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Class Action Legal Update

Supreme Court Poised To Decide Two Cases That Will Affect Class Action Practice

During the 2009-2010 term, the Supreme Court will decide two cases that could have a significant effect on class action practice. In ***Stolt-Nielsen S.A. v. Animalfeeds International Corp.* (No. 08-1198)** , the question presented is whether the Federal Arbitration Act (FAA) permits class arbitration w the arbitration agreement is silent on that subject. If the Court concludes that the FAA prohibits class arbitration w the arbitration agreement is silent (as advocated by the petitioner), that could effectively preclude most class arbitrations because arbitration agreements rarely provide for class arbitrations. While many arbitration agreements expressly bar class arbitrations, some courts have found such provisions to be unconscionable and unenforceable. The case was argued on December 9, 2009. Justice Sotomayor has recused herself in the case. Based on the oral argument, the remaining justices may be sharply divided, although some of the questions suggested that the Court might not reach the merits.

The Supreme Court previously granted *certiorari* to consider the same issue in *Green Tree Fin. Corp. v. Bazzle* , 539 U.S. 444 (2003), but issued a split decision with no majority opinion. A plurality opinion by Justice Breyer (joined by Justices Scalia, Souter, and Ginsburg) concluded that the case had to be remanded for the arbitrator to determine whether the contract was in fact silent regarding class arbitrations or whether it effectively prohibited them. Justice Stevens concurred in the judgment, but would have reached the merits and held that t was nothing in the FAA that would preempt the South Carolina Supreme Court's determination, as a matter of state law, that class arbitrations are permissible if not prohibited by the agreement. Chief Justice Rehnquist (joined by Justices O'Connor and Kennedy) dissented. They would have held that the issue of whether the arbitration agreement was silent with respect to class arbitrations should be decided by a court, and that, under the FAA, the arbitration agreement at issue should have been interpreted as not allowing a class arbitration. Justice Thomas dissented on the grounds that the FAA should not apply at all to proceedings in state courts. Both prior and subsequent to *Bazzle*, federal and state appellate courts have disagreed on the question presented in *Stolt-Nielsen*. In *Stolt-Nielsen*, the Second Circuit held that the arbitrators did not act in manifest disregard of the law in allowing a class arbitration w the agreement was silent on the subject. The Second Circuit concluded that *Bazzle* abrogated prior cases that held that the FAA prohibited class arbitrations w not expressly provided for in the arbitration agreement. The Seventh Circuit, in contrast, has refused to give *Bazzle* precedential force due to the failure of the Court to reach a majority opinion. *Employers Ins. Co. of Wausau v. Century Indem. Co.*, 443 F.3d 573, 580 (7th Cir. 2006).

The second case that could have a significant effect on class action practice is ***Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.* (No. 08-1008).** This case presents the question of whether a New York Civil Practice Law & Rules provision that prohibits the recovery of statutory penalties in class actions (absent express authorization in the penalty statute itself) is enforceable in federal court under *Erie* . If the Court rules that such a state statute prohibiting certain types of class actions is not enforceable in federal court, it could open the doors of federal courts to a significant number of new class actions brought under state statutes that impose small penalties on corporations for certain technical violations that, if aggregated in a

class action, potentially could result in damages of many millions of dollars. In some instances, these class actions could not be brought in a state court.

In *Shady Grove*, the plaintiff seeks to certify a class of persons whose insurance claims arising out of automobile accidents were not either paid or denied within 30 days, and who are t ore entitled to a small statutory penalty under a New York insurance statute. The Second Circuit held that the New York Civil Practice Law & Rules provision was enforceable in federal court because it was a substantive statute and was not in conflict with Fed. R. Civ. P. 23. The petitioner argues that the New York statute is procedural and conflicts with Rule 23 and, t ore, should not apply in federal court under *Erie*. The case was argued on November 2, 2009. The questions asked at oral argument suggest that the Court might be sharply divided on the outcome.

For further information on these cases or Robinson & Cole's class action practice, please contact Wystan M. Ackerman, Jamie M. Landry, or another member of the firm's Class Action Team.

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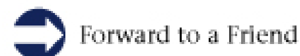

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