Recent Legal Developments in Preventing Class Actions and Class Action Waivers©

NYU CENTER FOR LABOR AND EMPLOYMENT LAW

CUTTING-EDGE EMPLOYMENT LAW ISSUES FOR CORPORATE COUNSEL

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Despite at least three recent decisions on arbitration, the United States Supreme Court will soon provide employers with still more guidance on the subject as it is set to decide in *American Express Co. v. Italian Colors Restaurant* whether *Concepcion* allows defendants to enforce class action waivers in arbitration agreements, or instead whether plaintiffs can escape such provisions if they can show that individual litigation would be prohibitively expensive. The Court also recently heard argument in *Oxford Health Plans, L.L.C. v. John Ivan Sutter, M.D.*, as to whether the parties to an arbitration agreement authorize class arbitration when the provision states that "any dispute" will be submitted to arbitration. This 2012 term already has provided employers with two favorable decisions in defending and preventing class actions, though much debate has ensued as to their applicability, and prognosticators predict *Italian Colors* and *Oxford Health* will follow. In *Genesis HealthCare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), for example, the Supreme Court resolved a circuit split and held that a collective action under the Fair Labor Standards Act cannot proceed where the lone plaintiff's claim is rendered moot by an offer of judgment in the full amount of the plaintiff's individual claim. Notably, however, the Supreme Court did not address the other circuit split employers were hoping to settle over whether an unaccepted Rule 68 offer of judgment which would have fully satisfied the named plaintiff's claims is sufficient by itself to moot a putative collective action. And, in *Comcast v. Behrend*, 133 S. Ct. 1426 (2013), the Court blocked certification of an antitrust action under Rule 23(b)(3) where the plaintiff class had not shown that damages were susceptible of measurement across the entire class for purposes of Rule 23(b)(3). Being sure to point out that the result was no more than a "straightforward application of class-certification principles," Justice Scalia, who authored the 5-4 decision, explained that in this case "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." To the extent there was any question as to whether *Comcast* applied to employment cases, the U.S. Supreme Court immediately vacated and remanded *Ross v. RBS Citizens, N.A*. for further consideration in light of *Comcast*. 133 S. Ct. 1722 (2013).

I. Arbitration After *Concepcion*

A. Background

In April 2011, in a 5 to 4 decision, the U.S. Supreme Court held that the Federal Arbitration Act (FAA) preempted a California unconscionability doctrine that denied enforcement of arbitration agreements requiring consumers to waive any right to bring a class action unless the agreement also provides for class arbitration. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

In *Concepcion*, the plaintiffs signed a service agreement with AT&T that included a clause requiring the arbitration of all disputes and prohibiting class proceedings. When the plaintiffs sued AT&T for false advertising relating to an offer for free cell phones, AT&T moved to compel arbitration. Both the district court and the Ninth Circuit held AT&T's class action waiver unenforceable, finding it unconscionable because (1) the waiver was in a "take it or leave it" consumer contract; (2) the waiver involved a dispute with a predictably small amount of damages; and (3) it was alleged that the party with superior bargaining power engaged in a scheme to deliberately cheat consumers. *See Concepcion v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009).

The Supreme Court reversed, finding that the California rule conditioned the enforceability of arbitration agreements on the party's acquiescing to a "manufactured . . . class wide arbitration," and thus undermined the FAA's chief purposes in three ways.

First, the Court explained that class wide arbitration "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." Second, the Court expressed concern that class-wide arbitration requires a level of procedural formality, such as notice to absent parties, which is inconsistent with conventional arbitration, and it was unlikely that Congress meant for arbitrators to take on such complex issues as class certification. Finally, the Court noted that "[a]rbitration is poorly suited to the higher stakes of class litigation," particularly given the FAA's extremely limited judicial review of arbitrators' decisions. The Court observed that, while defendants may be willing to accept some degree of error in decisions affecting individual litigants, the risks in class-wide, and sometimes company-wide, proceedings were likely to be unacceptable, and if forced to roll the dice in class arbitration, defendants would settle questionable claims. The Court explained that the FAA permits parties to agree to class wide arbitration and that the FAA "requires courts to honor parties' expectations." However, when the parties have not contracted for class wide arbitration, state law may not require it.

B. Recent Supreme Court Analysis of Arbitration Agreements

On February 27, 2013, the Supreme Court heard oral arguments in ***American Express Co. v. Italian Colors Restaurant***, No. 12-133, and will determine whether the FAA permits federal courts, invoking the "federal substantive law of arbitrability," to invalidate arbitration agreements on the grounds they do not permit class arbitration of a federal law claim. Counsel for American Express argued that being required to arbitrate an individual antitrust claim in an arbitral forum would not be cost prohibitive for antitrust plaintiffs because the arbitrator could design cost-effective and cost-sharing measures to address the parties' evidentiary needs, including expert costs. Class counsel argued that the arbitration agreement's confidentiality provision would prohibit the sharing of costs/data amongst plaintiffs in the context of an arbitration, which would render futile any cost-sharing mechanism. In addition, class counsel argued that an expert is necessary to support individual antitrust claims, making it necessary to have a class action device available to antitrust plaintiffs. Justice Breyer suggested ways for parties to cut down on arbitration costs in the antitrust context (*e.g.*, by appointing an expert as the arbitrator to avoid the cost of an expert report, by asking a trade association to pay costs on behalf of several claimants). Notably, several Justices questioned whether the case should be remanded for additional facts to be developed about the arbitration-specific costs at issue in the case, since the facts developed in the record related largely to court costs. The Court's opinion has not been issued to date.

