difference in quality of care between the old and new plans; (5) any difference in the new and old plans available to current employees and retirees; and (6) how the new plan compares to those offered by companies similar to CNH with demographically similar employees. The dissent believed that the LMRA prohibits unilateral modification of the scope of health benefits without the consent of the pensioner.

- In *Witmer v. Acument Global Tech., Inc.*, --- F.3d ---, No. 11–1793, 2012 WL 4053734 (6th Cir. Sept. 17, 2012), the Sixth Circuit affirmed a lower court's ruling that a collective bargaining agreement did not bestow retirees with the right to vested, lifetime health care benefits. Although the collective bargaining agreement contained a promise of "continuous health insurance," it also contained a reservation of rights clause. The court concluded that the broadly worded reservation of rights clause was incompatible with an intent to create vested, unchangeable benefits. Because the language of the plan was clear, the court declined plaintiffs' request to review extrinsic evidence in support of the retirees' claims.

**Contractual and Statutory Limitations Periods**

- In *Heimeshoff v. Hartford Life & Accident Ins. Co.*, No. 12-651-cv, 2012 WL 4017133 (2d Cir. Sept. 13, 2012) (summary order), the Second Circuit affirmed the district court's ruling dismissing plaintiff's claim for long-term disability benefits on the grounds that the claim was barred by the plan's contractual three-year limitations period, which ran from the time that proof of loss was due under the plan. The court observed that the plan's limitations language was "unambiguous" and did "not offend the statute" by running the limitations period before the claim accrued.

- In *Fallin v. Commonwealth Indus., Inc. Cash Balance Plan*, --- F.3d ----, No. 09-5139, 2012 WL 3608517 (6th Cir. Aug. 23, 2012), the Sixth Circuit affirmed the dismissal of claims that a 1998 cash-balance conversion violated ERISA because it did not credit participants with the value of an early retirement subsidy provided by the old plan. Eight of the nine plaintiffs had received lump-sum distributions more than five years prior to pursuing administrative remedies under the plan. As to these plaintiffs, the court applied Kentucky's five-year statute of limitations for statutory claims with no limitations period of their own, and concluded the plaintiffs' claims accrued when they received lump-sum distributions that "unequivocally repudiated" any claim to additional benefits. The court vacated dismissal of a claim by a ninth participant (Corley), finding that it was equitably tolled while he exhausted his administrative remedies. On the merits of that participant's claims, the court held the plan fiduciary acted within its discretion (and consistent with Treasury regulations) in excluding the subsidy from the cash-balance calculations. However, the court vacated dismissal of Corley's anti-cutback claim, even though he had not satisfied the age requirement at the time of the conversion. Noting that Corley had satisfied the plan's service requirement prior to the amendment, the court found that entitlement to the subsidy had accrued, since the statute permits age requirements for such a subsidy to be met after the plan amendment. The court remanded for determinations whether Corley's benefits were actually reduced by the conversion, and whether the subsidy constituted "an early retirement benefit" that could not be reduced.

**Employer Stock Drop Litigation**

- In *In re GlaxoSmithKline ERISA Litig.*, No. 11-2289-cv, 2012 WL 3798260 (2d Cir. Sept. 4, 2012) (summary order), the Second Circuit affirmed the district court's dismissal of plaintiffs' ERISA stock-drop action alleging that the fiduciaries of the plan breached their duties of prudence and loyalty by offering the company stock fund as an investment option under the plan. The district court ruled that because the plan did not afford the defendants any discretion with regard to offering the company stock fund as an option under the plan, there was no basis for a claim of breach of fiduciary duty, and accordingly, dismissed the complaint. The Second Circuit, in affirming the decision, stated that although *In re Citigroup ERISA Litig*., 662 F.3d 128 (2d Cir. 2011), makes clear that the law in the Second Circuit is "not quite that absolute," the complaint was properly dismissed because the plan terms strongly favored investment in employer stock and plaintiff failed to plead that the company faced a "dire situation that was objectively unforeseeable by the settler" and that could require fiduciaries to override plan terms. The Second Circuit also affirmed the district court's dismissal of plaintiff's negligent misrepresentations and omissions claims, finding that, even though SEC filings were incorporated into the summary plan description, the employer did not issue the SEC filings in its capacity as plan administrator.

