Second Circuit (Again) Rules that Arbitration Clauses that Diminish Vindication of Federal Claims are Not Enforceable

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The ping-pong match between the Second Circuit and the U.S. Supreme Court regarding the enforceability of arbitration provisions continues. The Second Circuit reaffirmed its decision that the class action waiver provision contained in the contracts between American Express and merchants is unenforceable under the Federal Arbitration Act (FAA), because enforcement of the clause would as a practical matter preclude any action seeking to vindicate the statutory rights asserted by the plaintiffs. *In re American Express Merchants' Litigation*, Slip Op. No. 06-1871, — F.3d — (2d Cir. Feb. 1, 2012). This decision creates a potential conflict with the Supreme Court's recent decision in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (U.S. 2011), discussed here.

The Second Circuit has now issued three opinions on this question. The dispute is rooted in an arbitration agreement between AmEx and merchants who accept AmEx charge cards. In *Amex I*, 554 F.3d 300 (2d Cir. 2009), the court determined that the enforcement of a mandatory arbitration clause in a commercial contract that also contained a class action waiver was unenforceable. The Supreme Court granted Amex's petition for certiorari and vacated and remanded in light of its decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp*., 130 S. Ct. 1758 (2010), which held that parties could not be compelled to submit to class arbitration unless they agreed to it. In *Amex II*, the Second Circuit found that *Stolt-Nielsen* did not affect its original analysis because the court was not ordering the parties to participate in class arbitration. After *Amex II*, the court placed a hold on its mandate to allow Amex to file a petition for certiorari. While the mandate was on hold, the Supreme Court issued *Concepcion*, which upheld AT&T's right to compel consumers to submit to arbitration even though, under California common law, consumer class-action waivers were considered unconscionable. The ruling was widely viewed as an endorsement of mandatory arbitration clauses

In *Amex III*, a two-judge panel of the Second Circuit ruled that neither *Concepcion* nor *Stolt-Nielsen* broadly stand for the proposition that class arbitrations may always be waived. Instead, the court looked to other Supreme Court decisions, such as *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U. S. 614 (1985) and *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), which acknowledged the importance of class actions and arbitrations in vindicating statutory rights. In particular,

in *Green Tree* the Court conceded that the cost of an individual proceeding could stand in the way of a litigant exercising federal statutory rights through arbitration.

Because neither *Stolt-Nielsen* nor *Concepcion* overrules *Mitsubishi* and neither case mentions *Green Tree*, the Second Circuit reaffirmed its earlier analysis in *Amex II*. The court made clear that each class-action waiver must be considered on its own merits, based on its own record and "governed with a healthy regard for the fact that the FAA 'is a congressional declaration of a liberal federal policy favoring arbitration agreements ….'"

To be sure, the Second Circuit panel said that its ruling doesn't mean "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." Moreover, it is important to note that *Amex III* does not impact the enforceability of arbitration clauses with respect to state statutory and common law claims, which were at issue in *Concepcion*. However, the opinion's conclusion that "each class action waiver must be considered on its merits" is powerful ammunition for class action lawyers seeking to avoid arbitration. And although framed as a narrow ruling based on "uncontested" evidence regarding the cost of individual arbitrations, the Second Circuit opinion ostensibly is at odds with the recent pro-arbitration decisions in *Stolt-Nielsen*, *Concepcion*, and *Compucredit Corp. et al. v. Greenwood et al*. (discussed here), all of which were compelled in large part by the expediency of arbitration for the resolution of claims.

In light of this tension and the fact that the Supreme Court already granted *certiorari* once in the *Amex I* litigation, it appears likely that the latest chapter in this case may be the subject of Supreme Court review. Notably, Justice Sonia Sotomayer, a member of the original Second Circuit panel that decided *Amex I* and a dissenter in *Concepcion*, may be recused from ruling in this matter, which may favor reversal in the Supreme Court.

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