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AT&T Mobility LLC v. Concepcion - What Does It Mean For Class Arbitration And Class Actions In Federal Antitrust Cases?

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On Wednesday, April 27, 2011, the United States Supreme Court decided *AT&T Mobility LLC v. Concepcion*, No. 09-893 (U.S. Apr. 27, 2011), holding that the Federal Arbitration Act, 9 U.S.C. sec. 2 ("FAA") preempts the California Supreme Court's "*Discover Bank*" rule, which held that class action waivers in arbitration agreements were unconscionable and unenforceable. The Supreme Court held that California's *Discover Bank* rule directly conflicted with the central purpose of the FAA, which is to ensure that private arbitration agreements are enforced according to their terms.

The *AT&T Mobility* decision rests on preemption grounds and does not necessarily resolve the question of whether class action waivers can be enforced against plaintiffs pursuing federal antitrust claims. However, the Second Circuit addressed that precise issue only weeks earlier in *In re American Express Merchants' Litig.*, 634 F.3d 187 (2d Cir. 2011), in which it held that class action waivers contained in an arbitration agreement were not enforceable against a class of plaintiffs pursuing tying claims against American Express under Section One of the Sherman Act. Thus, the stage may now be set for the Supreme Court to decide this issue. Although the Supreme Court expressed great hostility to class arbitration in *AT&T Mobility*, it is not a foregone conclusion that it will similarly hold class action waivers unenforceable in the context of federal antitrust claims. On the other hand, if it does so hold, the entire landscape of antitrust consumer class actions could drastically change.

1. **The *AT&T Mobility* Decision**

The FAA, 9 U.S.C. sec. 2, provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." In *AT&T Mobility*, the Supreme Court held that under the FAA, states may not condition the enforceability of arbitration agreements on the availability of class procedures.

At the district court level, plaintiffs alleged that defendant AT&T unlawfully charged them sales tax on free cell phones. The agreements between AT&T and its cell phone customers included mandatory arbitration provisions coupled with class action waivers. The district court denied AT&T's motion to compel arbitration, holding that the class action waivers rendered the mandatory arbitration agreements unconscionable and unenforceable under the California Supreme Court's decision in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005). The Ninth Circuit affirmed, holding that the FAA did not preempt California law.

The Supreme Court reversed the Ninth Circuit and held that the FAA preempted California's "*Discover Bank*" rule. As the Court explained: "Although sec. 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." (Slip Op. at 9). The principal purpose of the FAA is to enforce arbitration agreements according to their terms. (*Id*.). Thus, states may not apply generally applicable contract defenses in a way that "disfavors arbitration." (Slip Op. at 7). The Court found that the California Supreme Court's use of the generally applicable unconscionability doctrine to render arbitration agreements with class action waivers unenforceable "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." (Slip Op. at 9). The Court noted that, otherwise, states could rely on the doctrine of unconscionability or other general contract principles to strike down arbitration agreements based on other fundamental differences

between arbitration and litigation: "The same argument might apply to a rule classifying as unconscionable arbitration agreements that fail to abide by the Federal Rules of Evidence, or that disallow an ultimate disposition by a jury." (Slip Op. at 8).

The Supreme Court went on to express strong views against class arbitration, holding: "Arbitration is poorly suited to the higher stakes of class litigation." (Slip Op. at 16). The decision discusses numerous problems with class arbitration, including: (1) lack of incentives for lawyers to arbitrate individual claims; (2) lack of incentives for companies to resolve individual claims; (3) arbitrators' general lack of experience with class issues; (4) added difficulties with respect to confidentiality; (5) increased delay and procedural complexity; (6) required use of formal procedures sufficient to bind absent class members; (7) increased risk that errors will go uncorrected due to difficulty in obtaining review from arbitration decisions; and (8) increased settlement pressure on defendants. (Slip Op. at 13-17).

2. **The Second Circuit's decision in *In re American Express Merchants' Litig.***

Only weeks before the Supreme Court decided *AT&T Mobility*, the Second Circuit held in *In re American Express Merchants' Litig.*, 634 F.3d 187 (2d Cir. 2011) that a mandatory arbitration agreement containing a class action waiver was unenforceable in a case involving federal antitrust claims brought by merchants against American Express. There, plaintiffs brought a tying claim against American Express under Section One of the Sherman Act, alleging that defendant American Express unlawfully forced them to accept American Express credit cards and debit cards as a condition of accepting American Express charge cards. The contracts between the merchants and American Express included mandatory arbitration clauses that prohibited class actions. In 2006, the district court granted American Express's motion to compel arbitration. In 2009, the Second Circuit reversed, holding that the class action

waivers were unenforceable because they would grant American Express "de facto immunity from antitrust liability by removing the plaintiffs' only reasonably feasible means of recovery." 634 F.3d at 192. The Supreme Court granted American Express's petition for writ of certiorari and remanded in light of its decision in *Stolt-Nielsen S.A. v. Animalfeeds Intr.*, 130 S. Ct. 1758 (2010), which holds that class arbitration may not be imposed on a party that has not agreed to it.

On March 8, 2011, on remand, the Second Circuit reaffirmed its earlier 2009 decision. According to the Second Circuit, *Stolt-Nielsen* was inapposite: "*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* enforceable." 634 F.3d at 193. The Second Circuit repeated much of its earlier 2009 decision and relied heavily on expert testimony explaining that individual arbitration of antitrust claims was cost prohibitive: "We find the record evidence before us establishes, as a matter of law, that the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws." *Id.* at 197-98. According to the Second Circuit, the class action waivers amounted to waivers of plaintiffs' federal antitrust claims, and could not be enforced for public policy reasons based on Supreme Court precedent prohibiting waivers of antitrust liability.

