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2nd Circ. To Weigh FLSA Class Waivers In Citigroup Case

By **Scott Flaherty**

Law360, New York (March 18, 2013, 7:58 PM ET) -- The Second Circuit is set to hear arguments Wednesday in Citigroup Inc.'s appeal of a ruling that blocked the company from enforcing an arbitration agreement that required employees to waive their collective action rights — a case experts say could help clarify whether employers can force wage disputes into individual arbitration.

At oral arguments Wednesday in Raniere et al. v. Citigroup Inc. et al., the financial services company is expected to challenge a ruling that it can't compel arbitration of claims that it misclassified home lending specialists as exempt from overtime under the Fair Labor Standards Act.

"The whole issue in this is, 'Can an employment arbitration agreement preclude an FLSA class action?'" said Brandon McKelvey, a partner in Seyfarth Shaw LLP's labor and employment practice.

Although several federal appeals courts have found in favor of employers looking to enforce class waivers in arbitration pacts, the issue has seen "mixed results" in federal district courts. The question now is whether the Second Circuit will align itself with the others, according to McKelvey.

"I think what this [case] does is it adds another piece to the arbitration-collective action puzzle," he said. "This is just one step along the way of figuring out this issue."

The Citigroup appeal comes after the U.S. Supreme Court's 2011 decision in AT&T Mobility LLC v. Concepcion, in which the high court upheld class arbitration waivers in a dispute between the company and consumers. With the Citigroup case, the Second Circuit is poised to address whether similar waivers are valid in the realm of employment disputes, particularly those involving FLSA claims.

Citigroup has maintained that an arbitration pact it reached with two of the named plaintiff employees — an agreement that incorporated a collective action waiver — is enforceable.

The home lending employees, on the other hand, are expected to argue that a collective action waiver runs counter to the FLSA's intent, and that the New York federal court was right when it denied Citigroup's bid to arbitrate.

For employers, arbitrating disputes with employees on an individual basis is a way to minimize the risks posed by class or collective actions, according to Ellen Kearns, a partner with employment firm Constangy Brooks & Smith LLP. Those risks have only increased in the past decade, which has seen an "explosion of FLSA litigation," she said.

"Because of the risk," Kearns said. "That's the primary reason that an employer attempts to get out from any class process."

But employees who are forced into individual arbitration may have trouble finding attorneys willing to work on their behalf, according to Trey Branham of Branham Law LLP, who has

experience representing workers in wage-and-hour actions. The possible recovery from an individual wage dispute is often less than the costs of pursuing those claims, he said.

"The danger here for the employee is that you really begin to lose the ability to get lawyers to take the case," said Branham.

The dispute underlying the Citigroup appeal dates to April 2011, when the home lending specialists sued the company, as well as its Citibank NA and CitiMortgage Inc. units, claiming they had been misclassified as overtime-exempt.

In May 2011, Citigroup asked the district court to compel arbitration of claims brought by two of the named plaintiffs, Tara Raniere and Nichol Bodden, who had signed pacts promising to arbitrate FLSA disputes on an individual basis, according to court filings.

U.S. District Judge Robert Sweet denied the motion, ruling in November 2011 that FLSA collective action rights could not be waived through an arbitration agreement. Although the Second Circuit hadn't yet ruled on the issue, the judge concluded that there was a strong case that FLSA collective action waivers are "per se" unenforceable.

On appeal at the Second Circuit, Citigroup said the lower court had created "unprecedented" rules that were out of step with both the FLSA and the Federal Arbitration Act.

"It is difficult to overstate the implications of the district court's ruling," Citigroup said in a brief filed in February 2012.

In response, the employees argued that the general FAA policy favoring arbitration could not be used to wipe out rights under the FLSA.

"The legislative history and congressional record leading to the enactment of the FLSA, Supreme Court precedent, and the analogous statutes addressing employees' rights unquestionably establish the primacy of collective action rights to the overall statutory scheme of the FLSA," the employees said in an April brief.

The outcome of the case could impact the way wage disputes are resolved, as well as employers' policies, experts said.

If the employees prevail, it could "strengthen the concept and use of a class action in certain kinds of employment cases," said David Lewin, professor of management at the University of California, Los Angeles.

Lewin, who has served as an expert witness in wage-and-hour cases, added that a victory for the employees might "cause companies to reexamine their employment policies, and especially their internal dispute policies."

On the other hand, if Citigroup prevails, employers may be more likely to use arbitration agreements that incorporate class waivers.

"Employers who have been sitting on the fence regarding whether to adopt an arbitration program for its employees will now give such a program serious consideration if they can avoid class arbitrations with a class action waiver," said Kearns, the Constangy Brooks attorney.

An attorney for the employees, Douglas H. Wigdor of Thompson Wigdor LLP, said he was looking forward to arguing in front of the Second Circuit on Wednesday, "and answering any questions from the panel as to why Judge Sweet’s thoughtful decision denying CitiMortgage's motion to compel arbitration should be affirmed."

An attorney for Citi did not immediately respond to a request for comment.

The employees are represented by Douglas H. Wigdor of Thompson Wigdor LLP.

Citigroup is represented by Samuel S. Shaulson and William S.W. Chang of Morgan Lewis & Bockius LLP.

The case is Raniere et al. v. Citigroup Inc. et al., case number 11-5213, in the U.S. Court of Appeals for the Second Circuit.

--Additional reporting by Melissa Lipman and Ben James. Editing by Kat Laskowski and Katherine Rautenberg.