Class Action Alert
Recent developments in class action law

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U.S. Supreme Court will hear landmark class action waiver case: *American Express Co. v. Italian Colors Restaurant*

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This past week, the United States Supreme Court granted a writ of certiorari to review the most recent decision of the United States Court of Appeals for the Second Circuit in *American Express Travel Related Services Co. v. Italian Colors Restaurant ("In re Amex Merchants' Litigation")*. *See* No. 12-133, 2012 US LEXIS 8697(Nov. 9, 2012). The Second Circuit has addressed the arbitration clause and class action waiver in this case three times since 2009, and it has been to the Supreme Court once before already. It is back at the Supreme Court because, following remand to the Second Circuit in 2010, the Court of Appeals—as it had done twice before—reversed the trial court's decision in favor of individual arbitration, once again determining that the relevant arbitration and class action waiver clauses at issue were unenforceable.

The Supreme Court has not yet squarely addressed the question of whether or under what conditions a class action waiver might not comport with the Federal Arbitration Act (the "FAA," 9 U.S.C. §§ 1-16). The Supreme Court's upcoming decision could determine whether plaintiffs can relatively easily avoid such clauses in the future.

Background

The enforcement of contractual arbitration and class action waiver clauses has been the subject of significant litigation in the past few years. (See, for example, our prior alert here.) The Supreme Court has been strongly supportive of arbitration, and has indicated some support for class action waivers. Not all lower courts have demonstrated the same deference, however.

Plaintiffs in the *In re Amex Merchants' Litigation* case are merchants (not consumers) who accept Amex cards for customer purchases. Amex and its chief competitors, Visa and Mastercard, earn revenue by withholding a "merchant discount fee" from each charged transaction. Plaintiffs allege that Amex charges a supra-competitive fee that exceeds the fee charged by Visa and Mastercard under circumstances that constitute a violation of federal antitrust law.

The contract that permits the American Express Company ("Amex") to charge a fee is its Card Acceptance Agreement (the "Agreement") with merchants. The Agreement is a form contract. Merchants do not negotiate its terms with Amex. It contains an "Honor All Cards" provision, which

requires that merchants accept both Amex's charge cards (where the customer pays in full at the end of the month) and Amex's credit cards (where the customer can pay over time, like a typical credit card). According to the plaintiffs, legitimate reasons permit Amex to charge a higher fee with respect to its charge cards. But when Amex charges a higher fee for its credit card, plaintiffs allege that it does so by improperly using the "Honor All Cards" provision of the Agreement to create an illegal "tying arrangement" between the two different card products all in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1; *see e.g.*, *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5-6 (1958) (defining a tying arrangement as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product . . . .").

In addition to its "Honor All Cards" provisions, the Amex Agreement contains a mandatory arbitration clause and class action waiver clause. These clauses preclude merchants from suing in court or commencing any arbitration other than on an individual (non-class) basis. Plaintiffs challenged this clause by filing suit in the United States District Court for the Southern District of New York rather than commencing an arbitration.

Amex I

On March 16, 2006, the District Court determined that the enforceability of the class action (or class arbitration) waiver was a matter to be decided by arbitrators and granted Amex's motion to compel arbitration under the FAA. *In re Amex Merchants' Litig.*, No. 06-1871, 2006 U.S. Dist. LEXIS 11742 (S.D.N.Y. March 16, 2006). The plaintiffs promptly appealed. In a January 30, 2009, opinion the Second Circuit reversed, concluding that the plaintiffs had properly raised a question of the enforceability of the class waiver provision, and, by extension, the arbitrability of the dispute, and that the issues were therefore for decision by a court, not an arbitrator. It further determined that the class waiver provision was unenforceable under the FAA because its enforcement would effectively preclude any action by plaintiffs. *See In re Amex Merchants' Litig.*, 554 F.3d 300 (2d Cir. 2009) ("*Amex I*").

In reaching these conclusions, the Second Circuit noted both the strong federal policy in favor of arbitration and recent debates surrounding class waivers in mandatory arbitration clauses. *Id.* at 302-03. But it also cited the Supreme Court's decision in *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 82 (2000), for the proposition that a party may seek to invalidate an arbitration agreement on the grounds that arbitration would be prohibitively expensive if the plaintiff can show the likelihood of incurring such costs. *Amex I,* 554 F.3d at 315 (also citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)).

Although the Second Circuit recognized that, in the Supreme Court decisions it cited, the Supreme Court had enforced the underlying arbitration clauses, the Second Circuit claimed that a collective remedy was available in those cases, unlike in *Amex I*. It then concluded that the plaintiffs' evidence showed that they could not pursue their claims as individual arbitrations. The plaintiffs' expert had, for example, opined that an average single merchant might need to spend hundreds of thousands of dollars in order to claim only several thousand dollars in damages. The Second Circuit rejected the analysis (offered both by Amex and the District Court) that trebling of damages under the Clayton Act and the availability of attorneys' fees for a prevailing party would make an individual claim economically feasible. Instead, the Second Circuit held that to enforce the Agreement would "grant Amex *de facto* immunity from antitrust liability by removing the plaintiffs' only reasonably feasible

means of recovery." *Id.* at 320. Amex responded with a petition for a writ of certiorari. *See American Express Co. v. Italian Colors Restaurant*, 130 S. Ct. 4201 (2010).