By way of background, *AmEx I* found unenforceable a mandatory arbitration clause in a commercial contract that contained a class action waiver. The Supreme Court granted *certiorari* in *AmEx I*, then vacated and remanded for further consideration in light of its decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), which held that a party cannot be compelled to submit to class arbitration unless the party agreed to submit to class arbitration in the arbitration agreement. In *AmEx II*, the Second Circuit found the outcome of *AmEx I*

unchanged by the *Stolt-Nielsen* decision and remanded to the district court for further proceedings. The Second Circuit reasoned that the "only economically feasible means" of pursuing plaintiffs' antitrust claims was a class action. Shortly after this decision in *AmEx II*, the Supreme Court handed down *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), which found that the FAA preempted a California law barring enforcement of class action waivers in consumer contracts. In *AmEx III*, the Second Circuit observed that neither *Concepcion* nor *Stolt-Nielsen* stand for the proposition that all class action waivers are enforceable. *AmEx III* observed that class actions are the most suitable vehicle for vindicating antitrust violations that would otherwise be "prohibitively expensive" on an individual basis in an arbitration, and individual arbitrations would deprive plaintiffs of their statutory protections to enforce the antitrust laws, citing *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000).

On March 25, 2013, the Court heard arguments in ***Oxford Health Plans, L.L.C. v. John Ivan Sutter, M.D.***, No. 12-135, to address whether the parties to an arbitration agreement authorize class arbitration when the provision states that "any dispute" will be submitted to arbitration. During the argument, Oxford's counsel argued that the arbitrator's construction of the arbitration agreement did not support a finding, as required by *Stolt-Nielsen*, of Oxford's consent to class arbitration, and that the arbitrator's decision exceeded his authority. Justice Sotomayor challenged Oxford's counsel by asking him to explain how Oxford could challenge the arbitrator's decision that the language in the agreement covered class arbitration when Oxford itself agreed to have the arbitrability issue decided by the arbitrator in the first place. In addition, the Justices questioned how Oxford's counsel could argue that the arbitrator's decision exceeded his authority when the scope of the arbitration provision was ambiguous. The Justices questioned Sutter's counsel about the precedent for class arbitration within the AAA, particularly given that the class in this case was composed of approximately 20,000 physicians who had not chosen the arbitrator and would be bound by any decision made by the arbitrator. The Court's opinion has not been issued to date.

By way of background, a physician filed a class action complaint against several insurers, including Oxford Health, concerning alleged breach of provider agreements. The cases were severed as to each defendant and Oxford moved to compel arbitration. The arbitrator first issued a decision finding that the arbitration agreement permitted class arbitration. Subsequently, the arbitrator issued a decision defining a class of claimants and certifying the class pursuant to the AAA Supplementary Class Rules. Oxford moved to vacate the arbitrator's class certification decision, which motion the district court denied. Specifically, the district court rejected Oxford's request for the court to apply *de novo* review, as arbitration awards are reviewed using a deferential standard. In addition, the court found no basis to support Oxford's claims that the arbitrator exceeded his powers or manifestly disregarded the law because the arbitrator issued a well-reasoned and rational arbitration decision that directly addressed then-existing precedent and provided adequate reasoning supporting the arbitration award. Oxford appealed and the Third Circuit affirmed the decision of the district court denying the motion to vacate.

C. Recent Cases on Class Action Waivers

1. Unenforceable

***Sutherland v. Ernst & Young*, No. 10cv3332, 2012 WL 130420 (S.D.N.Y. Jan 17, 2012):** The district court found the class arbitration waiver unenforceable, despite *Concepcion*, because Plaintiff "is not able to vindicate her rights [under the FLSA] absent a collective action." According to the court, *Concepcion* emphasized that provisions in the arbitration agreement at issue were more favorable to the Concepcions than a class action and ensured that the Concepcions would find redress for their claims (even if on an individual basis); here, however, the court found that Plaintiff would not be able to obtain representation or vindicate her rights on an individual basis. The court found Plaintiff's situation more akin to the line of cases in which the Supreme Court stated that it may not enforce contractual agreements that would operate "as a prospective waiver of a party's right to pursue statutory remedies." *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). The court also emphasized that, unlike the *Discover Bank* rule in *Concepcion*, which mechanistically applied to adhesion contracts and in a manner that disfavored arbitration, the court here was applying a case-by-case analysis that considers the ability of a Plaintiff to obtain legal representation and resolve her claims. Moreover, the court noted that the rule struck down in *Concepcion* was grounded in state common law, whereas Plaintiff's objection to the motion to compel arbitration in the present case arose out of the federal courts' interpretation of the FAA.

***Raniere v. Citigroup Inc.*, 827 F. Supp. 2d 294 (S.D.N.Y. 2011):** The district court held that employees bound by an arbitration agreement with their employer could not waive their statutory right to proceed collectively under the FLSA. Relying on Second Circuit case law, which the court found was not overruled by *Concepcion*, the court reasoned that such a waiver was invalid because it would not allow Plaintiffs to vindicate their statutory rights and prevent the FLSA from serving its remedial and deterrent functions. The court examined the structure, purposes, and legislative history of the FLSA and determined that the collective action enforcement mechanism was a substantive provision not subject to waiver. Currently, Citigroup is appealing the denial of its motion to compel arbitration to the Second Circuit.