**Section 510 Claims**

- In *George v. Junior Achievement of Cent. Indiana, Inc*., --- F.3d ---, No. 11–3291, 2012 WL 3984408 (7th Cir. Sept. 4, 2012), the court vacated dismissal of an employee's claim that his employer retaliated against him for making an informal complaint about his retirement account. After observing that a split in circuit authority had developed on this issue, the Seventh Circuit held that ERISA Section 510 applies to informal employee complaints, and is not limited to grievances or other formal action. The Seventh Circuit joined the Fifth and Ninth Circuits in applying Section 510 to informal employee complaints. In contrast, the Second, Third, and Fourth Circuits hold that a formal proceeding is a necessary prerequisite for Section 510 protection.

**Fiduciary Status**

- In *Tocker v. Kraft Foods N. Am. Inc. Ret. Plan*, No. 11-2445-cv, 2012 WL 3711343 (2d Cir. Aug. 29, 2012) (summary order), the Second Circuit affirmed the district court's ruling that a benefits manager was performing a "ministerial function," and thus did not act as an ERISA fiduciary when sending plaintiff participant correspondence proposing a special arrangement under which plaintiff would receive a lump sum benefit through a workforce reduction program while continuing to obtain long-term disability benefits. In support of this finding, the court noted that the benefits manager investigated whether the plaintiff could participate in the workforce reduction program and continue to receive long-term disability benefits at the instruction of senior management and did not have the level of "discretionary authority" required to be considered a fiduciary under ERISA.

**Subrogation Claims**

- In *Treasurer, Trustees of Drury Indus., Inc. Health Care Plan and Trust v. Goding*, --- F.3d ---, No. 11–2885, 2012 WL 3870585 (8th Cir. Sept. 7, 2012), the Eighth Circuit affirmed a decision dismissing a plan's subrogation claim under ERISA Section 502(a)(3) against a law firm that represented a participant in obtaining a tort recovery following an injury that resulted in the payment of plan benefits for his medical expenses. The Plan sought to enforce its subrogation clause against the law firm because the participant entered into bankruptcy. The court ruled that there was no cognizable ERISA Section 502(a)(3) claim against the law firm because the firm was not in possession of funds belonging to the plan. In so ruling, the court rejected the argument that the firm's mere acknowledgement of the subrogation clause was sufficient to support an equitable claim. The court also upheld the finding that the successful defendant was entitled to attorney's fees.

**Fiduciary Exception to Attorney-Client Privilege**

- In an issue of first impression, the Ninth Circuit in *Stephan v. Unum Life Ins. Co. of Am.*, No. 10-16840, --- F.3d ---, 2012 WL 3983767 (9th Cir. Sept. 12, 2012), held that the fiduciary exception to attorney-client privilege applied to an insurance company that served as both an ERISA fiduciary and a plan sponsor. The ruling arose in connection with a review of a district court determination that Unum Life Insurance Company (Unum) did not abuse its discretion in denying plaintiff's claim for additional long-term disability benefits. In an effort to demonstrate that Unum operated under a conflict of interest, plaintiff sought to discover a series of documents created by Unum's in-house counsel at the request of Unum's claims analysts. The documents were created after Unum approved plaintiff's claim for long-term disability benefit, but while plaintiff's appeal for additional benefits was pending. The court concluded that some of the documents sought by plaintiff were subject to the fiduciary exception, even though they were created after the initial benefit determination was made, because they dealt with plan administration and did not address potential civil or criminal liability. Specifically, the court found that the documents (1) were prepared to advise Unum claims analysts as to how the insurance policy under which plaintiff was covered ought to be interpreted and whether plaintiff's bonus ought to be considered monthly earnings within the meaning of the plan, and therefore, constituted advice relating to plan interpretation, and (2) were communicated to the analysts before any final determination on plaintiff's claim had been made.