3. **Will the Supreme Court uphold the enforceability of class action waivers in federal antitrust cases?**

The Second Circuit recently stayed the proceedings in *In re American Express*, and it appears that the Second Circuit will likely reconsider its decision in light of *AT&T Mobility*. Once that occurs, the stage may be set for the Supreme Court to review the Second Circuit's decision in *In re American Express* and decide whether agreements that waive plaintiffs' rights to pursue

classwide relief in federal antitrust cases are enforceable. Unlike the *AT&T Mobility* decision, which involved a conflict between the FAA and California state law, this question pits the FAA against the federal antitrust laws. Indeed, the Supreme Court has already indicated its interest in resolving conflicts between the FAA and other federal laws, as just days ago, the Supreme Court granted certiorari in *Compucredit Corp. v. Greenwood*, No. 10-948, (cert. granted May 2, 2011) and will address a similar conflict between the FAA and statutory rights under the federal Credit Repair Organization Act ("CROA") (the Ninth Circuit in *Compucredit* held that an arbitration agreement could not be enforced because plaintiffs' right to sue *in court* cannot be waived under the CROA).

To resolve the conflict between the FAA and federal antitrust laws, the Supreme Court must give consideration "to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions." *Boys Markets v. Clerks Union*, 398 U.S. 235, 250 (1970). On the one hand, the purpose of the FAA is to enforce the terms of arbitration agreements, but on the other hand, federal antitrust laws are designed to promote competition. This battle has several possible outcomes:

- The Court could agree with the Second Circuit and hold that class action waivers are unenforceable in the context of federal antitrust claims because it is cost prohibitive to arbitrate antitrust claims on an individual basis, and, as the Second Circuit observed, it is "a firm principle of antitrust law that an agreement which in practice acts as a waiver of future liability under the federal antitrust statutes is void as a matter of public policy." *In re American Express*, 634 F.3d at 197.
- The Court could disagree with the Second Circuit and and hold that class action waivers are enforceable in the context of federal antitrust claims because it is not cost prohibitive to arbitrate antitrust claims on an individual basis, and, as the Supreme Court has observed, the central

purpose of the FAA is to enforce arbitration agreements according to their terms. *AT&T Mobility*, Slip Op. at 9.

- The Court could agree with the Second Circuit that it is cost prohibitive to arbitrate antitrust claims on an individual basis, but nevertheless hold that class action waivers are enforceable in the context of federal antitrust claims. To do so, the Court would need to find that the policy reasons supporting the FAA and its goal of enforcing arbitration agreements strongly outweigh any antitrust policy concerns. The Court could diminish the purportedly "firm principle of antitrust law" against waivers of future antitrust liability. The Court could also hold that the risk of immunizing federal antitrust violations through class action waivers is low because violators would still be subject to government enforcement and private suits by competitors.
- The Court could disagree with the Second Circuit and hold that it is not cost prohibitive to arbitrate antitrust claims on an individual basis, but nevertheless hold that class action waivers are unenforceable in the context of federal antitrust claims. To do so, the Court would need to find that antitrust policy concerns strongly outweigh any FAA policy concerns. The Court could find that any disincentive to private enforcement of federal antitrust laws gives violators too much protection and is intolerable, noting that it is precisely because antitrust violations are difficult to detect and prove that Congress provides for treble damages in antitrust cases.
- The Court could partially agree with the Second Circuit and hold that while the class action waivers are unenforceable under the specific facts of *In re American Express*, their enforceability must be determined on a case-by-case basis, and might be held enforceable in a case where individual claims are large enough.
- The Court could partially disagree with the Second Circuit and hold that while the class action and class arbitration waivers are enforceable under the specific facts of *In re American Express*, their enforceability must be

determined on a case-by-case basis, and might be held unenforceable if the individual claims are small enough.

- The Court could also disagree with the Second Circuit and hold that its decision is barred by *Stolt-Nielsen*. There, the Supreme Court reversed a Second Circuit decision upholding a class arbitration award, holding that class arbitration procedures were inappropriate because the arbitration agreement was silent with respect to class arbitration. In *In re American Express*, the Second Circuit distinguished *Stolt-Nielsen*, holding: "*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* enforceable." 634 F.3d at 193.

These are just some of the possible outcomes if the Supreme Court decides to review the Second Circuit's *In re American Express* decision and decide the issue. Should the Supreme Court hold that class arbitration waivers coupled with mandatory arbitration provisions are indeed enforceable, this decision has the potential to drastically change the landscape of consumer antitrust class actions in federal court. One would expect sellers to start adding these provisions to every contract, if they have not already done so. If this practice becomes widespread, antitrust class actions brought by direct purchasers should decrease and potentially stop altogether. On the other hand, indirect purchasers would not be subject to the terms of arbitration agreements between direct purchasers and upstream sellers, and could still pursue classwide relief to the extent permitted by state law. With the 2005 enactment of The Class Action Fairness Act, 28 U.S.C. sec. 1332(d) ("CAFA"), defendants now routinely remove indirect purchaser class actions from state to federal court. Thus, a Supreme Court decision enforcing class arbitration waivers coupled with mandatory arbitration provisions may indirectly transform federal courts from venues that previously only entertained antitrust overcharge cases brought by direct purchasers between 1977 and 2005, to venues that decide only antitrust overcharge cases brought by indirect

purchasers. This result surely was not envisioned by the Supreme Court when it decided *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) and held that indirect purchasers lack standing to seek antitrust relief in federal courts specifically because of the difficulties inherent in proving overcharge damages passed on to indirect purchasers.

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