2. Enforceable

***Chen-Oster et al. v. Goldman Sachs & Co. et al.*, No. 11-529, 2013 WL 1149751 (2d Cir. Mar. 21, 2013):** In a decision consistent with pro-arbitration precedent from the U.S. Supreme Court, and a victory for employers looking to avoid class litigation, the Second Circuit held that companies can use arbitration agreements to preclude Title VII class actions. The court further ruled that an ex-Goldman Sachs & Co. managing director had no substantive right to pursue a pattern-or-practice sex-bias claim. A three-judge appeals panel unanimously rejected former Goldman worker Lisa Parisi's argument that she had a substantive right to bring a pattern-or-practice claim, which she could pursue only on a class basis, finding that the term "pattern or practice" referred to a method of proof, not to a distinct cause of action. More specifically, the court stated, "since private plaintiffs do not have a right to bring a pattern-or-practice claim of discrimination, there can be no entitlement to the ancillary class action procedural mechanism . . . we see no reason to deviate from the liberal federal policy in favor of arbitration." By way of background, Parisi, along with Cristina Chen-Oster and Shanna Orlich, filed suit against Goldman in September 2010, accusing it of engaging in a systematic policy, practice or pattern of discrimination against female employees. A magistrate judge rejected Goldman's bid to

compel arbitration in April 2011, ruling that because a pattern-or-practice claim can only be brought in a class action context, Parisi's Title VII claim could not be sent to arbitration, "lest she be deprived of her substantive rights." Goldman sought reconsideration based on the Supreme Court's ruling in *AT&T Mobility LLC v. Concepcion*, which upheld class arbitration waivers in a dispute between AT&T and consumers. After the district court affirmed the magistrate judge, Goldman appealed. The Second Circuit ruled that no right to bring a substantive pattern-or-practice claim exists, and pointed out that courts have consistently ruled that Title VII claims can be subject to mandatory arbitration, and that Congress specifically approved arbitration of these claims in the Civil Rights Act of 1991. The court further noted that the Supreme Court has consistently interpreted the FAA as establishing a federal policy in favor of arbitration agreements.

***Owen v. Bristol Care, Inc.*, 2013 WL 57874 (8th Cir. Jan. 7, 2013)**: The Eighth Circuit recently held that an arbitration agreement that contained a class action waiver provision prohibiting an employee from arbitrating claims on behalf of a class was valid and enforceable. The court observed that collective actions under the FLSA require an employee to affirmatively opt in to the lawsuit. Even assuming Congress intended to create some "right" to class actions, the court reasoned, the employee enjoys the freedom to waive participation in a class action as well. Furthermore, the Eighth Circuit criticized the district court's attempt to distinguish the *Concepcion* case and its reliance on the NLRB's decision in *D.R. Horton,* which is discussed more fully below.

***Quilloin v. Tenet Healthsystem Philadelphia, Inc.*, 673 F.3d 221 (3d Cir. 2012):** The Third Circuit reversed the denial of Defendants' motion to compel arbitration, concluding that a registered nurse must arbitrate her federal and state wage and hour claims pursuant to an arbitration agreement that is neither substantively nor procedurally unconscionable. The district court found that the arbitration agreement at issue could be substantively unconscionable based on the potential inclusion of a class action waiver and language in the agreement that could be interpreted to prohibit the recovery of attorney's fees and costs. The Third Circuit recognized the ambiguities in the agreement, but concluded they should be left to an arbitrator. The Court also concluded that even if the agreement explicitly waived Plaintiff's right to pursue class actions, the Pennsylvania law prohibiting class action waivers "is surely preempted by the FAA under *Concepcion*." The Pennsylvania law provided that class action waivers are substantively unconscionable where "'class action litigation is the only effective remedy' such as when 'the high cost of arbitration compared with the minimal potential value of individual damages denie[s] every Plaintiff a meaningful remedy.'" The Court found the Pennsylvania law was "not substantively different" from the California rule of law the Supreme Court found preempted in *Concepcion*.

***Dixon v. NBCUniversal Media, LLC*, 12cv7646, 2013 WL 2355521 (S.D.N.Y. May 28, 2013):** Plaintiff argued that an arbitration agreement which purports to waive collective action rights is unenforceable *per se*. Citing *AmEx III*, the court noted that plaintiff did not argue that the effective vindication of federal statutory rights rationale applies to her claims. In fact, plaintiff conceded her claim was sufficiently large to pursue effectively on an individual basis, but argued the court should permit discovery so that she could ascertain "if there are collective action

potential members with small dollar claims who will opt into the class and who could easily satisfy the [*AmEx*] standard." The court rejected the argument, stating "[i]t would be contrary to the Second Circuit's instruction that "each waiver must be considered on its own merits, based on its own record," *AmEx III*, 667 F.3d at 219, to allow Dixon to avoid arbitrating her own claims based on the hypothetical possibility that there may be some other, as-yet-unknown plaintiff as to whom the effective vindication rationale applies." Citing *Concepcion*, the court also further "join[ed] the vast majority of courts in holding that the right to proceed collectively under the FLSA can be waived in an arbitration agreement."

***LaVoice v. UBS Financial Servs., Inc.*, No. 11cv2308, 2012 WL 124590 (S.D.N.Y. Jan. 13, 2012):** The district court granted Defendant's motion to compel arbitration of Plaintiff's class and collective action claims under the FLSA and state laws. Plaintiff's compensation plans and various other employment documents contained arbitration agreements and class action waivers. In light of *Concepcion*, the court rejected Plaintiff's argument that the FLSA creates an unwaiveable right to collective action. Under a case-specific analysis, the court examined whether the "practical effect of enforcement of the waiver" would "preclude" Plaintiff from exercising his rights. After examining Plaintiff's submissions regarding his estimated damages claim ($127,000 in overtime claims), his estimated attorneys' fees, his estimated expert fees, his disinclination to pursue his claims individually, his likelihood of success at arbitration and the fact that the arbitration agreement provided that Plaintiff could recover his attorneys' fees, the court found that Plaintiff failed to show that he would incur such prohibitively high costs that the class action waiver would preclude him from bringing individual claims against Defendant.