**Delinquent Contributions**

- In *Central Pension Fund of the International Union of Operating Engineers & Participating Employers v. Haluch Gravel Co.,* No. 11-1944, --- F.3d ----, No. 11-1944, 2012 WL 3984621 (1st Cir. Sept. 12, 2012), the First Circuit vacated an award of delinquent contributions against an employer that failed to maintain accurate payroll records and report all covered work to the plan. Joining several other circuits, the court adopted a burden-shifting framework under which the court applies a rebuttable presumption that the employer owes contributions for "all hours worked . . . in which [employees] were shown to have performed some covered work," except where the employer shows the work was not covered. Applying this framework, the court observed that the evidence showed that 75% of one employee's work was covered in a given year. Accordingly, the employer was presumptively liable for the same proportion (75%) of hours worked by a replacement employee performing the same covered work. The court also ordered recalculation of attorneys' fees based upon the total amount of contributions for which the employer was liable.

**Withdrawal Liability**

- In *Chicago Truck Drivers, Helpers & Warehouse Workers Union (Independent) Pension Fund v. CPC Logistics, Inc*., --- F.3d ----, No. 11-3034, 2012 WL 3554446 (7th Cir. Aug. 20, 2012), the Seventh Circuit sustained an arbitrator's ruling that a plan miscalculated an employer's withdrawal liability. The court found the calculation was not based on the "actuary's best estimate," as required by ERISA, because the plan directed the actuary to use a higher interest rate used for minimum funding requirements rather than the "blended" rate endorsed by the actuary as the appropriate rate for calculating withdrawal liability. After lamenting the "hideous complexities" in the parties' briefs, Judge Posner implored lawyers to "write other than in jargon," noting judges are not knowledgeable about every specialized area of the law, including ERISA, "a highly specialized field that judges encounter only intermittently."

* Originally published by Bloomberg Finance L.P. Reprinted with permission.

[1] *See AT&T v. Concepcion*, 131 S. Ct. 1740 (2011); *Stolt-Nielsen v. AnimalFeeds*, 130 S. Ct. 1758 (2010).

[2] *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987).

[3] *See*, *e.g.*, *Williams v. Imhoff*, 203 F.3d 758, 24 EBC 2183 (10th Cir. 2000); *Kramer v. Smith Barney*, 80 F.3d 1080 (5th Cir. 1996); *Pritzker v. Merrill Lynch*, 7 F. 3d 1110 (3d Cir. 1993); *Bird v. Shearson Lehman/American Express Inc.*, 926 F.2d 116 (2d Cir. 1991); *Sulit v. Dean Witter Reynolds Inc.*, 847 F.2d 475, 9 EBC 1857 (8th Cir. 1988); *Hernandez v. Jobe Concrete Prods. Inc.*, 282 F.3d 360, 27 EBC 1784 (5th Cir. 2002).

[4] No. 3:10cv680, 2012 U.S. Dist. LEXIS 81552 (M.D. Ala. June 13, 2012).

[5] *D.R. Horton Inc.*, 357 NLRB No. 184 (2011), *appeal docketed*, No. 12-60031 (5th Cir. Jan. 13, 2012).

[6] 785 F. Supp. 2d 394 (S.D.N.Y. 2011), *reconsideration denied*, 10-cv-06950 (S.D.N.Y. July 7, 2011).

[7] *See also Owen v. Bristol Care Inc.*, 2012 U.S. Dist. LEXIS 33671, at *11 (W.D. Mo. Feb. 28, 2012) (agreeing with *Chen-Oster* in a wage-and-hour case).

[8] 2011 U.S. Dist. LEXIS 135393 (S.D.N.Y. Nov. 22, 2011), *appeal docketed* No. 11-5213 (2d Cir. Dec. 19, 2011).

[9] *See Oliveira v. Citicorp N. Am. Inc.*, No. 8:12-cv-00251 (M.D. Fla. May 18, 2012).

[10] *Compare Morvant v. P.F. Chang's China Bistro Inc.*, No. 11-05405 (N.D. Cal. May 7, 2012) (enforcing a class action waiver in a wage-and-hour lawsuit brought under various state laws post-*Concepcion*) *with Sutherland v. Ernst & Young LLP,* 768 F. Supp. 2d 547, 551 (S.D.N.Y. 2011) (declining, prior to *Concepcion*, to enforce a class action waiver in a FLSA claim).

[11] *See* ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2).

**Related Professionals**

- **Russell L. Hirschhorn**
  Partner
- **Myron D. Rumeld**
  Partner