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In re American Express Merchants' Litigation - Plaintiffs Survive Three Rounds In The Second Circuit, But Can They Survive The Supreme Court?

February 7, 2012 by David Garcia and Leo Caseria

On February 1, 2012, the Second Circuit Court of Appeals decided *In re American Express Merchants' Litigation*, No. 06-1871-cv, (2d Cir. Feb. 1, 2012) ("AMEX III"), holding, for the third time, that a class action waiver in an arbitration agreement between American Express and plaintiff merchants was unenforceable because it would effectively preclude plaintiffs from vindicating their federal statutory rights under the Sherman and Clayton Acts. The Second Circuit's decision likely sets the stage for Supreme Court review, and a final decision on whether and under what circumstances class action waivers are enforceable in at least federal antitrust cases, and perhaps other types of federal statutory claims as well.

Plaintiffs are merchants alleging that American Express unlawfully forced merchants to accept American Express credit cards and debit cards as a condition of accepting American Express charge cards, at the same high rates associated with charge cards. American Express moved to compel arbitration based on arbitration agreements with the merchants. Those arbitration agreements included class action waivers. In 2006, the Southern District of New York granted American Express's motion to compel arbitration. Plaintiffs appealed.

In 2009, the Second Circuit reversed, holding that the class action waiver was unenforceable. *In re American Express Merchants Litigation*, 554 F.3d 300 (2d Cir. 2009) ("AMEX I"). Its decision was guided by *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), which held that a party seeking to "invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive . . . bears the burden of showing the likelihood of incurring such costs." *Id*. at 92. The Second Circuit in AMEX I held that plaintiffs satisfied this burden through expert economic opinion indicating that plaintiffs could not reasonably pursue individual antitrust claims against American Express, largely because of the cost of procuring expert economic testimony.

In 2011, after the Supreme Court decided *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), the Second Circuit reaffirmed its decision. *See In re American Express Merchants Litigation*, 634 F.3d 187 (2d Cir. 2011) ("AMEX II"), discussed at *AT&T Mobility LLC v. Concepcion* - What Does It Mean For Class Arbitration And Class Actions In Federal Antitrust Cases?. It held that *Stolt-Nielsen* was inapposite and did not require a different result: "*Stolt-Nielsen* states that parties cannot be forced to engage in a class arbitration absent a contractual agreement to do so. It does not follow, as Amex urges, that a contractual clause barring class arbitration is *per se* unenforceable." 634 F.3d at 193.

On February 1, 2012, the Second Circuit reaffirmed its earlier decisions and again held that the class action waiver in the American Express arbitration clause is unenforceable. The Second Circuit was unphased by two US Supreme Court cases decided since *Stolt-Nielsen* dealing with arbitration agreements. In *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the Supreme Court upheld the enforceability of a class action waiver in an arbitration agreement on the grounds that the Federal Arbitration Act (FAA) preempted California common law. The Second Circuit held that *AT&T Mobility* was inapposite because it did not address whether a class action waiver could be enforced if "the practical effect of the enforcement would be to preclude [plaintiffs'] ability to vindicate their *federal* statutory rights." AMEX III, p. 13 (emphasis added). According to the Second Circuit, *AT&T Mobility*, like *Stolt-Nielsen*, did not "require that all class-action waivers be deemed per se enforceable." *Id*. at p. 15.

In *Compucredit Corp. v. Greenwood*, No. 10-948 (U.S. Jan. 10, 2012), decided only weeks before AMEX III, the Supreme Court held that an arbitration agreement could be enforced in a case involving claims under the federal Credit Repair Organizations Act (CROA), because the CROA is silent on whether arbitration is permissible. Unlike *AT&T Mobility*, which involved a conflict between the FAA and state law, *Compucredit* involved a conflict between the FAA and another federal statute. Nevertheless, the Second Circuit found that *Compucredit*, like *AT&T Mobility* and *Stolt-Nielsen*, was inapposite. According to the Second Circuit, proof of Congressional intent need not be explicit: "Although the Sherman Act does not provide plaintiffs with an express right to bring their claims as a class in court, forcing plaintiffs to bring their claims individually here would make it impossible to enforce their rights under the Sherman Act and thus conflict with congressional purposes manifested in the provision of a private right of action in the statute." AMEX III, p. 15 n.5.

After disposing of the Supreme Court's recent decisions in *Stolt-Nielsen*, *AT&T Mobility* and *Compucredit*, the Second Circuit explained that arbitration clauses preventing litigants from the effective enforcement of federal statutory rights cannot be enforced. It relied, as it had in AMEX I and II, on the Supreme Court's *Green Tree* decision and expert evidence produced by plaintiffs indicating that it would not be economically feasible for plaintiffs to bring individual actions

against American Express. It also relied, as it had in AMEX I and II, on Supreme Court dicta in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614 (1985) (which enforced an arbitration agreement in the context of a federal antitrust claim) indicating that where contract clauses operate "as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." *Id*. at 637 n.19. As the Second Circuit concluded: "Eradicating the private enforcement component from our antitrust law scheme cannot be what Congress intended when it included strong private enforcement mechanisms and incentives in the antitrust statutes." AMEX III, p. 23.

The Second Circuit was careful not make any sweeping pronouncements about class action waivers. Instead, it narrowly limited its holding to the specific class action waiver before it, and held that class action waivers must be considered on a case-by-case basis under the framework of *Green Tree*: "We do not hold today that class action waivers in arbitration agreements are per se unenforceable, or even that they are per se unenforceable in the context of antitrust actions. Rather . . . we hold that each waiver must be considered on its own merits." AMEX III, p. 24.

Thus, the stage is now set for the Supreme Court to decide whether class action waivers can be enforced in federal antitrust cases. Some of the possible outcomes are mentioned in our previous article following AMEX II. *See* *AT&T Mobility LLC v. Concepcion* - What Does It Mean For Class Arbitration And Class Actions In Federal Antitrust Cases?.