***Palmer v. Convergys Corp.*, No. 7:10-cv-145, 2012 WL 425256 (M.D. Ga. Feb. 9, 2012).** Defendants' employment applications contained a class action waiver and required employees to acknowledge receipt and voluntary agreement. Plaintiffs subsequently filed a putative collective action under the FLSA for off-the-clock work violations and argued that the class action waiver was unenforceable because it was not a binding agreement and public policy concerns weighed against upholding the class action waiver. The district court disagreed, finding that there is no logical reason to distinguish a waiver in the context of an arbitration agreement from a waiver in the context of any other agreement and "class action waivers, like many other contractual terms, are proper subjects for contractual bargaining because there is no substantive right associated with class action litigation." The court also rejected Plaintiffs' public policy concerns, finding that the amount of recovery in the case was not so small as to completely preclude recovery on an individual basis and that the FLSA provides for mandatory attorney's fees which would ensure Plaintiffs would be able to achieve legal representation. The court also refused to follow the NLRB's decision in *D.R. Horton* because "it does not meaningfully apply to the facts" of the case.

D. NLRA Weighs In On Arbitration Agreements

The National Labor Relations Board has jumped into the fray regarding arbitration agreements. Specifically, it has staked out the position that the National Labor Relations Act (NLRA) – the federal law protecting employees' rights to engage in concerted protected activity – affords non-union employees a protected right to join together as a class to pursue common employment claims.

***D.R. Horton, Inc.*, 357 NLRB No. 184 (Jan. 6, 2012):** D.R. Horton utilized a "Mutual Arbitration Agreement" as a condition of employment that required employees to resolve employment-related disputes through binding arbitration and contained a class action waiver provision stating that only "individual" claims could be heard in arbitration. Charging Party filed an unfair labor practice charge when D.R. Horton failed to arbitrate his proposed class claims under the FLSA. The NLRB's General Counsel issued a complaint, contending the MAA violated Section 8(a)(1) of the NLRA by infringing on the right of D.R. Horton's employees to exercise their rights under Section 7 of the NLRA. The Board held that employees' rights to join together as a class to pursue common employment claims is a protected, concerted activity under Section 7 and that right is unlawfully restrained when employers require employees to enter into mandatory arbitration agreements that waive class action rights. The Board also concluded that its holding did not conflict with the text or policies of the FAA and that neither the FAA nor *Concepcion* militated a different result. It reasoned that the purpose of the FAA was to prevent courts from treating arbitration agreements less favorably than other private contracts, but the current dispute did not threaten less favorable treatment. "To find that an arbitration agreement must yield to the NLRA is to treat it no worse than any other private contract that conflicts with Federal labor law." The Board found that the FAA's protection cannot require a party to forego any substantive rights protected by statute, and in this case, the MAA directly interfered with the employees' substantive Section 7 rights in seeking class certification. The Board also distinguished its decision from *Concepcion* and *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), because those decisions did not involve the waiver of substantive rights protected by the NLRA or employment agreements.

Many of the legal questions raised by *D.R. Horton* will remain unresolved at least until the Fifth Circuit has completed its review. The enforceability of class/collective action restrictions, however, is adjudicated much more often in the courts than before the NLRB, and the courts (especially federal courts) have been more receptive to the use and enforceability of mandatory arbitration and class/collective action restrictions. Indeed, three federal district courts that were asked to enforce arbitration agreements with class/collective action restrictions following *D.R. Horton* have all granted enforcement while distinguishing or refusing to rely on the Board's decision. *Sanders v. Swift Transp. Co. of Ariz., LLC*, --- F. Supp. 2d ---, No. 10-cv-03739, 2012 WL 523527 (N.D. Cal. Jan. 17, 2012); *Palmer v. Convergys Corp.*, No. 7:10-CV-145 HL, 2012 WL 425256, at *3 (M.D. Ga. Feb. 9, 2012); and *Johnmohammadi v. Bloomingdales, Inc.*, slip op., No. CV 11-6434 (C.D. Cal. Feb. 23, 2012). The federal district courts' consistent rejection of *D.R. Horton* over the last year suggests that most courts are unlikely to deny enforcement of arbitration agreements with class/collective action restrictions or waivers based upon an argument that such restrictions or waivers violate the NLRA, particularly where the arbitration agreement was not entered into as a condition of employment.

***24 Hour Fitness USA Inc. v. Alton J. Sanders* (NLRB 20-CA-35419):** In May 2012, the NLRB's General Counsel issued a complaint against 24 Hour Fitness USA Inc. alleging the company violated federal law by insisting all employment-related disputes be resolved by individual arbitration. As a condition of employment, 24 Hour Fitness requires employees to agree in writing to forego any rights to collective or class action lawsuits or arbitrations. The complaint was issued after an employee of a 24 Hour Fitness Center in San Ramon, California

filed a charge alleging that since at least summer 2010, the company has enforced its no-class-action policy by asserting it in litigation brought by employees in numerous cases. In September 2012, the National Chamber Litigation Center filed an amicus brief urging the NLRB Administrative Law Judge to hold that 24 Hour Fitness' arbitration policy, which requires bilateral rather than class-wide arbitration, does not violate the NLRA.

On November 7, 2012, an ALJ deemed 24 Hour Fitness USA Inc.'s policy unlawful in spite of a clause saying workers could opt out. Citing *D.R. Horton*, the ALJ ruled that both the class action ban and a nondisclosure restriction contained in the fitness chain's arbitration policy unlawfully limited employees from exercising their Section 7 rights under federal labor law. In finding 24 Hour Fitness' arbitration policy unlawful, the ALJ dismissed the fitness chain's assertion that its policy was distinct from D.R. Horton's mandatory agreement because it included a provision giving employees a 30-day window to opt out. The judge also rejected the notion that the U.S. Supreme Court's pro-arbitration decisions in the consumer context, *AT&T Mobility v. Concepcion* and *CompuCredit v. Greenwood*, meant the policy should be permitted, saying those rulings had little to do with arbitration in the employment context when it comes to agreements unilaterally imposed by employers. Calling the opt-out provision "an illusion," the ALJ found that requiring employees to affirmatively act to preserve rights already protected by Section 7 rights through an opt-out process is unlawful. As a remedy, the ALJ not only called for 24 Hour Fitness to stop maintaining and enforcing its arbitration policy but also to notify any arbitral or judicial tribunal where it has pursued the enforcement of the policy since Aug. 15, 2010, that it desires to withdraw any such request and that it no longer objects to its employees bringing or participating in class or collective actions.

