

### **April 2009 Class Action Arbitration Update**

Several recent cases have clarified important issues related to federal court enforcement of arbitration provisions under the Federal Arbitration Act, 9 U.S.C. §1 et seq. Additionally, significant legislation continues to move forward, which, if passed, would severely limit the enforceability of arbitration provisions in many circumstances.

For regular updates on these and other developments, the firm’s California Consumer Finance Litigation blog may be a helpful resource: [www.consumerfinancelitigation.com](http://www.consumerfinancelitigation.com).

#### **Cases**

***In Re: American Express Merchants’ Litigation, 554 F.3d 300 (2nd Cir. 2009).***

In this consolidated action involving alleged violations of the anti-tying provisions of the Sherman Antitrust Act, the 2nd Circuit Court of Appeals held that the enforceability of a class action waiver provision is a question for the Court, not an arbitrator, and that the class action waiver provision at issue in the American Express merchant agreement was unenforceable under the Federal Arbitration Act.

***Hoffman v. Citibank (South Dakota), N.A., 546 F.3d 1078 (9th Cir. 2008).***

The Ninth Circuit addressed choice of law considerations in the context of a class wide arbitration waiver. In *Hoffman v. Citibank (South Dakota), N.A.*, the Ninth Circuit held that the district court’s analysis of California choice of law was flawed, and remanded for the district court to re-analyze whether California or South Dakota law applies to the class arbitration waiver. The arbitration provision at issue appeared to be enforceable under South Dakota law, but the Ninth Circuit strongly suggested that if California law were to apply, the class arbitration waiver could be held substantively and procedurally unconscionable and unenforceable.

***Vaden v. Discover Bank, 129 S.Ct. 1262 (2009).***

In this closely-watched and procedurally complex case, the U.S. Supreme Court more clearly defined the limits of federal jurisdiction under Section 4 of the Federal Arbitration Act, 9 U.S.C. §1 et seq. (“FAA”). The Court granted certiorari to determine “whether district courts, petitioned to order arbitration pursuant to §4 of the FAA, may ‘look through’ the petition and examine the parties’ underlying dispute to determine whether federal-question jurisdiction exists over the §4 petition.” The Court held federal courts may “look through” a §4 petition to

determine whether federal jurisdiction exists over a suit arising out of the controversy between the parties. Applying that process here, the Court found no federal jurisdiction over this dispute. The Court noted that, while the doctrine of complete preemption recasts a state-court claim as a federal claim, and may form the basis of federal court jurisdiction despite the “well-pleaded complaint” rule, this does not apply to counterclaims.

### **Congressional Legislation to Watch**

#### **“Arbitration Fairness Act”**

The “Arbitration Fairness Act” would amend several provisions of the Federal Arbitration Act, making sweeping changes to the enforceability of arbitration provisions. The Act would expressly invalidate arbitration agreements—retroactively—in employment, consumer, or franchise disputes and in any “dispute arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power.” Specifically, in the context of a “consumer dispute,” broadly defined, the Act would make a “predispute arbitration agreement” invalid and unenforceable.

#### **“Automobile Arbitration Fairness Act”**

The “Automobile Arbitration Fairness Act,” would eviscerate pre-dispute arbitration provisions in auto sales or lease contracts. The Automobile Arbitration bill provides that any “controversy arising out of a motor vehicle consumer sales or lease contract,” entered after the effective date of the Act “may not be settled by arbitration unless, after such controversy arises, all the parties to such controversy agree in writing to settle such controversy by arbitration.” The bill would also require any arbitration award to “include a brief, informal discussion of the factual and legal basis for the award.”

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Mr. O’Rielly is a partner in the San Francisco law firm O’Rielly & Roche LLP, a business litigation law firm founded by litigators with extensive experience representing corporate clients throughout California. Mr. O’Rielly focuses his practice on consumer financial services litigation and commercial litigation. He specializes in the defense of financial institutions, including banks, credit card issuers, mortgage lenders, and consumer lenders in litigation involving state and federal consumer finance laws. Mr. O’Rielly has extensive experience defending financial institutions in class actions.

Mr. O’Rielly publishes a blog entitled *California Consumer Finance Litigation*, ([www.consumerfinancelitigation.com](http://www.consumerfinancelitigation.com)) reporting on recent developments and providing analysis of important finance topics related to banking, credit cards, mortgages, and consumer finance statutes and regulations.

Mr. O’Rielly also represents businesses in commercial litigation, including contract disputes, employment litigation, and related issues. He is a certified mediator, focusing on mediating disputes involving consumer finance claims, contract disputes, and unfair business practices.

### Education

Cornell University J.D., 1998.  
Colgate University B.A. in Economics, 1995.

### Bar Admissions

Illinois, 1998; U.S. District Court for the Northern District of Illinois; U.S. Court of Appeals for the Seventh Circuit; California, 2001; U.S. District Courts for the Northern, Eastern, Central, and Southern Districts of California; U.S. Court of Appeals for the Ninth Circuit.

### Special Training

Mediation and Conflict Resolution (Certified Mediator). University of California at Berkeley, Extension. Berkeley, California, 2008.

National Institute for Trial Advocacy. Southwest Regional Trial Skills Program. Los Angeles, California, 2003.