



The Continued Erosion Of Overbroad Class Actions - The Supreme Court Takes Action

Scott O'Connell

Nixon Peabody (Boston, MA)

soconnell@nixonpeabody.com | 617.345.1150

http://www.nixonpeabody.com/scott_oconnell



Class Action Decisions

- *The Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013)

Plaintiff's stipulation that damages would be under the \$5 million CAFA threshold (to avoid removal) ineffective.

Absent class members cannot be bound by the stipulation. It is a nullity

Class Action Decisions

- *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013)

FLSA issue. Does an unaccepted offer of judgment moot the claim

Justice Kagan: "So a friendly suggestion to the Third Circuit: Rethink your mootness-by-unaccepted offer theory. And a note to all other courts of appeals: Don't try this at home"

Class Action Decisions

- *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013)

Securities class action. In a Fraud on the Market theory, materiality cannot be challenged at class certification time.

Class Action Decisions

- *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013)

Construction of arbitration clause by arbitrator will get higher deference than contract review by court de novo

Class Action Waivers

- *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013)

Vindication of rights exception to FAA largely rejected. The fact that arbitration of individual claims might cost more than recovery is not a basis to set aside arbitration contract and class waiver.

Justice Kagan Dissent: “Too darn bad”

Class Action Waivers

- *AT&T Mobility LLC v. Concepcion*
 - 5-4 decision
 - Arbitration provision with class waiver upheld
 - California’s *Discovery Bank* rule overturned



Federal Arbitration Act

Agreements to arbitrate are:

“valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”

9 U.S.C. §2

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Fraud

Duress

Unconscionability

FAA Preemption

“When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.”

FAA Preemption

Post Conception

- *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012)(*per curium*)
- *Nitro-Lift Technologies, LLC v. Howard*, 133 S. Ct. 500 (2012)(*per curium*)

Post Conception Issues

- Unconscionability
- Vindication of Statutory Rights
 - Federal (*Amex*)
 - State (*Morgan Tire, Dell*)
- Public Interest
 - Public Injunctions (*Kilgore*)

Kilgore v. KeyBank, NA

Ninth Circuit, March 7, 2012

en banc, April 11, 2013

*Original Decision-- Preemption of state law
barring arbitration of cases seeking public
injunction under UCL 17200*

- *Originally Broughton/Cruz line of cases overturned*
- *Originally decided 17200 claims seeking public injunctions are arbitrable*
- *En Banc Opinion side-stepped this issue*

Kilgore v. KeyBank, NA

Ninth Circuit, March 7, 2012

en banc, April 11, 2013

En Banc Opinion—

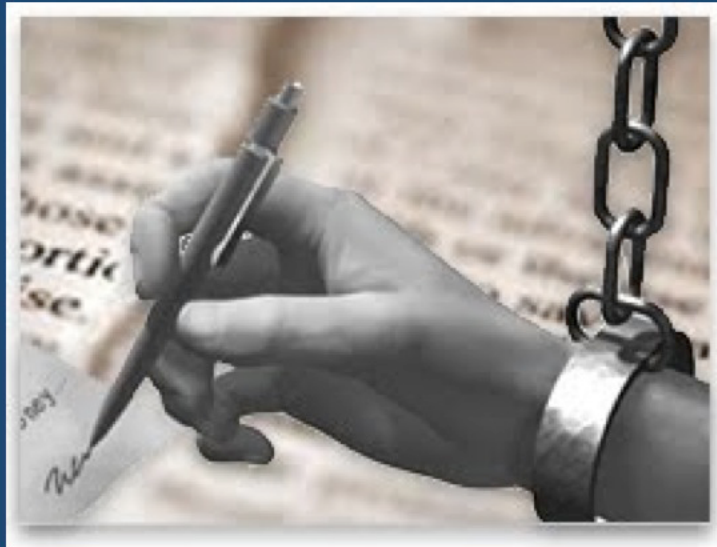
- *Not unconscionable*
 - *Opt out*
 - *Prominent*
- *Not a public injunction case*
 - *“for the benefit of the general public...”*
- *Individual contractual relationships*

Vindication of Rights

- Federal (*Amex*)
- State (*Kilgore, Morgan Tire, Dell*)



Unconscionability



About Scott O'Connell

Partner; Deputy Chair, Litigation Department | Nixon Peabody | Boston, MA

617.345.1150 | soconnell@nixonpeabody.com

http://www.nixonpeabody.com/scott_oconnell

Scott O'Connell is deputy chair of Nixon Peabody's Litigation department as well as the practice group leader of the Commercial Litigation team and the Class Action & Aggregate Litigation team. He represents integrated financial service companies—including banks, securities firms, insurance companies, and regulated subsidiaries of nonfinancial parents—in federal and state court litigation and before regulatory agencies.

Scott has extensive experience defending financial institutions in class actions concerning lender liability, breach of contract, breach of fiduciary duty, breach of good faith, unfair and deceptive trade practices, fraud, misrepresentation, fair debt collection practices, and civil RICO. He has particular trial experience litigating complex financial relationships between parties, unfair and deceptive trade practices claims, corporate control issues including corporate freeze-out, lender liability, and civil RICO.

While at law school, Scott served as an editor of the Cornell Law Review and as chancellor of the Moot Court Board. He was also an instructor in the Cornell undergraduate government course, "Law: Its Nature and Function."

U.S. News/Best Lawyers named Scott O'Connell 2013 "Lawyer of the Year" in Litigation—Securities Law (Boston). Scott has been recognized for exceptional standing in the legal community for litigation in Chambers USA: America's Leading Lawyers for Business 2013, which describes him as "a very good lawyer who is very interested in his clients." He has also been recognized by Chambers USA in previous years. In addition, he has been recognized as a "New England Super Lawyer" in Securities Litigation and/or Class Action-Mass Torts based on a peer-review survey by Thomson Reuters (2007 to present). Scott has been included in The Best Lawyers in America from 2010 through 2013 for Commercial Litigation, Litigation-Banking & Finance, Litigation-Securities, Product Liability Litigation-Defendants, and Mass Tort Litigation/Class Actions-Defendants. Scott was recognized as a local litigation star in the 2011 and 2012 edition of Benchmark Litigation, the definitive guide to America's leading litigation firms and attorneys. Scott has also earned an AV peer rating from Martindale-Hubbell. Additionally, Scott has been named the Best Lawyers' 2013 Boston Litigation – Securities "Lawyer of the Year."

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Education

- Cornell Law School, J.D., 1991, (Editor, Law Review)
- St. Lawrence University, B.A., 1987, cum laude
- Harvard Business School, 2008, "Leading Professional Service Firms"