II. ***Genesis HealthCare Corp. v. Symczyk***

In *Genesis*, plaintiff, a nurse at the defendant healthcare facility, filed a collective action under the FLSA alleging that her former employer violated the FLSA by automatically deducting meal breaks from employee pay, whether or not the employees took their breaks. 133 S. Ct. at 1527. The Defendant served the plaintiff at the outset of the case with a Rule 68 offer of judgment equal to $7,500.00 in alleged unpaid wages, plus any reasonable attorneys' fees that the court would award. *Id.* The plaintiff was given 10 days to accept the offer before it would be withdrawn. *Id.* After the plaintiff refused to accept the offer, the defendant moved to dismiss the entire case, stating that because the plaintiff rejected the offer of judgment, she "no longer possessed a personal stake or interest in the outcome of the suit, rendering the action moot." *Id.* The district court agreed with the defendant, dismissing the FLSA claim with prejudice, and holding that the Rule 68 offer had mooted the collective action. *Id.* The Third Circuit, despite agreeing that the action had in fact been mooted, remanded the case for further proceedings to assess whether additional parties who might wish to join in the litigation could be added to the suit, and whether the new claims could then proceed by relating back to the original plaintiff's claim. *Id.* at 1527-28. The Supreme Court reversed the Third Circuit, but did not decide the question the employment community anticipated—namely, whether an unaccepted Rule 68 offer of judgment for full individual relief could moot a collective action.

The majority, in an opinion authored by Justice Clarence Thomas, explained that it could not resolve the mootness issue because the issue was not properly brought before the Court for two

reasons. First, the Third Circuit had "clearly held" that plaintiff's individual claim was moot with no cross-petition from plaintiff. Second, plaintiff waived the issue by conceding mootness at the district court and appellate level. So, the majority assumed—without deciding—that the Rule 68 offer mooted plaintiff's individual claim. Assuming mootness, the Court held the case was properly dismissed because no justiciable FLSA collective action remained. The majority based this finding on the rationale that "collective" actions are different from "class" actions. "Conditional certification" under the FLSA, unlike a class action certification under Rule 23, "does not produce a class with an independent legal status, or join additional parties to the action." Accordingly, the relation-back doctrine arises uniquely in the class-action context, preserving the claims of named plaintiffs for class certification purposes that might otherwise be moot if asserted purely as individual claims.

Justice Kagan's dissent points out that the majority opinion assumes the collective action brought under the FLSA is moot, without reaching the imbedded question of whether an offer of judgment would in fact moot the collective action. *Id.* at 1532-33. And Justice Kagan goes further to opine that an unaccepted Rule 68 offer can never moot an individual claim. Thus, while the majority's ruling gives employers the green light to try and use an offer of judgment at the onset of litigation to moot a potential collective action claim under the FLSA, it does not resolve whether such an offer that goes unaccepted in fact moots the case (as is currently the precedent in a few jurisdictions).

A. Appellate Decisions Applying *Genesis*

***Schlaud v. Snyder*, No. 12-1105, 2013 WL 2221589 (6th Cir. May 27, 2013):** The Plaintiffs, a group of home childcare providers, sought to file a class-action lawsuit for the return of union dues and agency fees that were collected by defendant, allegedly in violation of plaintiffs' constitutional rights. The U.S. District Court for the Western District of Michigan denied certification of plaintiffs' proposed class and subclass because of imbedded conflicts within each grouping. The district court also held the case to be moot against the union defendants because the defendants tendered monetary and nominal damages to the named plaintiffs. In footnote 3 of the opinion, the Sixth Circuit found that it retained jurisdiction to consider whether the district court properly denied certification despite that the district court dismissed the case as moot against the union defendants. The Sixth Circuit found *Genesis* "not at odds with this determination" because *Genesis* did not involve class certification under Rule 23, which is "'fundamentally different from collective actions under the FLSA' because 'a putative class acquires an independent legal status once it is certified under Rule 23[, whereas u]nder the FLSA . . . , 'conditional certification' does not produce a class with an independent legal status, or join additional parties to the action.'" The Sixth Circuit also noted that plaintiffs moved for certification prior to defendants' attempt to settle.

B. District Court Decisions Applying *Genesis*

***Datascope Analytics, LLC v. Comcast Cable Communs.*, No. 13-608, 2013 WL 2147948 (E.D. Pa. May 17, 2013):** Plaintiffs sought to represent a class of customers who entered into contracts with the defendant for voice and internet services. Originally, the suit was brought in

the Northern District of Illinois, but before plaintiffs filed a motion to certify the class in that case, defendants sent a letter to plaintiffs' counsel offering full and complete relief for all of plaintiffs' claims. The plaintiffs voluntarily dismissed the Northern District of Illinois claim, but then refused the offer and filed a subsequent class complaint in the Eastern District of Pennsylvania, which was identical in all material aspects to the one filed in the Northern District of Illinois. The district court cited *Genesis* for the proposition that "[i]f an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be dismissed as moot." Third Circuit precedent in *Weiss v. Regal Collections*, 385 F.3d 337, 342 (3d Cir. 2004), established that "[a]bsent undue delay in filing a motion for class certification [] where a defendant makes a Rule 68 offer to an individual claim [sic] that has the effect of mooting possible class relief asserted in the complaint, the appropriate course is to relate the certification motion back to the filing of the class complaint. But the district court distinguished *Weiss* because in this case, the offer of complete relief occurred before the filing of *both* the Class Complaint and the Motion for Class Certification. Thus the district court found that an unaccepted offer of proof moots individual claims and, at least if done before a class action complaint, disposes of the class action.

