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One Minute Memo®

Ninth Circuit Punts in *Kilgore*, Continuing Uncertainty on Arbitration

On April 11, 2013, the Ninth Circuit issued its long-anticipated *en banc* decision in *Kilgore v. Keybank, National Association,* No. 09-16703, declining to resolve whether the Federal Arbitration Act preempts California's *Broughton-Cruz* rule prohibiting arbitration of injunctive relief claims. While the *Broughton-Cruz* rule likely did not survive the United States Supreme Court's landmark decision in *AT&T Mobility v. Concepcion*, *Kilgore* ensures continued litigation over the issue as class action plaintiffs continue their attempts to challenge consumer arbitration provisions that prohibit class actions.

The *en banc* decision in *Kilgore* turned on the simple fact that defendant Keybank no longer was making the type of loan challenged in the case, so there was no basis for seeking injunctive relief. Because there was no continuing conduct, there was no need to determine whether public policy prohibits arbitration of a claim seeking to enjoin such conduct. By ducking the issue, the *en banc* panel avoided not only the central question in the case, but also the "vindication of statutory rights" argument the Second Circuit used to evade the holding of *AT&T Mobility* in *In re American Express Merchants Litigation,* 667 F.3d 204 (2d Cir. 2012). That issue is now pending before the Supreme Court, which granted certiorari and recently heard oral argument.

Kilgore illustrates that the battle over enforceability of consumer class action waivers is far from over. While *AT&T Mobility* certainly had a huge impact, the class action bar continues to pursue judicially created exceptions as well as regulatory and legislative measures that would limit or reverse the decision.

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