was granted. And that particular phase of the case is currently on appeal to the Eastern District of Sacramento.

Walker: In that case, the city ordinance under which the arbitration was proceeding is on the ballot and will be voted on shortly, presenting some additional complexities.

Simon: Their next step will be to hold a Swiss Town Hall meeting to determine the terms and conditions of employment.

Harris: That's right. The IBEW represents every employee who is a bargaining unit member, except police officers and firefighters. The police and the firefighters have already made a deal. There may be some law on the rejected IBEW contract shortly; we're plowing new ground.

II. The Implications of *14 Penn Plaza v. Pyett*

Moderator: Ira Jaffe
Panelists: Thomas J. Bender, Stuart Davidson, Bruce H. Simon, John A. DiNome, Regina A. Hertzig, and Nancy Walker

Jaffe: We are now going shift from one hot button topic—bankruptcy—to another: the impact of the *Pyett* case[1] on bargaining positions and, for any advocates whose clients have agreed to the arbitration of external law disputes, the impact of *Pyett* on the application of their agreements.

Bender: *Pyett* was a case decided by the Supreme Court in April 2009. The Court held, in essence, that if your CBA requires employees to use the grievance–arbitration procedure to resolve disputes arising under external law—for example, Title 7, the Age Discrimination in Employment Act, and state statutes—that requirement is enforceable.

Our firm has about 760 lawyers, and all we do is management-side labor and employment advocacy. A survey of my firm disclosed that no attorney had yet had a "full–*Pyett*" case. What we are starting to see is what I would call mini–*Pyett* cases that deal with certain wage-hour issues, and particularly meal and rest breaks, driven by an epidemic of collective actions filed by the plaintiffs' bar. Plaintiff law firms are sending e-mails, particularly in the

[1] 14 Penn Plaza v. Pyett, 129 S. Ct. 1456 (2009).

health care industry and the hospitals, and making their websites available for complainants to sign up.

Many of the meal and rest break actions are being engendered by employers' adoption of the Kronos timekeeping system under which, if you've got a 30-minute unpaid lunch, you get an auto-deduct. And there is one attorney who does these nationwide. The reason he gives for pursuing collective actions in the wage hour area is the following (his words): "If I have a sex or an age or a race class action, I've got a lot of subjectivity in there. It's a harder case to prove. Wage hour, all I need is the employer's record and a calculator."

In response, employers are adopting CBA language that provides for a 30-minute unpaid lunch break and two 15-minute paid breaks, and, if you work through that lunch break, you must first get supervisory approval. This makes it a little harder to file such collective actions against the employer. And if you have a grievance over an unpaid lunch break that you had to work through, you've got to go through the grievance and arbitration process; it's your exclusive means of remedy, to the exclusion of federal or, in some cases, state court.

What the employer doesn't want, aside from going into federal court with these issues, is the financial impact of class action or a collective action. When you do the math, you can see that when two hours a week is multiplied by 2,000 employees, it soon can become a large potential liability.

Jaffe: Are the unions obtaining meaningful reciprocation for granting those kinds of concessions?

Bender: Explicit class-action enablement has been held to be a prerequisite in the context of commercial arbitration under the FAA.[2] But we are careful to clarify, in the labor agreement context, that employees do not have class-action arbitration rights and

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[2]Attorney Bender cited the 2010 Supreme Court decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* In that case, the Supreme Court held that, in commercial disputes, the imposition of class arbitration on parties who have not explicitly agreed to it is inconsistent with the Federal Arbitration Act (FAA).

In *Stolt-Nielsen*, the petitioners were shipping companies that chartered vessels to customers, including AnimalFeeds, under a standard contract known, in the maritime trade, as a "charter party." The charter party at issue contained an arbitration clause that was silent on the subject of class actions. AnimalFeeds brought a class-action antitrust suit against Stolt-Nielsen. Ultimately, the parties referred the issue of arbitrability to a panel of arbitrators. The panel determined that the arbitration clause's silence on class actions allowed such actions. The Supreme Court ruled that the FAA imposed on the charter party "the basic precept that arbitration 'is a matter of consent, not coercion'" and that "…the FAA's central purpose is to ensure that 'private agreements to arbitrate are enforced according to their terms.'"

that any action brought by the union on behalf of its members requires that employees opt-in rather than opt-out. If you have an opt-in class, you normally get only 15 to 30 percent of the employees opting in.

Jaffe: But in the collective context, the union represents the entire bargaining unit. Can't they effectively, legally, opt in for everyone?

Bender: That's why you don't allow them to have that as a class grievance.

Unidentified Speaker: Under Section 7, in both the union and in nonunion contexts, there is a substantial body of law saying that you can bring class-action complaints, and suggesting that a waiver of the right to bring a class action would be an invalid encroachment upon Section 7 rights. So, the anomaly might be that, over time, there may be class-action waivers upheld under *Stolt-Neilson*, but also waivers that are found to run afoul of the NLRA.

Bender: Currently, in California, an individual's agreement to arbitrate a consumer dispute is unenforceable. Any relevance of that law to the employment context is unclear. And the Supreme Court, on Monday of this week, granted certiorari for a case in which the issue is whether the California statute is enforceable.

Sands: In dicta, Justice Thomas said that the kind of clause in *Pyett* was a mandatory subject of bargaining. My question is whether, from management's side, there is any interest in getting these things in collective bargaining agreements or holding out to impasse to get them.

Bender: Be careful that you don't get what you wish for—that's my personal view on inclusion of a "full *Pyett*" provision; i.e., an arbitration provision that has Title 7 and everything else thrown in. I don't think that the unions want to take on the burden of fair representation of rights that are so broad. And as a practical matter, you're not going to get a negotiated agreement to that effect.

