SUTHERLAND

LEGAL ALERT

February 3, 2012

Second Circuit Holds Class Action Waiver Unenforceable Where Individual Arbitration Would be Prohibitively Expensive

"[A]s the class action waiver in this case precludes plaintiffs from enforcing their statutory rights, we find the arbitration provision unenforceable."
– U.S. Court of Appeals for the Second Circuit

In a shot across the bow of recent Supreme Court precedent in favor of arbitration, the Second Circuit has held that a mandatory class action waiver in an arbitration provision is unenforceable where the plaintiffs established that the practical effect of enforcement of the waiver would be to preclude claims under federal antitrust statutes. *In re American Express Litigation*, Slip Op. 06-1871-cv (February 1, 2012) (For a copy of the Second Circuit's opinion, click here). This ruling sets up a potential conflict with the Supreme Court's recent decision in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (U.S. 2011), a decision strongly in favor of the enforceability of class action waivers within arbitration provisions.

This is the third time the Second Circuit has decided this issue in the *American Express* antitrust litigation, each time holding that the class action waiver is unenforceable. In each decision, the court has rested its holding on "a vindication of statutory rights" analysis, and defined the issue as "whether a mandatory class action waiver clause is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to bring federal antitrust claims." Slip Op. at 14-15. In this recent decision, the Second Circuit considered the Supreme Court's *Concepcion* decision, but opined that "what *Concepcion* [does] not do is require that all class-action waivers be deemed per se enforceable." *Id.*

Distinguishing *Concepcion*, the Second Circuit relied instead on *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000) for the proposition that where "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." Slip Op. at 20. The court found that "[t]he evidence presented by plaintiffs here 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." Slip Op. 21-22. Accordingly, the Second Circuit found the agreement unenforceable, because otherwise "[t]he defendant will thus have immunized itself against all such antitrust liability by the expedient of including in its contracts of adhesion an arbitration clause that does not permit class arbitration."

The *American Express* antitrust litigation has been bouncing back and forth between the Second Circuit and the Supreme Court for more than two years on the arbitration issue, and the case will once again be a candidate for Supreme Court review. The litigation began as a consolidated class action brought by merchants who contracted with Amex to accept its corporate, charge and credit cards. *See In re American Express Merchants' Litigation*, No. 03-CV-9592, 2006 WL 662341 (S.D.N.Y. March 16, 2006). Plaintiffs alleged that the merchant contract violated the Sherman Act. The merchant contract contained an arbitration provision that required all claims "arising from or relating to [the] Agreement" to be resolved by arbitration. The contract also contained a class action waiver that purported to preclude merchants from bringing or participating in class actions regarding issues subject to arbitration. Based on the

© 2012 Sutherland Asbill & Brennan LLP. All Rights Reserved.
This communication is for general informational purposes only and is not intended to constitute legal advice or a recommended course of action in any given situation. This communication is not intended to be, and should not be, relied upon by the recipient in making decisions of a legal nature with respect to the issues discussed herein. The recipient is encouraged to consult independent counsel before making any decisions or taking any action concerning the matters in this communication. This communication does not create an attorney-client relationship between Sutherland and the recipient.

arbitration provision, the U.S. District Court for the Southern District of New York granted Amex's motion to compel arbitration. *Id.* The district court did not resolve the issue of the enforceability of the class action waiver, holding that the issue was for the arbitrator to decide. On appeal, the United States Court of Appeals for the Second Circuit reversed and held that the class action waiver was unenforceable. *See In re American Express Merchants' Litigation* (*Amex I*), 554 F.3d 300 (2d Cir. 2009).

American Express sought review by the Supreme Court. In a May 3, 2010, order vacating the judgment and remanding the case, the Supreme Court instructed the Second Circuit to reconsider the case in light of the Supreme Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corporation,* 130 S.Ct. 1758 (U.S. 2010). There the Supreme Court had held that imposing class arbitration on parties that have not agreed specifically to class arbitration is inconsistent with the Federal Arbitration Act, 9 U.S.C. § 1 et seq. On remand to the Second Circuit, in *Amex II,* Amex argued that *Stolt-Nielsen* compelled a different result, but the Second Circuit disagreed and reconfirmed its prior ruling. 634. F3d 187 (March 8, 2011). The Second Circuit found its original analysis unaffected by *Stolt-Nielsen* and held that the class action waiver within the arbitration agreement was unenforceable because "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.*

Following the Supreme Court's decision in *Concepcion*, the Second Circuit accepted supplemental briefing from the parties and found the class action waiver unenforceable for a third time. The court relied on an expert affidavit submitted by the plaintiffs stating that "the only economically feasible means for plaintiffs enforcing their statutory rights is via class action." The court found that "Amex has brought no serious challenge to the plaintiffs' demonstration that their claims cannot reasonably be pursued as individual actions." Slip. Op. at 22-23.

Because the decision was based on this specific factual finding, the Second Circuit was careful to qualify its holding by expressly stating that "[w]e 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." Slip Op. at 24. It also stated that the decision was not based on the status of plaintiffs as "small" merchants, and instead emphasized that the arbitration agreement "must be considered on its own merits." *Id.* There may also be some question as to whether the decision is limited to antitrust claims, because the Second Circuit discusses at length the federal policy allowing private enforcement of antitrust laws.

Although the Second Circuit has not framed its unenforceability holding in terms of unconscionability, the case creates tension with the Supreme Court's decision in *Concepcion*, a case broadly supporting the enforceability of class action waivers within arbitration agreements. In *Concepcion,* the Supreme Court held that the Federal Arbitration Act preempted California state law under which class action waivers in consumer arbitration agreements had been held to be unconscionable in many situations, including most consumer and employment contracts. The Second Circuit's new decision in *Amex III* raises the issue of whether other circuits will follow the Second Circuit in adopting a vindication of statutory rights analysis and whether the Supreme Court will review this case yet again.

© 2012 Sutherland Asbill & Brennan LLP. All Rights Reserved.
This article is for informational purposes and is not intended to constitute legal advice.

SUTHERLAND

If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

Authors

Lewis S. Wiener	202.383.0140	lewis.wiener@sutherland.com
Gail L. Westover	202.383.0353	gail.westover@sutherland.com
Wilson G. Barmeyer	202.383.0824	wilson.barmeyer@sutherland.com

Related Attorneys

Thomas M. Byrne	404.853.8026	tom.byrne@sutherland.com
Thomas W. Curvin	404.853.8314	tom.curvin@sutherland.com
Allegra J. Lawrence-Hardy	404.853.8497	allegra.lawrence-hardy@sutherland.com
James R. McGibbon	404.853.8122	jim.mcgibbon@sutherland.com

© 2012 Sutherland Asbill & Brennan LLP. All Rights Reserved.
This article is for informational purposes and is not intended to constitute legal advice.