***Kubacki v. Peapod, LLC*, No. 13 C 729, 2013 U.S. Dist. LEXIS 74874 (N.D. Ill. May 24, 2013); *Falls v. Silver Cross Hosp. & Med. Ctrs.*, No. 13 C 695, 2013 U.S. Dist. LEXIS 74872 (N.D. Ill. May 24, 2013):** In two separate actions, Senior United States District Judge Milton Shadur authored mirroring opinions advising the defendants in no uncertain terms that "this Court is not prepared to entertain any defense motion modeled after the successful motion in *Genesis* and offered to trigger a mootness ruling here." In both cases, plaintiffs moved at the outset of the case to certify a class, which the court described as a practice intended to block the tactic of "making an individual offer that can trigger dismissal of the individual named plaintiff and, in turn, dump the entire class action on mootness grounds as well." Judge Shadur opined that "[i]t is not entirely clear" whether *Genesis* casts doubt on Seventh Circuit precedent upholding the practice of filing motions for certification that, even though not ruled upon, have prevented the mooting of class actions by picking off the named plaintiff. The court explained that *Genesis* had no certification motion to consider and specifically distinguished between the Rule 23 procedure and the FLSA opt-in procedure. While the court cautioned defendants not to make any *Genesis*-type motions, it also cautioned that the parties need to find a way to have the motion decided before the statutorily required September 30 report.

***Lobianco v. Hayter*, No. 1:13cv41-MW-GRJ, 2013 WL 2097414 (N.D. Fla. May 14, 2013):** Plaintiff filed a class action suit against an attorney and a law firm engaged in the debt collection business to collect statutory damages for himself and others who received a letter from the law firm in violation of the Fair Debt Collections Practices Act. Defendants' offer of judgment offered the full amount of Plaintiff's statutory damages but limited costs and attorney's fees to those incurred as of the date of the offer of judgment. The court denied Defendants' motion to dismiss, finding the Defendants' offer of judgment did not offer complete relief to Plaintiff and as such did not moot Plaintiff's claim. The court cited *Genesis* for the general proposition that a moot case is properly dismissed for lack of subject-matter jurisdiction, but then noted the circuit split regarding whether an unaccepted offer of judgment that fully satisfies a plaintiff's claim will actually render the claim moot. The court also noted that while the Eleventh Circuit has not

decided that issue, it had decided that a settlement offer for the full amount of damages minus judgment was not a full offer of relief that would moot a case. Drawing parallels here because the fees offered would not offer full relief, the court denied Defendants' motion to dismiss.

***Bilbao v. Bros. Produce*, No. 13-20535-CIV-KING, 2013 WL 1914406 (S.D. Fla. May 7, 2013):** In an action for unpaid wages under the FLSA and Florida law, plaintiff had sent a pre-litigation demand letter and defendant tendered a cashier's check for the full amount in the demand letter. The letter that accompanied the check was explicit that the tender of payment was for the purpose of mooting the plaintiff's claims. No other plaintiffs had been joined at the time defendant tendered the payment. Subsequently, three additional plaintiffs filed consents to join the action. In an order granting a Rule 12(b)(1) motion to dismiss, the Court relied on *Genesis* for the proposition that mere presence of collective-action allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied. Because the tender of payment preceded the filing of the other plaintiffs' consents to join the lawsuit, the case was closed and other similarly situated individuals could not join. Accordingly, the court found the opt-in plaintiffs were not parties to the case and granted the defendant's motion to dismiss.

III. *Comcast v. Behrend*

The *Comcast* plaintiffs sought to certify a class under Rule 23(b)(3) alleging violations of antitrust law under Sections § 1 and 2 of the Sherman Act. According to the plaintiffs, Comcast engaged in a strategy of acquiring competitor cable providers in the Philadelphia "Designated Market Area" (DMA), which includes 16 counties located in Pennsylvania, Delaware and New Jersey. The plaintiffs alleged that the strategy resulted in Comcast's acquisition of 69.5 percent of the Philadelphia DMA by 2007. 133 S.Ct. at 1430-31. To support their damages argument, plaintiffs raised four theories of damages but offered an expert's regression analysis, which computed only a single damages figure resulting from the cumulative effect of the four distinct business practices. *Id.* The district court permitted class certification to proceed on the basis of only one of the theories and declined to accept Comcast's argument that plaintiffs should provide a model for damages that would disaggregate the portion attributable to the single business practice certified by the court. *Id.* The Third Circuit approved of the district court's omission, explaining that such an inquiry would touch upon the merits of the case. The Supreme Court reversed but—as the dissent notes—did not break "new ground" in the process.

First, the Court said that class plaintiffs "'must affirmatively demonstrate . . . compliance' with Rule 23," which means that they must "'prove that there are in fact sufficiently numerous parties, common questions of law or fact,'" etc. *Id.* at 1432. This burden is even higher where the class is to be certified under Rule 23(b)(3), which requires an evidentiary showing that "questions of law or fact common to class members predominate over any questions affecting only individual members." *Id.* Then the Court emphasized, as it has before, that it may be necessary for the court to probe behind the pleadings and touch on merits before deciding certification question. The Court explained that the district court's refusal to explore the evidentiary basis for the expert's opinion, as well as the crucial question whether damages could be supported by one theory alone, "ran afoul of [the Supreme Court's] precedents requiring precisely that inquiry." *Id.* at 1433. Notably, the Court was clear that such "[c]alculations need not be exact," as long as they are

"consistent with [plaintiff's] liability case . . ." But if a plaintiff's "assurance" that its model will yield a class-wide damages measurement was enough, it "would reduce Rule 23(b)(3)'s predominance requirement to a nullity." *Id.*

Justice Ginsburg's dissenting opinion, however, states that the majority's holding is "good for this day and case only" because the plaintiffs conceded the amount of recoverable damages must be susceptible to class-wide proof. *Id.* at 1437. The dissent also argued that challenges to the efficacy of the damages model were waived because Comcast neither objected to the admissibility of the expert's report under Rule 702 or *Daubert*, nor moved to strike the expert report. While the majority pointed out that, while Comcast may have waived the right to challenge the admissibility of the expert's testimony, it did not waive the right "to argue that the evidence failed 'to show that the case is susceptible to awarding damages on a class-wide basis,'" the conversation underscores the importance of making and preserving *Daubert* challenges.