Amex II

The Supreme Court granted Amex's petition for certiorari and remanded the case for further consideration following its decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010). In that case, the Supreme Court held that a party cannot be forced to submit to class arbitration without evidence that it had agreed to such a collective procedure (and that silence is not sufficient evidence of such consent). (See our prior alert here).

On remand, however, the Second Circuit determined that *Stolt-Nielsen* had no real effect on the issues before it. It concluded that *Stolt-Nielsen* stands for the proposition that one party cannot initiate class arbitration against another party absent a contractual agreement to do so, but that *Stolt-Nielsen* did not mean that a contractual clause barring class arbitration is per se enforceable. *In re Am. Express Merchants' Litig.*, 634 F.3d 187, 193 (2d Cir. 2011) (*Amex II*).

In reaching this conclusion in *Amex II,* the Second Circuit once again found that plaintiffs had demonstrated that the class waiver in the arbitration clause at issue would preclude plaintiffs from bringing Sherman Act claims against Amex. *Id.* at 196. This time, the Second Circuit panel also seemed especially convinced that, as a matter of public policy, plaintiffs must never be deprived (even indirectly) of the protections of the federal antitrust laws. *See id.* at 197-98. It flatly rejected Amex's argument that *Stolt-Nielsen* disallowed the use of public policy as a basis to void contractual language. Instead, the panel held that *Stolt-Nielsen* only forbids using public policy to interpret the parties' intent in a contract to find that they had agreed to a class arbitration procedure. *Id.* at 199-200.

Amex III

On April 11, 2011, the Second Circuit placed a hold on its mandate in *Amex II* to allow Amex to file another petition for a writ of certiorari. While the mandate was on hold, the Supreme Court decided *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). The parties then submitted supplemental briefing to the Second Circuit on the potential impact of *Concepcion.*

The Second Circuit held, however, that *Concepcion* did not alter its prior analysis. *See In re Am. Express Merchants' Litig.*, 667 F.3d 204 (2d Cir. Feb. 1, 2012) (*Amex III*). In its view, the decision in *Concepcion*, like the decision in *Stolt-Nielsen*, did not render class waivers per se enforceable. Instead, the Second Circuit held that both cases are simply applications of the principle that parties cannot be forced into a class wide arbitration unless they have agreed to that procedure. *Id.* at 213. The panel therefore described the Supreme Court's decision in *Concepcion* as offering "a path for analyzing whether a state contract law is preempted by the FAA," *id.*, not whether a class waiver is necessarily enforceable if plaintiffs demonstrate that enforcement would preclude their ability to vindicate federal statutory rights, *id.* at 214.

The Second Circuit denied rehearing *en banc* on May 29, 2012. In the concurring opinion to the order denying rehearing, Justice Pooler reiterated that the holding in Amex III "rests squarely on the vindication of statutory rights analysis—an issue untouched in *Concepcion*." *In re Am. Express Merchants' Litig.*, 681 F.3d 139 (2d Cir. 2012).

Looking Ahead

Having granted certiorari, the Supreme Court is expected to hear oral argument on *Amex III* early next year. The question on which it granted review is "[w]hether the Federal Arbitration Act permits courts, invoking the 'federal substantive law of arbitrability,' to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim." *See* Question Presented and Grant of Cert., *American Express Co. v. Italian Colors Restaurant*, No. 12-133, *available at* http://www.supremecourt.gov/qp/12-00133qp.pdf (last visited Nov. 14, 2012). A decision would most likely be announced in June 2013 and could be meaningful not only in the commercial context, but perhaps in shedding light on how the Supreme Court might address issues such as the National Labor Relations Board's recent decision in *D.R. Horton Inc.,* 357 NLRB No. 184 (2012) (deeming the "right" to file a class action or class arbitration a concerted protected activity and on that basis invalidating an arbitration agreement that allegedly violated federal labor law by requiring individual arbitration).

The dissent to the order denying rehearing *en banc* in the Second Circuit argued that *Concepcion* "teaches that the FAA does not allow courts to invalidate class-action waivers even if 'class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system.'" 681 F.3d at 143, quoting *Concepcion*, 131 S. Ct. at 1753. This argument will likely carry weight with the majority of the Supreme Court that has in the past strictly upheld party choice in arbitration clauses. Whether it will be powerful enough for a reversal is yet unknown, but there is one other factor favoring Amex: Justice Sotomayor, who originally sat on the Second Circuit panel in *Amex I*, is recused from the case. She was in the minority in *Concepcion* and thus might have been a voice against reversal in *Amex III*.

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