Antitrust Law Blog
Current Antitrust News & Regulatory Developments
Presented By SheppardMullin

New York Federal Court Holds That Meetings Related To Drafting Arbitration Clauses May Be Probative Of Antitrust Conspiracy Despite Decision Makers' Lack Of Knowledge

February 21, 2012 by Eric O'Connor

In *In re Currency Conversion Fee Antitrust Litig.*, 2012 WL 401113 (S.D.N.Y. Feb. 8, 2012), Judge William H. Pauley III denied a motion for summary judgment by Defendants Discover and Citigroup after finding that a handful of meetings over four years by Defendants' in-house counsel related to drafting and implementing arbitration clauses was probative of an antitrust conspiracy. This was despite Plaintiffs' admitted paucity of evidence, overall weak circumstantial evidence, the absence of discussions of pricing terms, and the lack of knowledge about such meetings by Defendants' decision-makers.

Background Claims and Facts

Plaintiffs, holders of credit or charge cards, alleged that the issuing bank Defendants violated Section 1 of the Sherman Act by conspiring to include mandatory arbitration clauses in cardholder agreements and participating in a group boycott by refusing to issue cards to individuals who did not agree to arbitration.

From 1999 through 2003, in-house counsel from Defendants allegedly met several times and discussed arbitration clauses. Moving Defendants Citigroup and Discover allegedly only attended 3-5 meetings, possibly adopted their arbitration clauses prior to such meetings, and their executives with decision-making authority to implement the arbitration clauses had "no knowledge" of such meetings. *In re Currency Conversion Fee Antitrust Litig.*, 2012 WL 401113, at *1-3. These two remaining Defendants moved for summary judgment, but the Court denied the motion because there were genuine issues of fact to be resolved at trial.

Legal Standards

The Court summarized the familiar antitrust summary judgment standards stated in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (“antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. … [Thus, t]o survive a motion for summary judgment ... a plaintiff [alleging] a violation of § 1 must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.”) and *Monsanto Co. v. Spray–Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (to survive summary judgment, Plaintiffs must proffer “direct or circumstantial evidence that reasonably tends to prove the [defendants] had a conscious commitment to a common scheme designed to achieve an unlawful objective.”).

Defendants' adoption of arbitration clauses was sufficiently "parallel" conduct to be probative of an antitrust conspiracy.

The Court noted that Plaintiffs "identify no direct evidence that Defendants participated in a conspiracy" and "acknowledged that there is an 'extreme paucity of documents' supporting their theory of the case." *In re Currency Conversion Fee Antitrust Litig*., 2012 WL 401113, at *5, 8. Nevertheless, the Court found that the Defendants' implementation and modification of their arbitration clauses over a five year time period "roughly coincided" with so-called "Arbitration Coalition" meetings attended by Defendants' in-house counsel. *Id*. at *2-3, 5. This was sufficient parallel conduct to consider additional "plus factors" that could support an inference of a conspiracy.

The "Plus Factors"

Conduct Contrary to Defendants' Self-interest

While the Court acknowledged that it was in Defendants' self-interest to resolve disputes through arbitration and bar class arbitration, evidence that one defendant provided competitors with certain sensitive business information could be a "tacit invitation to collude" and supported an inference that Defendants used the meetings to coordinate their decision-making on arbitration. *Id*. at *6.

Motive

This factor was more difficult because "there [wa]s little evidence indicating that adoption of an arbitration clause threatened any Defendant's competitive posture." *Id*. The evidence also was mixed. For instance, while "Plaintiffs' own expert [] opined that the presence or absence of arbitration clauses does not impact consumer choice", the Court found that Defendants could not establish that there was no rationale motive to conspire because "what consumers view as 'salient' may change over time." *Id*. at *7.

Standardization

While the Court recognized that the binary decision to implement an arbitration clause or not is unusual for this factor, the Court found that each Defendant's decision to adopt an arbitration clause that roughly mirrored those used by its competitors was probative of a conspiracy. *Id*. at *7-8.

Inter–Firm Communications

While there were frequent meetings allegedly attended by some of the Defendants' in-house counsel, plaintiffs still needed to provide evidence that "tends to exclude the possibility that the alleged conspirators acted independently." *Id*. at *8 (citing *Matsushita*, 475 U.S. at 588). Here, it was undisputed that the Defendants' executives with ultimate decision-making authority for the arbitration clauses had "no knowledge of the meetings." *In re Currency Conversion Fee Antitrust Litig*., 2012 WL 401113, at *8. However, the Court found a triable issue of fact because in-house counsel who attended were not "low level employees" engaged in mere "shop talk." *Id*.