Importantly, for employers, on April 1, 2013, the U.S. Supreme Court vacated and remanded *Ross v. RBS Citizens, N.A*. for further consideration in light of *Comcast*. 133 S. Ct. 1722 (2013). In *Ross*, the Seventh Circuit had affirmed the district court's decision certifying a class action involving off-the-clock and misclassification claims.

A. Appellate Decisions Applying *Comcast*

***Cuevas v. Citizens Financial Group, Inc.*, No. 12cv2832, --- Fed.Appx. ----, 2013 WL 2321426, 2 (2d Cir. May 29, 2013)**: Citing *Comcast* for the requirement of "a rigorous analysis," the Second Circuit remanded a decision certifying a class of Assistant Branch Managers claiming they were misclassified as exempt employees. The Second Circuit criticized the district court for holding that Citizens' blanket exemption of all ABMs, along with the policies set forth in its company-wide documents, established that common issues predominate over individual ones without addressing all of the evidence before it and resolving the material factual disputes arising from conflicting declarations regarding job duties. According to the Second Circuit, "[r]esolving these issues is essential to determining whether ABMs actually share primary duties such that common issues predominate over individual ones."

***Leyva v. Medline Indus.*, No. 11-56849, 2013 U.S. App. LEXIS 10649 (9th Cir. Cal. May 28, 2013):** Plaintiffs, current and former hourly employees in defendant's three California distribution warehouses, brought suit alleging that Medline's policy of rounding employees' start times according to 29-minute increments systematically resulted in off-the-clock work and that Medline improperly calculated employees' overtime pay rates, in addition to waiting-time penalty and wage statement claims. The district court denied class certification, in part, because evaluation of each putative class member's claims would require fact-specific, individualized inquiries into the amount of money to which the employee is entitled. The Ninth Circuit reversed, finding the district court abused its discretion by denying certification. The decision emphasized that "damages determinations are individual in nearly all wage-and-hour class actions," and explained that "[h]ere, unlike in *Comcast*, if putative class members prove Medline's liability, damages will be calculated based on the wages each employee lost due to Medline's unlawful practices [and] Medline's computerized payroll and time-keeping database

would enable the court to accurately calculate damages and related penalties for each claim." The *Leyva* decision went on to demonstrate how Medline had used these computerized records in its Notice of Removal, and had separately calculated each prospective class member's potential damages.

B. District Court Decisions Applying *Comcast*

***Hernandez v. Ashley Furniture Industries, Inc.*, No. 10cv5459, 2013 WL 2245894, 1 (E.D.Pa. May 22, 2013):** Plaintiffs claimed that Ashley violated Pennsylvania law by forcing employees to work, or failing to pay employees for all time worked, before and after scheduled shifts, during paid rest breaks, and during unpaid meal breaks. Citing *Comcast* for the proposition that "it may be necessary for a court to probe behind the pleadings before coming to rest on the certification question," the district court denied certification. The court explained that "testimony of named plaintiffs and other former employees reflects a broad range of experiences, and Ashley's time records show many instances in which employees were paid from the time they clocked in until the time they clocked out…There is no way to determine, without resorting to individualized inquiry, whether an employee whose start or end time was rounded on a particular day actually worked additional time without compensation."

***Xuedan Wang v. Hearst Corp.*, No. 12 CV 793 (HB), 2013 U.S. Dist. LEXIS 65869 (S.D.N.Y. May 8, 2013):** Plaintiffs, former interns at various magazines owned by defendant, brought suit alleging defendant violated minimum wage requirements, overtime provisions, and recordkeeping requirements in the FLSA and the New York Labor Law by employing plaintiffs as unpaid interns. In rejecting the plaintiffs' motion for class certification, the district court questioned the plaintiffs' ability to properly calculate damages. In so doing, the district court expressly noted its rejection of plaintiffs' contention that the *Comcast* ruling is limited to antitrust cases. The district court reasoned that the majority in *Comcast* expressly rejected such a proposition, and instead applied straightforward class-certification principles. The district court further noted that the Supreme Court's order to vacate the Seventh Circuit decision in *RBS Citizens, N.A. v. Ross*, 133 S. Ct. 1722 (2013), and to remand for further consideration in light of *Comcast* is arguably probative of a broader application of *Comcast*.

***Tracy v. NVR, Inc.*, No. No. 04-CV-6541L, 2013 U.S. Dist. LEXIS 62407 (W.D.N.Y. April 29, 2013):** Plaintiffs claimed they were misclassified as outside salesman and a key issue in the case was whether plaintiffs met the exemption's requirement that they work away from the employer's business for the requisite period of time each week. In denying certification of the Rule 23 state law class action, the court cited *Comcast* for the proposition that class certification requires a classwide method of measuring damages, and *Dukes* for the proposition that commonality requires not only common questions, but also common answers to those questions. Applying these principles, the court found that because plaintiffs worked in different locations, under different supervisors, and performed duties outside of their offices in varying degrees and in different ways, their claims "as well as any determinations to be made concerning damages – are too highly individualized to form the basis for a class action." Similarly, as to the FLSA collective claims, the court reasoned that the broad variations in plaintiffs' work activities made

it "impossible to make a blanket determination concerning the FLSA exempt status of the entire class of putative plaintiffs in this case . . . ."