Hertzig: I offer this *Pyett* nightmare scenario:

It follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. Here, the arbitration panel imposed class arbitration despite the parties' stipulation that they had reached "no agreement" on that issue. The panel's conclusion is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent. It may be appropriate to presume that parties to an arbitration agreement implicitly authorize the arbitrator to adopt those procedures necessary to give effect to the parties' agreement. . . . But an implicit agreement to authorize class-action arbitration is not a term that the arbitrator may infer solely from the fact of an agreement to arbitrate. The differences between simple bilateral and complex class action arbitration are too great for such a presumption."

A foreign employer has operated in a tax-free enterprise zone in New Jersey for 15 years, until that enterprise zone expired. They're now going to have to pay taxes on the imported products that they are selling in the United States. They move to Pennsylvania, so they could get a tax-free enterprise zone and also public money to build their new, fancy warehouse. The employer offers its long-term employees an opportunity to either move or commute two hours each way to work. Most of them agree to one or the other, in order to have a job in this economy. The employer offers a collective bargaining agreement that provides for the arbitration of all of the discrimination statutes, both state and federal, and then states the following:

> The union agrees, on behalf of itself and all employees covered by this agreement and this article, that the sole and exclusive forum for the adjudication of all such claims, statutory and contractual under this article, and the sole and exclusive remedy for violations of the rights, statutory and contractual, set forth in this article, to the preclusion of all other remedies and forums, judicial, administrative and otherwise, shall be the grievance and arbitration procedures of this agreement. Notwithstanding any other provisions of this agreement or the laws governing this agreement, the union shall be required to pursue any grievance filed by an employee under this article through the grievance and arbitration provisions of this agreement and may not compromise any such grievance without the agreement of the aggrieved employee.
>
> Notwithstanding any provision of this agreement, the arbitrator selected to hear and decide grievances alleging unlawful discrimination or retaliation shall be required to consider and apply all the appropriate statutes to the claims of discrimination or retaliation and determine if such statutes have been violated. Notwithstanding any other provisions of this agreement, the decision, determination and award of the arbitrator shall be the sole and exclusive remedy for the statutory and contractual claims, which were or could have been raised, and shall be final and binding upon the employer or the union and the employees determined to be aggrieved. And shall preclude the union and said employees from seeking and/or obtaining any other remedy whether statutory or contractual.

Davidson: You know, these clauses are the new zipper clauses. No union lawyer would agree to those terms, but they will find their way into collective bargaining agreements because of the overwhelming power that management has when its lawyers are at the bargaining table with union business agents. And especially now, in a difficult economy, when people are trying to stay afloat and to protect health care benefits, you can hear the management lawyer saying, "Look, all we're doing is saying that we're all going

to accept the laws. You want to live by the law, don't you? These are laws that protect you. And the union is the champion of the worker. And so all we're doing is putting in a benefit."

This is a prescription for the bankrupting of unions. I hope the Labor Board will take a different stance.

Hertzig: My scenario gets worse. There's a loser-pays-all provision in this agreement.

Davidson: Which may be trumped by law.

Bender: Under *Pyett*, in order to have a valid arbitration agreement, you have to afford the same remedy that you would get under the statute.

Walker: If small local unions actually had to try these cases, they'd be bankrupted. But under *Pyett*, unions can't agree to the waiver of individual employees' statutory rights. So if, because of cost constraints or expertise issues, a union decides not to proceed with a statutory claim, that individual is then permitted to go forward with the claim in any tribunal they think appropriate.

Pyett has created these real-world questions: Where does the union stand with respect to duty of fair representation claim? What are the union's obligations? Must unions bring in lawyers? Must they do discovery; if so, how? Regarding discovery, do the labor arbitration rules apply or must separate, employment arbitration rules be negotiated?

A lot of our contracts prohibit the kinds of conduct proscribed by statute, but don't say that statutory claims have to be heard in exclusively the arbitration forum. There have been only five district court cases dealing with the *Pyett* language since the Supreme Court issued its decision, and they have been all over the place with respect to the rationale. But in one of the cases looking at *Pyett*, the Court determined that, because the parties had referenced discrimination claims and had a grievance process with final and binding arbitration, arbitrators had the authority to apply the law. The Court strayed from the stricture of a knowing voluntary waiver, and compelled arbitration. This raises the question of what constitutes a knowing and voluntary waiver.

We have grievants who are raising discrimination claims, and unions are processing those claims through the grievance process, but not to the exclusion of a separate EEOC action. And I have had arbitrators look to Title 7 for guidance in matters such as burden shifting. Timely discovery is often not possible under labor arbitration rules, and this raises questions about the practical

limits of the union's capacity to fairly represent an employee making a statutory claim.

Jaffe: Waiver issues are different from process issues. When you deal with discovery, with issues of timeliness and the manner in which one perfects a claim, do you need to file with the EEOC in order to pursue a Title 7 claim even under the collective bargaining process? Or are any of those requirements waived? If the grievant comes in with private counsel, should the union counsel step aside? Should there be multiple counsels, with the private counsel dealing with the personal statutory claim and the union counsel taking on the institutional and contractual assertions associated with the collective bargaining agreement?

Walker: And if the union lets private counsel walk into a discrimination claim because of the unique nature of the claim, where do you then draw the line with respect to the "unique" nature of other kinds of contract claims? To what degree, if any, should unions consider relinquishing control of employee advocacy?

Bender: In my experience, when you have a situation that's covered by a collective bargaining agreement, people tend to look at that collective bargaining agreement for their remedy. They don't look elsewhere. If, for example, an employee is not receiving shift differentials, they don't file a wage hour claim. They use the grievance process.

On the other hand, I can think of only two or three situations where employees organized and filed a Title 7 claim. It hasn't been an individual Title 7 claim, it's been a group, filing claims against both the employer and the union for discrimination.