RECENT DEVELOPMENTS

MISCELLANEOUS

NLRA PROHIBITS CLASS ACTION WAIVERS

Morris v. Ernst & Young, LLP., 834 F.3d 975 (9th Cir. 2016). https://cdn.ca9.uscourts.gov/datastore/opinions/2016/08/22/13-16599.pdf

FACTS: Plaintiffs Stephen Morris and Kelly McDaniel worked for Defendant Ernst & Young, LLP. As a condition of employment, Morris and McDaniel were required to sign a "concerted action waiver" stating that they will not to join with other employees in bringing legal claims against the company. The waiver required Ernst & Young's employees to (1) pursue legal claims against Ernst & Young exclusively through arbitration and (2) arbitrate only as individuals in separate proceedings. Morris and McDaniel nonetheless brought a class and collective action against Ernst & Young in federal court alleging the employees were misclassified and Ernst & Young relied on the misclassification to deny the employee's overtime wages. Ernst & Young moved to compel arbitration pursuant to the concerted action waiver.

Under the NLRA, employees have the essential and substantive right to pursue work-related legal claims together.

The district court granted Ernst & Young's motion to compel arbitration and ordered individual arbitration. Morris and McDaniel appealed.

HOLDING: Reversed and remanded.

REASONING: Morris and McDaniel argued that their concerted action waiver was unenforceable because the waiver violated the National Labor Relations Act ("NLRA").

The Ninth Circuit, recognizing a circuit split, accepted Morris and McDaniel's arguments and held that Ernst & Young violated the NLRA by requiring its employees to sign the concerted action waiver as a condition of employment. Under the NLRA, employees have the essential and substantive right to pursue work-related legal claims together. The NLRA precludes contracts that foreclose the possibility of concerted work-related legal claims, and an employer may not condition employment on the requirement that an employee sign such a contract. Here, Ernst & Young interfered with the substantive right by requiring its employees to resolve all of their legal claims in "separate proceedings." Accordingly, the concerted action waiver violated the NLRA and was unenforceable.

ANALYSIS OF ANTI-STEERING COMPLAINT MUST CONSIDER BOTH SIDES OF THE MARKET—MERCHANTS AND CONSUMERS

United States v. Amn. Express Co., ___ F.3d ___ (2d Cir. 2016). http://www.ca2.uscourts.gov/decisions/isysquery/d964fafd-ae57-43fe-aa11-3a98a78284b1/9/doc/15-1672_opn.pdf

FACTS: The United States Government and seventeen Plaintiff States (collectively, "Plaintiffs") sued American Express Company and American Express Travel Related Services Company (collectively, "Amex") for unreasonably restraining trade in violation of §1 of the Sherman Act ("§1"). Plaintiffs alleged Amex's "anti-steering" or nondiscriminatory provision (NDPs) prevented merchants from encouraging cardholders' use of alternative and less costly network services at the point of sale, thus suppressing interbrand competition.

The district court concluded that Plaintiffs showed by a preponderance of the evidence that Amex's NDPs precluded anything from offsetting payment-card networks' incentive to charge merchants inflated prices for their services. The district court's rational was supported by its findings that the relevant market for its analysis only limited to payment-card network services, did not include the market for cardholders. Amex appealed.

HOLDING: Reversed and remanded.

REASONING: The court found the district court's exclusion of the market for cardholders from its definition of the relevant market in the case was fatal to its conclusion that Amex violated §1. The district court had patterned its definition of the relevant market in this case largely after the Second Circuit's definition of the relevant market in *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003). The court held that the relevant market in this case was not the same as the relevant market in *Visa* because the two-sided platform at issue in this case was a single firm operating within the broader network services industry at issue in *Visa*.

The court ruled that the district court should have considered the extent to which price increases from network services such as Amex could cause merchants to influence cardholders' switch to alternative forms of payment outside of payment-card network, thus acknowledging the need to analyze Amex's vertical restraints on both merchants and cardholders. The court's rationale was the price charged to merchants would necessarily affect cardholder demand that in turn affects merchant demand for payment-card network services. Ultimately, the court found that the District Court's analysis failed to acknowledge that any price increase promulgated by Amex against merchants necessarily affected both merchant and cardholder demand and was therefore an incomplete analysis. As a result, it was determined that the Plaintiffs had not met their burden under a rule of reason analysis by establishing a nexus between Amex's NDPs and anticompetitive effects suffered by both merchants and cardholders.

RICO CLAIM SURVIVES VICTIM'S DEATH

Malvino v. Delluniversita ___ F.3d ___ (5th Cir. 2016). http://law.justia.com/cases/federal/appellate-courts/ca5/15-41435/15-41435-2016-10-20.html

FACTS: Bonnie Pereida spent hundreds of thousands of dollars on rare coins. The coins were purchased from PCA Collectibles, a rare coin dealer owned by Anthony Delluniversita and his son, Paul Delluniversita. Each coin PCA sold Pereida came with an invoice that showed the grade as determined by independent third party grader PCI Coin Grading, Inc. However, Anthony owned, operated, and was the sole coin grader for PCI. Anthony had no formal training in numismatics. Pereida passed away and Albert Malvino became the executor of her estate. Malvino had the coin collection appraised by Heritage Auction Appraisal Services. Heritage determined that the fair market value of the PCA coins was only 26.2% of the amount Pereida paid.

Malvino filed suit against Anthony, Paul, PCA, and PCI, asserting a substantive civil RICO violations and various state common law claims. The district court entered judgment for Malvino against Anthony and PCA ("Defendants") for the RICO claims. Defendants appealed.

HOLDING: Reversed and Remanded.

REASONING: Defendants first argued that a RICO claim does not survive the victim's death. The court characterized survivability as an issue of statutory standing. Specifically, the general rule for survivability of federal statutes articulated by the court was that penal statutes do not survive, whereas remedial statutes do.

Whether a statute was penal or remedial turned on whether the wrong sought to be redressed was a wrong to the public, or a wrong the individual. Factors considered included: (1) whether the purpose of the statute was to redress individual wrongs or more general wrongs to the public; (2) whether recovery under the statute runs to the harmed individual or to the public; and (3) whether the recovery authorized by the statute is wholly disproportionate to the harm suffered.

Focusing on the last inquiry, Defendants argued that the availability of treble damages under RICO demonstrates the statute is punitive. However, the court presented a number of statutes that provided remedies beyond actual damages, which survived as remedial. Further, the court clarified that availability of treble damages under RICO does not prevent it from being classified as a remedial statute. The court concluded RICO's remedial purpose predominates and held that a claim under the statute survives the victim's death.