***Forrand v. Federal Exp. Corp.*, No. 08cv1360, 2013 WL 1793951, 5 (C.D.Cal. Apr. 25, 2013)**: The court denied Rule 23 class certification of California state law claims for off-the-clock work and unpaid work time during meal periods. In its decision, on remand from the Ninth Circuit, the district court noted that *Comcast* requires a plaintiff "to bring forth a measurement method that can be applied classwide and that ties the plaintiff's legal theory to the impact of the defendant's illegal conduct." The court found that the plaintiff's proposed damages methodology, which assumed the entire gap between clock-in and the start of paid time was compensable, could be applied classwide, but failed "to tie California law to liability and a reliable measure of damages." The court found that the plaintiff's proposed class claim raised factual questions regarding whether each individual employee was in fact working and/or under the employer's control during the gap period, and therefore individual factual inquiries predominated over classwide inquiries. On the meal period claim, too, the district court found *Comcast* instructive, stating that while the plaintiff's "evidence and method of proof was applicable to the class as a whole, it does not adequately tie [her] allegation . . . to a proper and reliable measure of damages for work done on those breaks," particularly because of the requirement to prove the employer knew or should have known of the work during the unpaid meal periods.

***Buchanan v. Homeservices Lending LLC*, No. 11cv0922, 2013 WL 1788579, 1 (S.D.Cal. Apr. 25, 2013):** Plaintiffs claimed certain paystub deductions and expenses were necessary and ordinary business expenses their employer improperly deducted and failed to reimburse in violation of California labor laws. Citing *Comcast* for the unremarkable propositions that a party seeking to maintain a class action must affirmatively demonstrate his compliance with Rule 23 and that Rule 23(b)(3) predominance is even more demanding than Rule 23(a), the court denied certification because the individual inquiries into whether HSL required enrollment in the marketing expenses "go to liability and not just damages, these individual inquiries will predominate the litigation."

***Smith v. Family Video Movie Club, Inc.*, No. 11 CV 1773, 2013 U.S. Dist. LEXIS 54512 (N.D. Ill. Apr. 15, 2013):** Plaintiffs, former employees of defendant video store, brought suit alleging violations of the Illinois Minimum Wage Law arising out of alleged failures to pay hourly employees for all hours worked and improperly excluding commission from overtime rate calculations. Plaintiffs sought to certify the class under Rule 23, but the district court denied certification. Citing *Comcast*, the district court reiterated that "common answers to common questions must not only exist, but must predominate any necessary individualized inquiries." The court then found that plaintiffs had failed to demonstrate that their individual claims, other than their claim regarding the calculation of overtime pay, are common to the class and capable of classwide resolution. Specifically, time plaintiffs allegedly worked "off-the-clock" varied by location and manager.

***Semenko v. Wendy's Intern., Inc.*, No. 2:12–cv–0836, 2013 WL 1568407, 11 (W.D.Pa. Apr. 12, 2013)**: A former manager claimed she suffers from degenerative arthritis, that she was released to return to work with restrictions following a leave of absence, but that Wendy's

refused to accommodate her, and terminated her employment. Plaintiff brought ADA and Pennsylvania Human Relations Act claims for failure to accommodate on behalf of herself and a class of "all persons who have been terminated or separated from employment following a leave of absence and/or otherwise not accommodated by defendant's failure to transfer to vacant and funded positions." Wendy's responded to plaintiff's class claims immediately by filing a motion to strike pursuant to Rules 12(f), 23(c)(1)(A), and 23(d)(1)(D). In essence, Wendy's argued that Semenko's claims were not appropriate as a class action because, Semenko's disability discrimination claims as alleged would require the Court to determine whether each of the putative class members is a "qualified" individual with a disability. Wendy's argued that this is "an assessment that encompasses inquiries . . . too individualized and divergent . . . to warrant certification under Rule 23(a) and (b)(2)." Citing *Comcast*, the court granted Wendy's motion, stating "individual issues clearly predominate over common issues with respect to both liability and damages in this case."

***Roach v. T.L. Cannon Corp*., No. 3:10-CV-0591 (TJM/DEP), 2013 U.S. Dist. LEXIS 45373 (N.D.N.Y, March 29, 2013):** Plaintiffs brought suit for violation of the FLSA and New York Labor Law against defendant, and several of its corporate and individual affiliates, that collectively own and operate sixty-one Applebee's Neighborhood Grill and Bar Restaurants. At issue in this decision was the magistrate's recommendation to certify a class on plaintiffs' spread of hours claim. Relying on *Comcast*, the court modified the magistrate's order and declined to certify a spread of hours class because plaintiffs did not offer "a damages model susceptible of measurement across the entire class, arguing instead that this issue is separate from the question of liability." The district court flatly rejected this argument, responding that the plaintiffs' "position is in contravention of the holding of [*Comcast*]." The district court went on to conclude that questions of individual damage calculations in the case would inevitably overwhelm questions common to the class.

***Martins v. 3PD, Inc.*, 11cv11313, 2013 WL 1320454 (D. Mass. Mar. 28, 2013):** The plaintiffs, delivery drivers for the defendant, alleged that they had been misclassified as independent contractors and sought to represent a class of similarly situated individuals. The district court held that Count I of the plaintiffs' complaint -- a claim that they were employees of the defendant under M.G.L. Ch. 149, §148B -- was appropriate for classwide treatment because it was based entirely on common questions and common evidence. The court, however, refused to certify plaintiffs' claims under the Wage Act or for unjust enrichment because no common form of proof existed to prove the elements of these claims. Citing *Comcast*, the judge noted that calculating what was deducted from whom "would require complex individual inquiries not suited to class-wide litigation."